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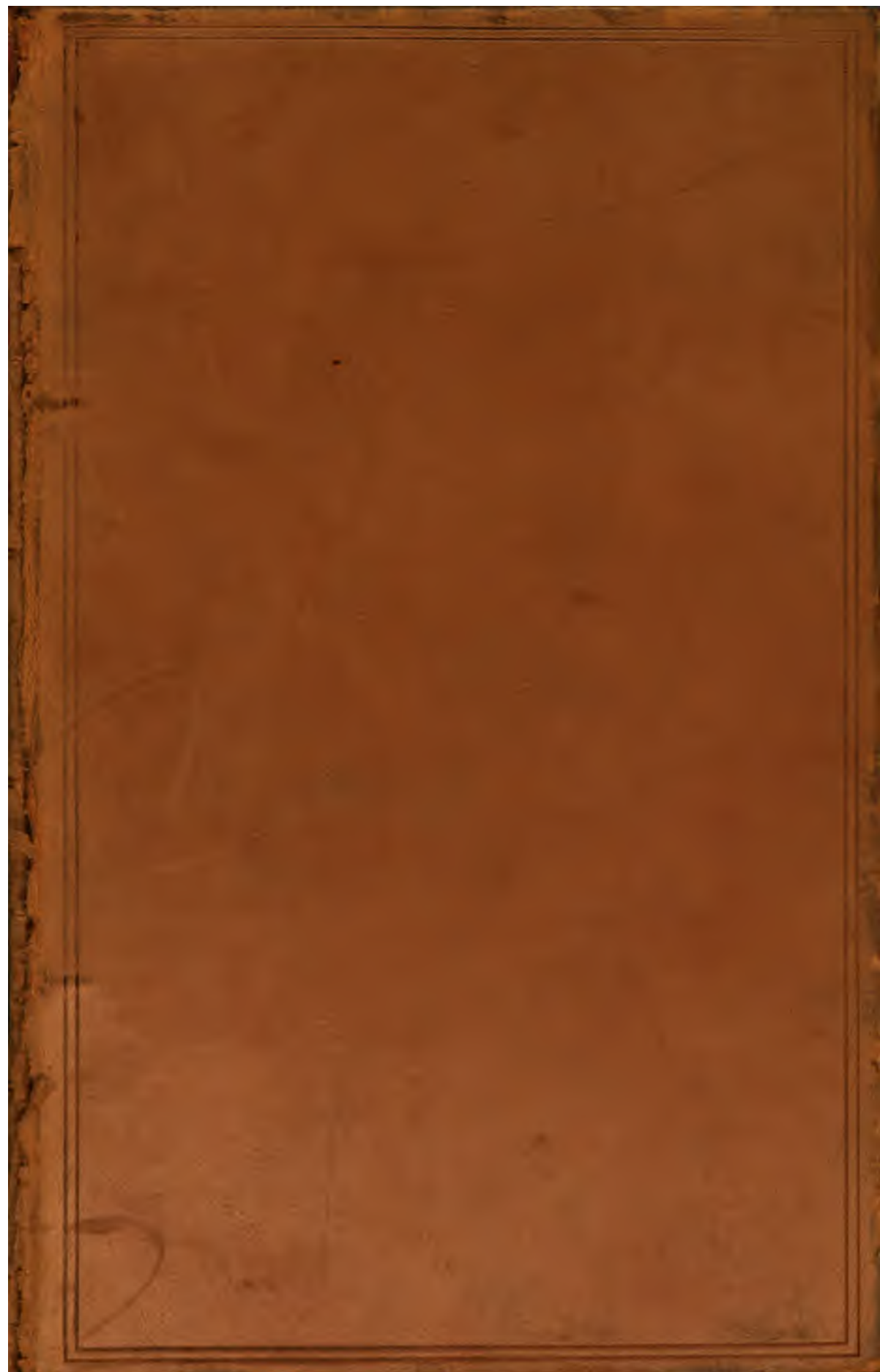
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# RAILROAD REPORTS

(Vol. 26 American and English  
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,  
DECIDED BY THE COURTS OF  
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME III.

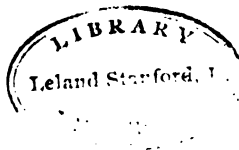
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# RAILROAD REPORTS

GULF, C. & S. F. RY. CO. *v.* DARBY *et al.*

(*Court of Civil Appeals of Texas, Feb. 5, 1902.*)

[67 S. W. Rep. 129.]

## Failure to Deliver Goods\*—Destruction by Storm—Conversion.†

Where a railway company received a car load of wheat for transportation, and, owing to delay in carriage and delivery at the point of destination, it was still in possession of the company, when a large part of it was destroyed by an unusual storm, the company is not liable for conversion of the wheat so destroyed.

## Same—Same—Same.

Where a railroad company received a car load of wheat for transportation, and while in the company's possession a large portion of it was destroyed by a storm, and the company recovered a portion of the wheat and retained it an unreasonable time, the company is liable for conversion of the wheat so recovered and retained.

## On Motion for Rehearing.

## Same—Notice to Consignee‡—Breach of Contract—Pleading.

Where, in an action against a railway company to recover the value of a car load of wheat which was shipped over the road and not delivered, the petition does not mention a contract to notify the consignee of the receipt of the wheat at its destination, or allege a breach of such condition, plaintiff cannot recover on the ground of such breach.

Appeal from Lampasas county court; D. C. Thomas, Judge.

Action by Darby & Cauthen against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Ballinger Mills and J. W. Terry, for appellant.

Walter Acker, for appellees.

FISHER, C. J. This is an action by appellees against the railway company to recover the value of a car load of wheat shipped by appellees over appellant's road from the town of Lometa, in Lampasas county, to the city of Galveston, which, it was alleged, by reason of the negligence of the defendant, was never delivered to the appellees or the consignee at the place of destination. Appellees recovered the full value of the car load of wheat. The testimony shows that there was a few days' delay in transporting the wheat to Galveston, and in keeping the same by the carrier at that point before the disastrous storm that occurred there on September 7, 1900, by which most of the wheat in the car was destroyed. After the storm a part of the wheat in the car was recovered, and it was retained in possession of the railway company for

\*See generally, note appended to *Spence v. Norfolk & W. R. Co.*, 2 Am. & Eng. R. Cas., N. S., 708.

†See generally, 2 Rap. & Mack's Dig. 125 et seq.

‡See 2 Rap. & Mack's Dig. 97. Also, see notes, 16 Am. & Eng. R. Cas. 275; 30 Am. & Eng. R. Cas. 133; 37 Am. & Eng. R. Cas. 649.

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several months without being accounted for and delivered to the appellees. Plaintiffs' cause of action is, in effect, one of conversion of the entire car load of wheat; but it does not appear from the facts that such an unreasonable length of time had elapsed from the time that the wheat should have arrived before the occurrence of the storm by which it was partially destroyed as would authorize the conclusion that such delay amounted to a conversion. A mere delay of a carrier in delivering the shipment is not usually held tantamount to a conversion of the property. *Bolling v. Kirby* (Ala.) 24 Am. St. Rep. 793, and notes thereto on pages 808, 815, and 816 (s. c. 7 South. 914). And if the property in the meantime is destroyed by the act of God, the carrier will not be held liable. This principle is recognized in the recent case of *Railroad Co. v. Bergman* (Tex. Civ. App.) 64 S. W. 999, in which it was also held that the storm in question was of such an unprecedented character that it could not have been anticipated and guarded against by the exercise of the utmost diligence; and we think that case is decisive of the question presented in this case under appellant's assignments of errors, except as to that portion of the wheat which was, after the storm, recovered by the appellant. We think the conduct of appellant relating to the wheat that was afterwards recovered would make it liable for its value. The delay in accounting for it and restoring it to the parties that were entitled to it was unreasonable, and the trial court, under the facts stated, would be authorized to render judgment against the railroad for the value of the wheat so recovered.

For the reasons stated, the judgment will be reversed, and the cause remanded. Reversed and remanded.

On Rehearing.

(March 3, 1902.)

Our reference in the original opinion to the case of *Bolling v. Kirby* (Ala.) 24 Am. St. Rep. 789 (s. c. 7 South. 914), was made for the purpose of directing attention to the authorities cited in the notes of the reporter to that case, to the effect that under a contract of shipment the carrier would not be held liable for the total value of the goods, where the negligence or the breach of the contract consisted merely in delay in transportation and delivery; that, in order to hold the carrier liable for the full value, the delay must be of such a character as would authorize the inference that the carrier had converted or appropriated the goods, or refused to account to the owners therefor. The cases referred to in the notes of the reporter were examined by us, and they were found to be in point upon this subject. Suppose that the plaintiffs in this case had sued the appellant, upon the same grounds stated in the petition, for the full value of the goods on the 7th day of September, prior to the storm that destroyed the property, and the carrier had tendered delivery in accordance with the

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contract upon that day; would the plaintiffs have been permitted, in view of this fact, to recover a judgment for the full value of the goods. We think, clearly not. The cause of action up to that time would have been simply for damages arising from the delay. If the suit had been to recover the total value of the property, with interest, the carrier could have defeated the action to that extent by tendering the goods to the consignee or the plaintiffs. This rule is virtually, in effect, conceded by all of the authorities that we have examined upon this subject, and it is not in conflict with the rule announced in *Ryan v. Railway Co.*, 65 Tex. 18, 57 Am. Rep. 589, and *Missouri Pac. Ry. Co. v. China Mfg. Co.* (Tex. Sup.) 14 S. W. 785. Those cases hold that, where there is a clause in the contract exempting the carrier from liability by reason of events that may subsequently occur, the carrier will not be relieved from liability, where its negligence had a tendency to cause the occurrence which destroyed the property. There is absolutely no relation existing between the negligence of the carrier in this case in delaying the shipment and delivery, and the disastrous storm by which the property was partially destroyed. Of course, it is needless to say that the act of the carrier had no tendency whatever in producing the storm. That was an act over which the carrier had not, and could not, in the nature of things, have, any control whatever. It was an intervening cause with which the original negligence of the carrier was in no wise proximately connected. It was unforeseen, and could not, in the nature of things, have been guarded against. From the time that the carrier received the shipment, and from the time of its failure to deliver to the consignee, it could not certainly have anticipated that such a destructive storm would arise as would destroy the property, or prevent the carrier from complying with its contract by which it agreed to deliver the property in question to the consignee.

In subdivision 3 of the motion for rehearing, the appellees make this statement, in complaining of the opinion of this court: "Because it appears from the opinion that the court ignored the fact that this suit was brought to recover damages for breach of a special contract of shipment, in which appellant expressly undertook and agreed to notify the consignee, Texas Star Flour Mills, of the arrival of the wheat in Galveston; and it conclusively appears from the evidence that appellant held the wheat in Galveston for more than three days before the storm, and never notified consignee of its arrival, as it had contracted to do, when if it had done so, the appellees' draft for the value of the wheat would have been paid two days before the storm." We said in the original opinion that the plaintiffs' cause of action was, in effect, one of conversion, to recover the total value of the wheat. Whatever name may be given to the plaintiffs' cause of action, it is clear that a judgment rendered in such case would have the effect, and

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the action would be, in its nature, of the character named by us in the opinion. In determining what is the character of the cause of action, and what are the grounds that authorize recovery, we look to the plaintiffs' petition to ascertain these facts, and such was done in this case. The plaintiffs' petition states a case in which it was sought simply to recover the value of the property, based upon the failure of the railway company to promptly transport and deliver it to the parties to whom it was consigned at Galveston. There is not one word in the petition indicating or charging any breach whatever upon the appellant of a failure or refusal to notify the consignee of the arrival of the wheat. If the plaintiffs sought to base their cause of action upon the failure of the appellant to notify the consignee of the arrival of the wheat, they should have made some statement to this effect in their pleadings, but it was not done. We are not at liberty, in order to support the judgment of a trial court, to go outside of the record, and make a case not presented by the pleadings, although there might be some evidence bearing upon such a question.

We have given this case very careful examination, and are still of the opinion that the authorities cited in the notes to the case reported in 24 Am. St. Rep. (s. c. 7 South.) are in point; and, according to the case made by the pleadings of the plaintiffs, it is controlled by the decision of the court of civil appeals in Railroad Co. v. Bergman, 64 S. W. 999.

The motion is overruled.

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FIRST NAT. BANK OF PULLMAN v. NORTHERN PAC. RY. CO.

(*Supreme Court of Washington, April 25, 1902.*)

[68 Pac. Rep. 965.]

**Delivery of Goods—Production of Bill of Lading.\***

Under commercial usage a carrier should deliver articles shipped only on production of bill lading, though it names the consignee.

**Same—Same—Rights of Transferee.†**

Under 1 Ballinger's Ann. Codes & St. § 3598, declaring a bill of lading negotiable, and that it may be transferred by endorsement of the party to whose order it was issued; and section 3603, declaring that a carrier is exonerated from liability for freight by delivery thereof to the holder of the bill of lading properly indorsed, or made in favor of the bearer; and section 3604, providing that when a carrier has given a bill of lading he may require its surrender before delivering the freight; and section 3600, providing that when a bill of lading is made to bearer, or in equivalent terms, a simple transfer by delivery conveys the title,—a

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\*As to delivery of goods without requiring presentation of bill of lading, see *Nebraska Meal Mills v. St. Louis S. W. Ry. Co.*, 7 Am. & Eng. R. Cas., N. S., 591, and note at end of case.

†See generally, 1 Rap. & Mack's Dig. 645 et seq.; *Gossler v. Schefeler*, 5 Daly (N. Y.) 476; *Morison v. Gray*, 2 Bing. 260, 9 E. C. L. 405, 9 Moore 484. But see also, *Waring v. Cox*, 1 Comp. 369.

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bill of lading naming the shipper and consignee, and that the goods are to be shipped, to be delivered to the parties entitled thereto, having been delivered by the carrier to the shipper, and by him indorsed and delivered to a third person, such person can hold the carrier liable, it having delivered the freight to the consignee.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by the First National Bank of Pullman against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stephens & Bunn, for appellant.

W. J. Bryant and H. W. Canfield, for respondent.

REAVIS, C. J. Action by respondent, a bank, to recover the value of two consignments of wheat carried by the appellant railway company from Whelan to Spokane. The wheat was shipped by Chambers, the owner. The railway company delivered to Chambers two bills of lading exactly alike except in the quantity of wheat described therein, one of which is as follows:

"Copy 50 M.

Northern Pacific Railway Company.  
S. & P. Division.

"No. Car, 10,230, N. P.

Whelan, Wash., Aug. 25, 1898.

"Received from W. M. Chambers, in apparent good condition:

"Consignee and Destination.	Description of property.	Weight.
"Centennial Mill Co.	360 sax wht.	47,520.

"Spokane, Wash.

"As described above, contents and value unknown, to be transported by the Northern Pacific Railway to station Spokane, ready to be delivered to the parties entitled to the same, and it is expressly stipulated and agreed that the above property is transported on the conditions indorsed hereon, which form part of this contract, and of the consideration for carrying the same, and not otherwise.

"Northern Pacific Railway,  
By J. S. Keeney, Agent."

"No. 3.

The case was tried by the court without the intervention of a jury. The railway company, defendant, carrier, set up some matters affirmatively in defense. This portion of the answer was stricken before trial, and error is assigned upon such ruling of the court. But, as this defense went to the construction and effect of the bills of lading, the error will be considered in the determination of the merits on the facts as found. These are that Chambers was the owner of the wheat, and consigned the same to the Centennial Mill Company at Spokane, and that no other names appeared in the bill of lading than "Chambers" and "Centennial Mill Company;" that Chambers, upon the shipment, sold, assigned, transferred, and set over the bills of lading to the bank by indorsing his name on the back thereof, for the actual consideration of the purchase price of the wheat, which was paid in cash to Chambers, and which Chambers used to pay for the purchase of the wheat, and that plaintiff is the owner of the bills of lading and entitled to the delivery of the wheat; that

defendant carried the wheat to Spokane, and, without any order or authority of plaintiff or Chambers, and without demanding or receiving a surrender of the bills of lading, wrongfully delivered the same to the Centennial Mill Company; that before the commencement of the action plaintiff demanded of defendant the delivery of the wheat, which delivery was refused. It was further found that in the spring of 1898 Chambers, Price & Co., doing business at Pullman, contracted to ship to the Centennial Mill Company a certain number of bushels of No. 1 wheat; that the wheat, when shipped, was subject to inspection at the terminal by the mill company, and was also subject either to rejection or dockage in weights and grades; that Chambers, Price & Co., pursuant to the contract, had shipped a sufficient number of bushels of grain to fill their contract with the mill company, but by reason of dockage and discount for claimed shortage in weights and deficiencies in quality the mill company claimed a balance due in money in the sum of \$665.58; that thereafter, in July, 1898, Chambers, who was a former partner of the firm of Chambers, Price & Co., the said firm having become insolvent, and having been theretofore dissolved, agreed with the mill company to carry out the firm contract of Chambers, Price & Co., and himself shipped the amount of grain necessary to fill the amount agreed to be delivered to the mill company at Spokane, and it was then agreed between Chambers and the mill company that he should draw against said shipments 50 to 55 cents per bushel in money to cover the purchase price of said grain, and no more; that Chambers and the Centennial Mill Company had, during a term of years, and it was the fixed and established custom between them, for Chambers, as shipper and vendor, to draw drafts through a banking house for the price of the commodities so shipped, and to attach the bills of lading thereto, and at the time of the transaction in controversy Chambers had no notice of any repudiation thereof, or of any change on the part of the Centennial Mill Company, in said settled course of business between them; that plaintiff, upon the receipt of the bills of lading and a draft upon the Centennial Mill Company for the price of the wheat, forwarded such bills of lading, with the draft attached, for collection from the mill company, but the mill company refused to receive the bills of lading or pay the draft, and they were returned to plaintiff; that at the time of the delivery of the wheat to the mill company it knew that plaintiff held the draft and bills of lading. The court concluded that the refusal of defendant to deliver the wheat to plaintiff on presentation of the bills of lading was conversion, and found the value of the wheat, and gave judgment in favor of plaintiff against the defendant for such amount.

1. The principal controversy between counsel is the function and construction of the bills of lading. It is urged by counsel for appellant that, if there be no reservation by the

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shipper, the title presumptively rests in the consignee, and a number of authorities are cited to support the view that in an ordinary shipment of commodities the duty of the carrier is to deliver to the consignee; that the consignee is presumptively the party to recover for breach of the contract of carriage. As illustrative of and supporting the view, among others the following authorities are mentioned: 2 Daniel, Neg. Inst. (4th Ed.) §§ 1743, 1744; 4 Elliott, R. R. § 1426; Pennsylvania Co. v. Poor (Ind. Sup.) 3 N. E. 253; The Sally Magee, 3 Wall. 451, 18 L. Ed. 197; Benj. Sales (6th Ed.) 332; Agricultural Co. v. Strand, 8 Wash. 647, 36 Pac. 682; Mattress Co. v. Rudebeck, 15 Wash. 336, 46 Pac. 392; Izett v. Mill Co., 22 Wash. 300, 60 Pac. 1128. Authorities are also cited which well support the contention that, where the carrier is ignorant of the fact that the consignor was the owner of the property, and the consignment is an absolute one, he has a right to assume that the consignee is the owner, and to settle a claim for loss with him. See Scammon v. Wells, Fargo & Co. (Cal.) 24 Pac. 284. But it is also urged that, where the consignor drew a sight draft on the consignee, and attached it to the bill of lading, and forwarded them to a third party for collection, and the company had no notice from the consignor to retain ownership and control of the shipment, and the company delivered it to the consignee without requiring production of the bill, the company was justified in presuming that the consignee was the owner, and that the company was discharged by the delivery to the consignee at the designation specified in the bill of lading. See Forbes v. Railroad Co., 9 Am. & Eng. R. Cas. 76. The principle stated by Cooley on Torts (page 456) that a mere bailee, whether common carrier or otherwise, is guilty of no conversion though he receive property from one not rightfully entitled to possession, and, acting as a mere carrier, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner, is suggested as pertinent to this controversy. In the absence of statutory definition and regulation of bills of lading, the deductions made from the very numerous authorities adduced by counsel for appellant which exonerate the carrier from liability in an ordinary contract when delivery is made to the consignee may be conceded. Primarily, a bill of lading or receipt is not necessary to constitute the contract. The delivery of commodities to the common carrier, with the designation of the person and place of the shipment, is all that is requisite. Custom and the law fix the responsibility and liability of the carrier. The presumption then is that the consignee is the owner, and, without notice to the contrary, the carrier may safely make delivery to him. It seems from an examination of a large number of cases involving the nature of bills of lading made by a common carrier that the custom very generally



exists of shippers selling or assigning such bills of lading and receiving payment therefor and advances upon the same. This custom enables the shipper to receive immediate payment from his local bank. The usage materially aids and stimulates trade and commercial transactions. It enables the small shipper or producer to realize upon agricultural products, such as wheat, at the most favorable market prices. In the case of *Ratzer v. Railroad Co.* (Minn.) 66 N. W. 988, 58 Am. St. Rep. 530, where a delivery was made without demanding the bill of lading, the court observed: "We are of the opinion that on the facts found the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboard by the aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit, and thereby turn their limited capital sufficiently quick and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading." And similar views are expressed in *Savings Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519. In the latter case, as in many others, the discussion of the nature of bills of lading under commercial usage and custom is without reference to statutory definitions and regulations. *Stock Yards Co. v. Westcott* (Neb.) 66 N. W. 419; *Walters v. Railroad Co.* (C. C.) 63 Fed. 391; *Gates v. Railroad Co.* (Neb.) 60 N. W. 583; *Furman v. Railroad Co.*, 106 N. Y. 579, 13 N. E. 587; *Garden Grove Bank v. Humeston & S. Ry. Co.* (Iowa) 25 N. W. 761. By virtue of the statute in New York, the carrier must demand and receive the bill of lading before delivery in order to avoid liability. *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. 114. Thus the better reasoning and the weight of authority seem, by the force of general commercial usage, to require that the delivery of commodities be made upon the produc-

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tion of the bill of lading, if one be issued by the carrier. Hutch. Carr. (2d Ed.) § 130b, observes: "The carrier, being thus bound to deliver the goods in accordance with the bill of lading, is, it is said, under obligation to ascertain whether or not a bill of lading was delivered to the shipper, and, if delivered, he must retain the property until it is demanded by one claiming under that title."

2. An examination of our statutes seems to fairly determine the controversy. Section 3598, 1 Ballinger's Ann. Codes & St., declares the effect of bills of lading and transportation receipts as follows: "All checks or receipts given by any person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage, for any grain, flour, pork, beef, wool, or other produce or commodity, stored or deposited, and all bills of lading, and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another." And section 3603 declares when the carrier may be exonerated, as follows: "A carrier or warehouse proprietor is exonerated from liability for freight by delivery thereof, in good faith, to any holder of an original bill of lading or warehouse receipt thereof, properly indorsed, or made in favor of the bearer." There is also a further pertinent provision in section 3604: "When a carrier or warehouse proprietor has given a bill of lading, warehouse receipt, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight." Suggestion is made by counsel that the indorsement of the bill of lading can only be made by the consignee, but it may be observed that section 3600, Ballinger's Ann. Codes & St., specifies: "When a bill of lading or warehouse receipt is made to 'bearer' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement." The bills of lading under consideration here were delivered by the carrier to the shipper. Surely, the defendant is conclusively charged with knowledge that the bills were given to Chambers, and the knowledge of their negotiability both by custom and the statute must likewise be imputed to it.

It follows that the judgment is correct, and it is affirmed.

WHITE, HADLEY, FULLERTON, ANDERS, DUNBAR, and MOUNT, JJ., concur.

JACK *v.* WILLIAMS *et al.*

STATE *ex rel.* CUNNINGHAM *et al.* *v.* JACK *et al.*

(Circuit Court, D. South Carolina, February 1, 1902.)

[113 Fed. Rep. 823.]

**Jurisdiction of Federal Courts—Citizenship of Parties—Actions Ex Relatione.**

A suit in the name of a state, on relation, is to be treated, for the purpose of determining the jurisdiction of a federal court, as though the relators were alone the complainants.

**Railroads—Duty to Operate—Nature and Extent.\***

In the absence of special circumstances, or an express contract embodied in a charter, the owner of a railroad, whether a corporation or individual, cannot be compelled to maintain and operate the same at an actual loss. The duty arising from the ownership of the franchise is merely to meet the public requirements, and, where the traffic on a road is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned.

**Same—Power of Court to Order Destruction of Road and Sale of Materials.**

A railroad company built a short piece of road, wholly with the proceeds of bonds sold, and then became insolvent. In a suit to foreclose the mortgage securing the bonds a receiver was appointed, who by leave of court issued certificates, with the proceeds of which he completed the road to a length of 12 miles, by which it connected two towns. He operated the road for a number of years in the most economical manner, and without salary himself, but its earnings barely paid operating expenses, producing nothing for creditors, or even for maintenance and repairs. After several attempts to sell the road, at which no bids were received, it was purchased for \$15,000 by three holders of receiver's certificates, and the sale confirmed. At that time private persons could own and operate a railroad under the laws of the state, but by a law passed soon thereafter all natural persons owning a railroad were required to organize into a corporation within 60 days, in default of which the franchise of the road was declared forfeited. The purchasers of this road failed to incorporate, and after its franchise had thus been forfeited one of them brought a suit to obtain a sale of the property and a division of the proceeds. A receiver was appointed, and the road was inspected by an expert, who reported that \$10,000 must be expended in repairs to render the road safe to operate for one year. There was no statute of the state making it obligatory upon the owner of a railroad to operate the same, nor was there any such requirement in the charter of the original company, which was permissive only, and the road had not been operated since its sale: *held*, that to compel the owners to repair and operate the road at a certain loss, or to keep it intact, though unused, would be to deprive them of their property without compensation, and that the court was justified, under the circumstances, in ordering the receiver to dismantle the road and sell the materials.

**Same.**

The receiver having taken up and sold the rails under an order of court entered without opposition, the court could not require the owners to purchase new materials and rebuild the road, on an offer by interveners to lease and operate the same if restored, especially in view of the fact that the franchise to operate it as a railroad had been forfeited.

**In Equity.** On cross bill of interveners.

See 102 Fed. 210, 106 Fed. 259.

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\*The principal authorities on this subject will be found collected in the opinion.

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Ansel & Cothran, for complainant.

B. A. Hagood, for defendants.

J. W. Barnwell, B. M. Shuman, and J. H. Heyward, for cross complainants.

Ansel & Cothran, B. A. Hagood, S. J. Simpson, and J. R. Lamar, for cross defendants.

SIMONTON, Circuit Judge. This case now comes upon the cross bill filed by the state of South Carolina, ex relatione T. B. Cunningham, and others, the answers thereto, and the testimony taken before the special master upon the issues therein set forth. Although the name of the state is used, still the suit being ex relatione, this court has jurisdiction. *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; *Indiana v. Glover*, 155 U. S. 517, 15 Sup. Ct. 186, 39 L. Ed. 243.

The legislature of South Carolina, in December, 1882, granted a charter to the Greenville & Port Royal Railroad Company, permitting it to construct a railroad from Greenville, S. C., to the port of Port Royal, in the same state. It had the power to issue bonds and secure the same by the mortgage of its property and franchises, and natural persons and municipal corporations, as well as other corporations were authorized to subscribe to its capital stock. In December, 1885, its charter was amended by the general assembly of South Carolina. Its name was changed into that of the Atlantic, Greenville & Western Railway Company, and its route was so changed as to extend from Greenville to Ninety-Six, in said state, with the privilege of extending eastward from Ninety-Six to some point on the Atlantic Coast, and westward from Greenville to the North Carolina line, by such route as the directors should select. By this act power was given to townships along the line of the road, or interested in its construction, to subscribe to the stock of said road, and to this end any such townships were declared to be bodies corporate. This special provision has been declared invalid. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242. By an act passed in December, 1886, the Piedmont and Pelzer Manufacturing Companies were each authorized to subscribe to the capital stock of this road. It may be mentioned in passing that there is no evidence in the record showing that any municipal or private corporation or person subscribed or paid any cash or property toward the capital of this company. In 1887, under the provisions of the general railroad act of South Carolina, this Atlantic, Greenville & Western Railway Company was consolidated with a corporation existing under the laws of the state of North Carolina and of the state of Tennessee, and thus became known as the Carolina, Knoxville & Western Railway Company. Some parts of the road-bed of this projected railway were built, but no part of it was constructed, except some 12 miles, starting from Greenville, towards the town of Marietta, in said county. The story of

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this enterprise is one of disaster. The construction company which undertook the contract for building the road became insolvent, and was placed in the hands of a receiver. The railway company itself was also placed in the hands of a receiver, being utterly insolvent. Soon after his appointment the receiver of the railway company applied to the court for leave to issue certificates to be used in completing the road toward Marietta, a distance of three miles. At the time of this application the road had no other terminus except Greenville, the other terminus being in the woods, and it was hoped that should it be extended to Marietta its business would be improved and its profits increased, and perhaps means could be provided for extending the road into territory which would serve the purposes of the contemplated enterprise and induce prosperity. Leave was granted, and the town of Marietta was reached. So low, however, were the credit and prospects of the railway that but for the efforts of the receiver and his personal friends the certificates could not have been placed. The railway under the receivership was conducted with the greatest economy. Every unnecessary expense was cut off. The receiver himself received no salary, notwithstanding that he gave his personal attention to the management. As a result, however, whether owing to the poverty of the territory or to the indifference of the people, the part of the railway so constructed scarcely met its operating expenses. Finally, the services of a superintendent could not be provided for, and the receiver had to fill the place himself. The roadbed of the other parts of the road and the railway on this small section had been constructed entirely from the proceeds of bonds secured by a mortgage of the whole road. Not a dollar of interest had been paid on any of these bonds, the amount of the total issue being \$200,000. The right of way contracted for and secured had not been paid for. The road ran through a territory requiring many trestles, and these and the roadbed itself were fast decaying, requiring immediate repair, their condition endangering life and property. Under these circumstances, the creditors applied for a sale of the road. No organization could be effected for its purchase, and a sale was ordered on 17th August, 1892, at an upset price of \$50,000. At the sale under this order no bids were received. Another sale was ordered 16th March, 1895, the upset price having been fixed at \$30,000. No bids were made at this sale. Then the upset price of \$25,000 was fixed at another sale ordered 23d September, 1895, and again no bids were made. Finally, on 24th June, 1896, a sale was ordered, and the highest bid, \$15,000, was received and accepted. At this sale James T. Williams became the purchaser. At the date of this purchase the road, roadbed, and rolling stock of the railway were in such a dilapidated condition that the railway could not have been operated without putting on many and expensive repairs. Williams did not operate it at

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all. Thereupon proceedings were instituted before one of the state judges, by way of mandamus, to compel him to operate the road. These proceedings failed because of an irregularity in them, the rule for the mandamus having been issued by one judge, and the return heard and mandamus issued by another judge, who was without jurisdiction. At the date of the purchase of this road the law of South Carolina gave the privilege to any purchaser of a railroad sold under foreclosure, of or under a provision in a mortgage, to organize a corporation to own and operate the same. Rev. St. S. C. § 1610.

In 1897, March 5th, the legislature passed an act requiring any person then owning any line of railroad in this state to reorganize, under section 1610, within 60 days after the passage of that act, under a penalty of \$50 per day for each day of failure to operate said road, unless reasonable cause be shown to the contrary, and, in addition to the penalty he should forfeit all the franchises, powers, and privileges granted to the railroad purchased. Williams did not accept the provisions of this act. Soon after the passage of the act, D. F. Jack filed his bill in this court, stating the purchase of this road by Williams; that the purchase was made by him for the benefit of himself, D. F. Jack, and H. C. Beattie; that he was not willing to organize a corporation under the requirements of the act of 1897; that it was impossible to rebuild the road, except at great expense, and with no prospect of gain; and praying an injunction against his co-tenants from making any effort in that direction; praying also for the appointment of a receiver to take charge of the property. Answers were filed, the injunction issued, and the receiver appointed. It is well to say here that this court in granting this order had no notice whatever of the mandamus proceeding in the state court. An inspection of the railroad property was had by a skillful railroad supervisor, under the instructions of the receiver, who reported that there were 22 trestles on the road, all of which but 2 needed extensive repairs; that 12,000 cross-ties were needed; that in many places the roadbed was covered with dirt two feet deep; and that it would cost over \$10,000 to put the road in proper condition to run one year.

The case thus presented to the court was this: This section of the railway had been built with borrowed money; had been operated for several years; had not, even when it was new and without need of repairs, earned more than its operating expenses, paying nothing on its debt by way of interest or principal, and paying nothing to the receiver. Its business had not increased. Its road had run down, requiring large additional expenditure. Its right of way had not been paid for, and the claims on this head were a first lien. It paid nothing on its first cost. It could pay nothing on the increased outlay which was imperatively demanded. Any one, natural person or corporation, attempting to operate it, would meet certain loss. It could not be operated except by a corpora-

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tion, and the purchasers had lost the privilege of incorporation, and the right to exercise the franchises, under the provisions of the act of 1897. Under these circumstances, the court authorized the sale of the rails on the road, and the taking them up. The sale was made, and the rails brought \$28,000, the Charleston & Western Carolina Railway Company being the purchaser. After the order of sale the present relators filed their petition for leave to intervene, the prayer of which was granted, and leave was also given to review the previous action of the court in ordering the sale. They filed their answer to the original bill, and asked and obtained leave to file this cross bill. This has been answered. The main issue in the case is: Can the court authorize the taking up and the sale of the rails on this railroad, which has been under operation, thus practically authorizing its abandonment?

A railroad is in a sense a public concern. To its construction and operation the action of the sovereign is needed. If a corporation is created, the franchise to be a corporation can be given only by the sovereign. Its franchise as a common carrier for hire of passengers and freight comes from the sovereign. Its right to exercise the right of eminent domain can come only from the sovereign. And, as its road is in a sense a highway, the sovereign grants that also. The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable. And the reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. *Smith v. Ames*, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819, 10 Am. & Eng. R. Cas., N. S., 1; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company, in the full enjoyment and use and capacity to use its franchises, cannot be compelled to exercise its franchises without reasonable remuneration. A fortiori a railroad corporation, or a person owning a railroad, cannot be compelled to operate that road, not only without remuneration, but at a loss. And this not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds, he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What, then, is a person to do who becomes pos-

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sessed of wholly unproductive railroad property? Sell it? But in the case at bar several distinct efforts to sell had been made, and made in vain. No bid whatever had been made except by these purchasers. The public—even that portion of the public on the line of the road—could not be induced to make a bid on it. Repair it and put it in condition? But experience had shown that even when it was a new road, requiring no expense for repairs, it barely paid operating expenses. Could the state or the public, in the face of the fourteenth amendment, compel such an expenditure, involving certain loss? Evidence has been introduced of persons who are of the opinion that the road would pay. Can such testimony override the result of actual experience? It appears also in evidence that, notwithstanding the existence of this road, dealers in cotton and farmers preferred to carry their cotton to market in wagons, rather than to ship it by rail. The difference of cost must have been small. But, small as it was, the people about the road evidently estimate the general advantage of the road at a sum still smaller. Under these circumstances, what other course could have been pursued? The roadbed was in such a condition that it could not be operated. The expenses attending its repair held out no hope of remuneration. The purchasers had lost the privilege of incorporation and retention of the franchise. They owned the property. Was it to be kept idle and useless, or could they dismantle it?

This question is somewhat of novel impression,—at least, there is no decision exactly on all fours with it. The leading case on this subject is *Kansas v. Dodge City, M. & T. R. Co.* (Kan.) 36 Pac. 755, 24 L. R. A. 564, and this clearly resembles the case at bar. In that case a mandamus was refused. This is the headnote:

“Where a railroad company owning a short line of railroad, 26 miles only, is wholly insolvent, and such company has no cars or engines with which to operate it, and no funds or property to be applied to the payment of expenses of the company or the road, and the road has been abandoned for several months, and the road cannot be operated except at a great loss by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having discretion in the granting of a writ of mandamus, will not compel by a peremptory writ the railway company to replace or put in repair its track, a part of which has been torn up, as such an order would be futile and of no public benefit.”

The facts of that case show that the road had been sold, and that a private person had bought it, and had sold to another person, who had removed the rails. Among other things the court says:

“The order prayed for should only be issued in the interest of the public. If the track is replaced there is no reasonable



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probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has very little interest in the operation of the road or in its being kept in repair."

Several cases are quoted in the note to this case, the annotator admitting that they leave the question uncertain. One of these cases (*Talcott v. Pine Grove*, 1 Flip. 120, Fed. Cas. No. 13,735) says that a railroad cannot be abandoned after it has become one of the great thoroughfares of the country. But this is clearly an obiter dictum, having no bearing on the case whatever, the question in which was the validity of certain municipal bonds. See *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 22 L. Ed. 227. *State v. Sioux City & P. R. Co.*, 7 Neb. 357, was the case compelling a railroad company to keep up its entire line because of a contract growing out of land grants toward its construction. *People v. Albany & V. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295, went off on a question as to the remedy. In *Rex v. Railway Co.*, 2 Barn. & Ald. 648, the company was ordered to restore an abandoned tramway, designed for the use of others besides itself, but the court refused to order the maintenance of the tram road. In *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, a part of the track of the railroad was abandoned in order to prevent competition by steamboats. This was held unlawful. And so with all the other cases quoted in this note. The question is incidentally touched upon in *Railroad Co. v. Dustin*, 142 U. S. 499, 12 Sup. Ct. 285, 35 L. Ed. 1095, and there the courts say:

"If, as in *Railroad Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State v. Hartford & N. H. R. Co.*, 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. Ed. 619; *People v. Boston & A. R. Co.*, 70 N. Y. 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point, when it would not be remunerative. *Railway Co. v. The Queen*, 1 El. & Bl. 858; *Railway Co. v. The Queen*, 1 El. & Bl. 874; *Com. v. Fitchburg R. Co.*, 12 Gray, 180; *State v. Southern Minnesota R. Co.*, 18 Minn. 40 (Gil. 21). In *Com. v. Fitchburg R. Co.*, 12 Gray, 180, mandamus was refused to compel the running of passenger trains over a branch road on

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which this had been discontinued, after running them for a time, because they were unprofitable. The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed."

The text writer Morawetz also says:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation. In such case the company may cease operating the road, unless this be contrary to the express terms of the charter." Mor. Priv. Corp. § 1119.

This is sustained in *Ohio & M. R. Co. v. People* (Ill.) 11 N. E. 350, 30 Am. & Eng. R. Cas. 509.

In *Coe v. Columbus, P. & I. R. R.* (Ohio) 75 Am. Rep. 524, the court says:

"If we are at liberty to suggest on what the legislature very probably relied for the continued operation of a railroad, once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the risk of the state."

There is another point of view. The purchasers of this railroad bought it at public auction, under an order of this court. They purchased all the visible property of the insolvent railroad corporation, its rolling stock, roadbed, iron on the road, together with its franchises, including the rights of way. At the time they purchased, private persons could buy, own, and operate a railroad. The legislature of South Carolina repealed this privilege, and required all natural persons owning railroads to organize as a corporation within 60 days, and, failing so to do, declared that they forfeited all the franchises of the railroad company. They did not fulfill this condition. They could not be compelled to fulfill this condition. No power exists in the legislature to compel an individual to join a corporation or to compel several individuals to become a corporation. They accepted the results of a failure to comply with the condition, and voluntarily forfeited its franchises. This, however, did not deprive them of their property, not included in their franchises. Being the owners of this property, having dominion over this property, they could dispose of it at pleasure. True, it had been applied to a public use. But the legislature has defeated and forbidden that use. If the purchasers, this act having been passed,

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cannot dispose of their property, they are deprived of it without due process of law.

So far the question has been discussed with reference to the facts and circumstances surrounding the case when the purchase was made, and the order permitting the removal of the iron was passed. Since this intervention two persons have made distinct and binding offers to lease the railroad, if it be restored, and so to operate the same. This offer comes too late. Rights have vested and acts have been done which cannot be set aside. The rails have been removed and have been sold. To restore them would require the investment of money by the purchasers, the remuneration of which will be fixed, not at its value, but at the rental value, which, in the estimation of third persons, will enable them to operate the road. Nor can these offers be taken as indicating the value of the road at the date of its sale. Apart from the fact that long experience has shown that the best test of the value of property is a sale at public auction open to all bidders, not one effort was made by any one, either among those using the road or owning property adjacent to it, either to buy it or to aid it in its extremity. Not a dollar of subscription money was used in its construction. Not a bid upon it was ever made except by these purchasers, and two of them were holders of receiver's certificates, bidding to protect themselves. No better test could be had showing that in public opinion the property was not profitable. When the conveniences offered by the road—offered, but by no means accepted by the public—were withdrawn, then some of the public became awake to the fact that that road could have been made useful,—had been neglected. But this neither the purchasers nor the court could foresee. The value of the road, or rather its hopeless want of value as an investment, was determined by the facts existing at the time and the attitude of the public to it.

As the result of this examination, it will appear that, in the circumstances of this case, the purchasers could rightfully exercise the option of accepting the provisions of the act of the legislature by incorporating themselves within 60 days after its passage, and trying the operation of the road, or of forfeiting the franchises they had purchased; that they exercised this option, and forfeited the franchises, rendering any proceedings in quo warranto unnecessary; that thence forward any attempt by them to exercise the franchises of a railroad company would have been unlawful; that they, being the owners of property which could not be used for the purposes of a railroad; by reason of this forfeiture, and the illegality of its use consequent thereon, could lawfully dispose of the same; that having thus taken up the rails on the road, and having sold them, this court will not compel them to buy other rails, rebuild the decayed trestles, decayed when the purchase was made, renew the cross-ties, which were also

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decayed at that time, and operate the railroad without remuneration.

There is another intervention in this case filed by land-owners through whose lands the railroad company had rights of way. Their rights will depend upon the correctness of the adjudication on this branch of the case. As without doubt the review of an appellate court will be sought, further proceedings in the matter will be postponed to await such an adjudication.

UNITED STATES *ex rel.* COFFMAN *v.* NORFOLK & W. RY.  
CO. *et al.*

(Circuit Court, D. West Virginia, June 15, 1901.)

[109 Fed. Rep. 831.]

Interstate Commerce—Mandamus—Pleading—Evidence—Unjust Discrimination.

In mandamus under the act of congress of March 3, 1899, to compel a common carrier to move and transport interstate traffic, or to furnish cars or other facilities for such transportation, on the ground that there has been such a violation of the interstate commerce act of February 4, 1887, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper, the gist of the whole proceeding is an unjust discrimination in favor of one shipper over another similarly situated. It is for the remedy of such a wrong that congress, by the act in question, gave the federal courts the power of mandamus, and for such a wrong alone. There must not only be a discrimination, but it must be an unjust discrimination; and that character of discrimination must not only be pleaded, but it must be proved, by the relator, otherwise the writ of mandamus will be denied him.

Railroads—Distribution of Equipment.

While the capacity of a shipper of coal may be greater than his allotment of cars, yet, where such is also the case with every other operation similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to prorate the supply on hand, without unjust discrimination, among all the operators, including the shipper in question.

Same—Special Cars.

A railroad company's duty to allot cars without unjust discrimination among coal shippers cannot be altered by the furnishing of special cars to the railroad company by one shipper, to be used exclusively in the transportation of coal for that shipper, whether the cars are sold by the shipper to the railroad company on the installment plan, or the shipper retains title to the cars. If the cars are purchased from the shipper by the railroad company on the installment plan, the company thereby becoming interested therein at once, and finally the absolute owner thereof, then, in the event of an exclusive application of the same to the business of that shipper, there never would be a time, from first to last, during which the railroad company, by such a course, would not be devoting rolling stock which it owns, or in which it is interested as a common carrier, to the demands of one shipper to the exclusion of others similarly situated, which it may not do; or, even if it should never become interested in, or the owner of, the cars, still it may not rent its tracks or permit them to be appropriated by any one to the detriment of other shippers whom it should serve to the uttermost; and

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in the stress of unusual business such special cars in its service would have to be applied to the accommodation of all shippers alike.

**Same—System of Coal-Car Distribution.**

A system of coal-car distribution which a railroad company has applied in a given field, if that system, under the circumstances and conditions peculiar to that field, be a reasonable one, and fair to all, and is applied to all alike, affords no just cause of complaint on the part of any shipper.

(Syllabus by the Court.)

**Mandamus.** Issue having been joined upon the writ of alternative mandamus and respondents' return thereto, this cause came on for trial before the court without a jury, both sides, by a stipulation filed, agreeing that the issues of fact upon the pleadings might be tried and determined by the court, and expressly waiving a jury.

Harold A. Ritz and B. M. Ambler, for relator.

J. F. Brown, John H. Holt, and Jos. I. Doran, for respondents.

**JACKSON, District Judge.** On the 5th day of January, 1901, W. H. Coffman, who is the sales agent for the Indian Ridge Coal & Coke Company, notified the agents of the Norfolk & Western Railway Company that he had orders for 4,450 tons of coal, 2,000 tons of which he desired transported by rail from the mines of the Indian Ridge Coal & Coke Company, state of West Virginia, to Lambert's Point, state of Virginia, there to be loaded upon a vessel, which would arrive on the 14th day of said month; and the remaining 2,450 tons he desired to be transported from the same mines to the same port, there to be loaded upon the steamship Chattan, due to arrive on the 17th day of said month; but he further informed the railway company that only 2,000 tons of the 2,450 was intended for cargo for the steamship, and that the remaining 450 tons was to be loaded in her bunkers, and need not be loaded upon the vessel before the 21st day of the month. The railway company began at once to furnish the mines of the Indian Ridge Coal & Coke Company with coal cars for tide-water shipment, and continued to place at said mines its quota or percentage of all available coal cars in the coal field wherein the Indian Ridge is situate, having due regard for the needs of other operations in the field, and continued to so furnish cars until the 12th day of January, 1901; but the cars were not furnished as rapidly as Coffman desired, and believing, or pretending to believe, that the railway company was discriminating against him in the matter of cars in favor of the sales agencies of other coal operations in the field, gave notice that he would, on the 14th day of January, 1901, apply to the circuit court of the United States for the district of West Virginia, at Charleston sitting, for a writ of mandamus under the interstate commerce act, to compel it to furnish cars for said shipments. The application was not made, however, either at the time or place named, but was made to the

same court at Parkersburg, on the 15th day of said month, and on that day an alternative writ of mandamus was issued against the railway company commanding it to furnish the cars as prayed for in the relator's petition, or appear on the 17th day of said month, and show cause to the contrary. The alternative writ recited that the relator, Coffman, was the factor of the Indian Ridge Coal & Coke Company for the shipment and sale of the product of its mines; that he had sold on its account 2,000 tons of coal, to be delivered at Lambert's Point, there to meet the barge R. T. Thomas on the 14th day of January, 1901, for reshipment to Providence, R. I.; and 2,450 tons, likewise to be shipped to Lambert's Point, to meet the steamer Chattan, which was due to arrive on the 17th day of said month, 450 tons of which, however, was intended for said ship's bunkers, and would not be loaded therein until the 21st day of said month; that he had demanded of the railway company the placing of cars at the mines of the Indian Ridge for these shipments, and that the railway company had failed and refused to furnish the same; that Castner, Curran, and Bullitt were the factors and sales agents for many other coal operations situate in the same field as the Indian Ridge, and that the railway company had been and was promptly and in full filling the orders of Castner, Curran, and Bullitt for cars, and were failing and refusing to fill the relator's orders,—that is to say, the railway company was discriminating against the relator, in the matter of furnishing cars, in favor of Castner, Curran, and Bullitt; that this discrimination had lasted for a period of six months; and that the relator, in consequence, could not ship his coal upon as favorable terms as the said Castner, Curran, and Bullitt. On the return day of the writ the railway company, and L. E. Johnson, its general manager, N. D. Marr, its superintendent, D. E. Spangler, its car distributing agent, and ——— Jenks, its local car distributing agent, who had been made respondents with the railway company, appeared, and demurred to the writ, but their demurrer was overruled, and thereupon they filed their joint and separate return to the writ. The return admitted Coffman's notice to the railway company, of his two orders for the 4,450 tons, and his request of January 5th for cars in which to ship the same, and alleged in reply thereto that the respondents had at once given orders that the cars be furnished him, and that he had been regularly, promptly, and daily given his fair pro rata allotment of all available coal cars since distributed in that coal field, and that the respondents were still furnishing him cars in that way to the best of their ability. It denied all discrimination against him in favor of Castner, Curran, and Bullitt, or any one else, either with respect to the particular shipments in question, or during the six months last past, or for any other period, or at any other time. The relator moved to quash the return, but his motion was overruled, and

issue was joined thereon, and a stipulation was filed by both sides waiving a jury, and agreeing to try the issue of fact thus raised to the court.

At the trial the relator, Coffman, was examined on his own behalf, as well as his bookkeeper, Mr. Hardie, Mr. Kilpatrick, the president of the Indian Ridge Coal & Coke Company, and Col. Botsford, the manager of the mines of said coal and coke company. On behalf of the respondents was heard the evidence of L. E. Johnson, general manager of the railway company, M. D. Maher, its superintendent of that portion of the road which traverses the coal field in question, and D. E. Spangler, its general car-service agent. In a general way, but accurately, upon the subject of discrimination, the evidence of the relator showed: (1) That Coffman had not received a sufficient number of cars in which to ship as much coal as the Indian Ridge mine was capable of shipping. (2) That something like 300 cars were weekly distributed to the various coal operations in the field in which the Indian Ridge is situated, in which distribution the Indian Ridge Coal & Coke Company did not participate. (3) That certain arbitraries were allowed certain coal operations in that territory; that is to say, that the Southwest Virginia Improvement Company and other coal operations in the general Pocahontas coal field were arbitrarily allotted a certain number of cars in addition to the allotment to other operations in that field. Upon behalf of the railway company and the other respondents it was shown as follows: (1) That it was true that Coffman did not receive a sufficient number of cars at all times, and in every case, in which to ship the full output of his principal, the Indian Ridge Coal & Coke Company, but that every other coal operation in the field was in the same situation, and that the possibilities of one were not met any more than the possibilities of the other, but that each and all were graded and treated alike without fear or favor, without discrimination for either, or against any; that the railway had done the best for each it could, and that it did not discriminate against any. (2) That the 300 cars, more or less, distributed among the other operations, and in which the Indian Ridge did not participate, were cars placed by the railway company at the various mines, not for traffic, state or interstate, but for railroad fuel alone; and that the reason why Coffman and his Indian Ridge principal did not participate therein was because they had refused to sell the railway company its fuel coal upon the same terms that it could purchase it from other operations. (3) That upon the question of arbitraries to the Southwest Virginia Improvement Company and other operations, such arbitraries did exist; and that the history, explanation, and justification thereof was as follows: In the beginning of the development of the coal territory in this region, the Norfolk & Western Railroad was constructed into the Pocahontas coal field east of the Great Flat Top Mountain, and several coal develop-

ments were made there. All these first operations shipped their coal to the East, or to tide water, exclusively, and there was no railroad or coal openings west of said mountain; and at that time the railway company had about 1,500 coal cars with which to serve the then existing operations east of the mountain. Subsequently it was determined to extend the railway by tunneling through the Great Flat Top, and down the grades on the western side, through the supposed coal field beyond. When this had been done at great expense, and mines opened on the western slope, it was discovered that for eastern shipment of coal it cost five or ten cents more per ton to haul coal from the mines on the western slope to tide water than it did from the mines on the eastern slope to the same point. This was in consequence of physical conditions. The grades were so steep up the western slope in tide-water shipment that three engines were required to haul the same number of cars to the summit that one engine could haul from the eastern side on to market. In other words, this railway, in consequence of natural location, had two distinct coal fields on its line in the Pocahontas territory; that is to say, the field east of the Great Flat Top and the field west of the Great Flat Top. But, in order that the eastern operations might not have such an advantage over the western operations, in consequence of the increased freight rate to the latter, as would drive the western field out of the market, it was sought to ascertain some way by which the western operations could be given the same freight rate as the eastern, and the eastern given some advantage that would compensate it, and not destroy the advantages of its natural location. In consequence of these things, the operators east of the mountain and the operators west of the mountain agreed, or at least indicated to the railway company, that, if the same freight rate east could be applied to both fields, it would be entirely satisfactory to those located east of the mountain, provided the operations east of the mountain were equalized by receiving in an arbitrary way an additional number of coal cars for shipment of coal. This was agreed to by every operator in the two fields at the time, east and west, and the railway company subscribed thereto by allotting to the operations east of the mountain for their exclusive use the 1,500 coal cars that were in existence before the western field was opened up. This is the history of the arbitraries. (4) That the mines of the Indian Ridge Coal & Coke Company are situated west of the Great Flat Top Mountain, together with 29 other operations, 8 operations being east of the mountain, and that there are no arbitraries west of the mountain; and that the Indian Ridge and all other operations west are treated exactly alike in the delivery of cars to them for the shipment of coal. (5) That the railway company has now, has had for the past six months, and has had from the time of its extension into the western division of the Pocahontas coal field, a system of car



distribution, which system, whether good or bad, has been uniformly and conscientiously adhered to without the slightest discrimination between the various coal operations in that territory. This system, in its history and detail, is as follows: The Pocahontas coal is a soft coal, and, in order to prepare it properly for market, it was discovered to be necessary to screen out the slack, and, in order that no waste might occur in consequence, it was determined that this slack should be manufactured into coke. By this arrangement the landowners would increase their royalties, the railway company its freights, and the mine operators or lessees their products for market; that is to say, the latter would have both good coal and good coke for sale, instead of inferior coal alone. The land owners, the railway company, and the mine operators all, in consequence of this situation, determined to act together for a common purpose, and to a common end. The landowners, therefore, required all their lessees or mine operators to construct 100 coke ovens for every 500 acres of coal land leased, and the railway company agreed to furnish for transportation purposes one and one-half coal cars for each coke oven completed, and distribute the same among the various operations in proportion to the number of ovens constructed by each. (6) That this was the system of car distribution at the time the Indian Ridge Coal & Coke Company entered the western field, and it agreed to the arrangement, and worked under it without complaint for years. This is shown by the testimony of its president. (7) That the railway company not only furnished one and one-half cars for each coke oven as agreed, but has furnished nearly two cars for each coke oven; and has distributed such cars among the operations in the western field without any discrimination, and among the operations of the two fields without any discrimination, except upon the arbitraries as above explained and justified. (8) That the barge R. T. Thomas, on which the first 2,000 tons of coal were to be loaded, did not arrive at Lambert's Point on the 14th day of January, 1901, and has not yet arrived; and that the barge Pendleton was not substituted in its place until the 19th day of that month, at which time there was sufficient coal on hand to load it. (9) That the steamer Chattan was reported on the 18th at Lambert's Point, instead of the 17th, and it had precedence at the pier over the barge Pendleton, and was still loading ahead of the barge as late as the 23d day of said month, at which time there was enough coal on hand at Lambert's Point, and in transit thereto from the coal fields, to load it and the barge Pendleton, too.

When we consider, therefore, the pleadings and proof and the act of congress under which this proceeding was instituted, it becomes evident that the peremptory writ of mandamus should be refused. In the first place, the gist of the whole proceeding is an unjust discrimination in favor of one shipper

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over another similarly situated. It is for the remedy of such a wrong that congress, by the act in question, gave the federal courts the power of mandamus, and for such a wrong alone. There must not only be a discrimination, but it must be an unjust discrimination; and that character of discrimination must not only be pleaded, but it must be proved by the relator, otherwise the writ of mandamus will be denied him. Act Cong. March 3, 1899 (supplemental to Interst. Com. Act Feb. 4, 1887); *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 276, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. Louisville & N. R. Co.* (C. C.) 73 Fed. 409; *Harding v. Railroad Co.*, 1 Interst. Com. R. 104; *Perry v. Railroad Co.*, 5 Interst. Com. R. 97; *Brewer v. Railroad Co.*, 7 Interst. Com. R. 224. In the present case no unjust discrimination in favor of Castner, Curran, and Bullitt was proven. If any discrimination at all were shown, such discrimination was fully explained and justified. The only effort, as we have seen, at such proof, was the arbitrariness, which were fully explained, and the 300 coal cars, in the allotment of which Coffman was not permitted to participate by reason of his own fault and refusal. While the capacity of the Indian Ridge mine may have been greater than its allotment of cars, yet that was shown to be the case with every other operation similarly situated in that field. In other words, the supply of coal cars was short, and the railway company simply prorated the supply on hand, without discrimination, among all the operations, the Indian Ridge included, which, under all the authorities, it not only had the right to do, but was compelled to do. *Iowa Railroad Commissioners*, 1878, p. 20; *Riddle v. Railroad Co.*, 1 Interst. Com. R. 594. And the railway's duty was not affected in the least by proof that the president of the Indian Ridge Coal & Coke Company offered to furnish the railway company cars to be used exclusively in the transportation of coal from the Indian Ridge mines: First, because these cars were to be purchased of the Indian Ridge by the railway upon the installment plan, the railway thereby becoming interested therein at once, and finally the absolute owner thereof; so that, in the event of an exclusive application of the same to the business of the Indian Ridge mines, there never would have been a time, from first to last, during which the railway company, by such a course, would not have been devoting rolling stock which it owned or was interested in as a common carrier to the demands of one shipper, to the exclusion of another similarly situated, which it cannot rightfully do. And, secondly, because, even if it never should become interested in, or the owner of, the cars, still it may not rent its tracks to, or permit them to be appropriated by, others, to the detriment of other shippers, whom it should serve to the uttermost. Even with such special cars in its service, when the stress of unusual business comes, the special cars would have to be applied to the accommodation

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cation that in the operation of its railroad it was a public officer, and that the plaintiff's right of action, if any he had, accrued by the acts of the defendant when acting as a common carrier in the operation of its said railroad, and therein as a public officer. It is urged that the county court should have heard evidence on the question whether the defendant was a public officer, as set forth in its plea, and that to dismiss the action without such evidence being heard was error. The plea, which was before the court as a part of the record, set forth that the defendant was acting in its capacity of a common carrier, and therein as a public officer. If it cannot be a public officer when thus acting, it was not necessary to hear evidence thereon. *Wyman v. Hayes*, 73 Vt. 24, 50 Atl. 556. It is safe to say that, to constitute a public officer, it is indispensable that the officer be invested with some of the sovereign functions of one of the branches of government, legislative, executive, or judicial, to be exercised by him for the benefit of the public. Unless the powers conferred are of this nature, the individual holding the office is not a public officer. *State v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723; *Attorney General v. Drohan*, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301; *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *Attorney General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606; *Patton v. Board*, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66; *Eliason v. Coleman*, 86 N. C. 235. It cannot be said that the defendant, in the operation of its road as a common carrier, holds any office which is a parcel of the administration of government, and it must follow that it is not delegated with any functions pertaining thereto, without which it cannot be a public officer.

The motion to dismiss was properly granted, and judgment is affirmed.

*GALLIERS v. CHICAGO, B. & Q. R. CO.*

(*Supreme Court of Iowa, April 11, 1902.*)

[89 N. W. Rep. 1109.]

**Carriers of Live Stock—Loss of Horse—Striking Out Allegations as to Value.\***

Where the petition in an action against a carrier for the loss of a stallion through defendant's negligence in shipping averred that the horse was purchased for breeding purposes, was young, highly bred, and well-gaited, and the answer denied these allegations, it was proper to strike from the answer an affirmative allegation that plaintiff traded for him an old horse, which he knew was without value, and without seeing the stallion, since such allegation was only material on the question of the value of the stallion, which could be shown under the denials, and the value of the horse traded was not in issue.

**Same—Same—Evidence.**

In an action against a carrier for the loss of a stallion through defend-

\*See generally, 1 Rap. & Mack's Dig. 807 et seq.

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ant's negligence in shipping the same in a car in which fresh lime had recently been carried, evidence that a horse traded by the plaintiff for the stallion was worthless, and that an action was pending against plaintiff for breach of warranty, together with the petition in such action, was properly rejected, since the value of an article traded for another cannot be shown in reduction of the value of the latter.

**Same—Same—Same.**

In such case, evidence of the value of the stallion when sold to another, long before he was obtained by plaintiff, was incompetent.

**Same—Negligence—Pleading—Amendments.**

Where the petition alleged that plaintiff's horse received injuries resulting in death, through the negligence of the defendant in shipping him in a car in which fresh lime had recently been carried, and an amendment was filed at the close of plaintiff's evidence, not as a substitute for the original petition, stating that the horse was unduly exposed to the elements while in the car, by reason of which he caught cold and died, the issue thus raised was properly submitted to the jury.

Appeal from district court, Monroe county; T. M. Fee, Judge.

Action to recover the value of a horse alleged to have died on account of the negligence of the defendant. Trial to a jury, and verdict and judgment for the plaintiff, from which the defendant appeals. Affirmed.

T. B. Perry and N. E. Kendall, for appellant.

Dashiell & Mason, for appellee.

SHERWIN, J. The petition alleges the loss of a standard-bred trotting stallion through the negligence of the defendant in shipping the horse from Des Moines to Albia in a car in which fresh lime had recently been carried. It was also averred that the horse was purchased by the plaintiff for breeding purposes, and that he was young, highly bred, and well-gaited. The defendant, in its answer, denied these allegations, and stated that the plaintiff traded for him an old horse, which he knew was of no value, and without seeing the stallion in question until his arrival at Albia. The affirmative allegation above noted was stricken out on motion. There was no error in this, for two reasons. In the first place, it could only be material on the question of the value of the horse traded for, which was provable under the denials in the answer; and, secondly, because the value of the horse traded was not in issue, and could not be put in issue, in this action, as we shall show hereinafter.

The defendant sought to show on the cross-examination of the plaintiff that the horse he traded for the stallion was worthless; and, further, that he then had an action pending for a breach of warranty in the sale of the horse to him. This testimony, and the offer of the petition in the other action, were rejected, and rightly so. We have held that the price at which an article sold may be shown as tending to fix its market value. *Buford v. McGetchie*, 60 Iowa, 298, 14 N. W. 790. But we have been cited to no case in this state or elsewhere which holds that, where personal property has been

traded for, and a third person destroys a part of that property, he may prove the worthlessness of the property exchanged therefor. If the seller is satisfied with the value of property which he received in exchange for his property, its value cannot be shown in reduction of the value of the property for which it was exchanged. This seems to us to be the sound rule, and in fact the only one that will keep the main issue in cases of this kind before the jury; otherwise it would be competent to try the value of every article which had entered into trades leading up to the one in controversy. There is no difference in principle between this rule and that where one is compelled to pay the debt of another, and does so in property which is accepted in full satisfaction thereof. In such case the debtor cannot reduce the recovery of his surety by offering evidence that the property was of less value. *Garnsey v. Allen*, 27 Me. 366. As applying the same principle, see *Winch v. Baldwin*, 68 Iowa, 764, 28 N. W. 62; *Likes v. Baer*, 8 Iowa, 368. The correctness of this rule is further illustrated in this case. It was shown that the dead horse, with others, was traded by a former owner to the party of whom the plaintiff purchased him, and the defendant then offered to show the value of all of these other horses, and in fact was permitted to show the value of some of them.

Evidence of the value of this stallion when sold to Keefe, long before he was obtained by the plaintiff, even if a cash price had been paid for him, was incompetent, under the rule announced in *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159.

The defendant offered evidence as to the market value of the sire of this stallion and of his ability as a trotter, as a colt getter, and as to the quality of his colts, the amount of his patronage, and his reputation as a sire where owned. Some of this evidence was received; more than was material to the issue in this case, we think, but enough to show the quality of the sire and the character of his stock. His breeding was not in dispute, and this was all that was material on the question of the value of the plaintiff's stallion for stock purposes.

At the close of the evidence the plaintiff filed an amendment to his petition, stating that the horse was unduly exposed to the elements in the car in which shipped, and that by reason thereof he caught cold, and died from the effects thereof. This issue was submitted to the jury, which is assigned as error. It was not filed as a substitute for the original petition, and, we think, was properly given to the jury. There was evidence supporting the issue thus presented, and, as we understand the record, the amendment was not assailed, but an answer thereto was filed, putting in issue its averments.

We discover no error, and the judgment is affirmed.

RAILROAD COMMISSION OF LOUISIANA *v.* KANSAS CITY  
SOUTHERN RY. CO.*(Supreme Court of Louisiana, March 31, 1902.)*

[31 So. Rep. 858.]

**Supreme Court—Jurisdiction—Suits by Railroad Commission.**

The provision of article 285 of the constitution, conferring upon this court jurisdiction of suits brought against the railroad commission to test the validity of whatever rule, regulation, etc., it may have adopted, cannot be made to apply to suits brought by the railroad commission to recover the amount of fines imposed by itself for violations of its ordinances. A suit of the latter kind is an ordinary suit, falling within the general rule as to jurisdiction.

(Syllabus by the Court.)

Appeal from judicial district court, parish of De Soto;  
John Bachman Lee, Judge.

Action by the railroad commission of Louisiana against the  
Kansas City Southern Railway Company. Judgment for  
defendant, and plaintiff appeals. Dismissed.

Walter Guion, Atty. Gen. (H. T. Liverman and Lewis  
Guion, of counsel), for appellant.

Alexander & Wilkinson, for appellee.

PROVOSTY, J. In this suit the railroad commission of Louisiana seeks to enforce payment of a fine of \$1,000 imposed by itself upon the defendant railway company, and a motion is made to dismiss the appeal on the ground of want of jurisdiction *ratione materiae*. As containing a grant of jurisdiction to this court in cases of this character, the attorney general refers to the following article of the constitution: "Art. 285. If any railroad, express, telephone, telegraph, steamboat and other water craft, or sleeping car company, or other party in interest, be dissatisfied with the decision or fixing of any rate, classification, rule, charge, order, act or regulation, adopted by the commission, such party may file a petition setting forth the cause of objections to such decision, act, rule, rate, charge, classification or order, or to either or to all of them, in a court of competent jurisdiction, at the domicile of the commission, against said commission as defendant, and either party to said action may appeal the case to the supreme court of the state, without regard to the amount involved, and all such cases, both in the trial and appellate courts, shall be tried summarily, and by preference over all other cases. Such cases may be tried in the court of the first instance either in chambers, or at term time: provided, all such appeals, shall be returned to the supreme court within ten days after the decision of the lower court; and where the commission appeals, no bond shall be required. No bond shall be required of said commission in any case, nor shall advance costs, or security for costs, be required of the commission." That article, in express terms, has refer-

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ence exclusively to suits brought against the commission for the purpose of testing the validity of some action it may have taken; but the attorney general argues that the provision of this article on the subject of the appeal must be read into article 286, under which the present suit has been brought,—the two articles being laws in *pari materia*, and having, therefore, to be construed together. The canon of construction here invoked is sound; but assuming, for argument's sake, that article 285 is in *pari materia*, the argument loses sight of the fact that there are other articles in the constitution which are also laws in *pari materia*, and in connection with which also article 286 must be construed. These are the articles inserted in the constitution for the special purpose of regulating the jurisdiction of this court, which impliedly prohibit this court from entertaining jurisdiction of cases involving a mere moneyed demand, where the amount is less than \$2,000. We can readily understand why suit is brought to test the validity of any rule, regulation, etc., that the commission may have made, should go to the highest court, which alone is competent to give a decision that shall be authoritative in other cases besides the one in which it is rendered; but after the validity of these rules, regulations, etc., has been established, either by decision or by failure to contest, we can think of no special reason why suits brought to collect fines imposed under these rules and regulations should come to this court, any more than should any other suits brought by the state, or by any of the state agencies, for the recovery of mere money, and involving no governmental regulation. We have no jurisdiction of the appeal, and have to sustain the motion to dismiss; but, in doing so, we will add that the case, being the first of this kind, is one in which we should entertain an application for a writ of review on the petition of either party, so that no permanent injury to either party can result from our present action.

Appeal dismissed.

#### TEXAS & P. RY. CO. v. TRIBBLE.

(*Court of Civil Appeals of Texas, April 4, 1902.*)

[67 S. W. Rep. 890.]

#### Railroads—Transportation of Stock—Negligence\*—Instruction.

In an action against a railroad company for injuries to two car loads of horses shipped over its road, an instruction that it was defendant's duty in handling them to exercise "such care, prudence, and caution as an ordinarily careful, prudent, and cautious man would have exercised under like circumstances; and, if \* \* \* defendant failed to exercise such prudence and caution, \* \* \* such failure would constitute negligence," was not improper.

As to duty of carrier during transit and liability for negligence, see 1 Rap. & Mack's Dig. 745-756.

## Texas &amp; P. Ry. Co. v. Tribble

Appeal from district court, Taylor county; N. R. Lindsey, Judge.

Action by G. M. Tribble against the Texas & Pacific Railway Company for damages to two car loads of horses shipped over defendant's road. Judgment for plaintiff, and defendant appeals. Affirmed.

The charge on negligence referred to in the court's opinion was as follows: "You are further instructed that in the transportation of said horses from Cisco, Texas, to Waskom, Texas, it was the duty of the defendant, in order to avoid injury to said horses, to exercise, in the handling and managing of the train in which said horses were transported, such care, prudence, and caution as an ordinarily careful, prudent, and cautious man would have exercised under like circumstances; and, if you find by a preponderance of the evidence that defendant failed to exercise such prudence and caution in handling and managing of said train, such failure, if any, would constitute negligence."

B. G. Bidwell, for appellant.

Hardwicke & Hardwicke, for appellee.

STEPHENS, J. This appeal is from a verdict and judgment for \$750 recovered as damages to two cars of horses carried from Cisco to Waskom, Tex., in November, 1900. The evidence tended to prove, and warranted the jury in finding, that, through the negligence of appellant, there was a delay of about 23 hours in the carriage of these horses from Cisco to Waskom,—the time usually required being only about 24 or 25 hours,—and that this delay, together with the careless and rough manner in which the horses were handled, resulting in the loss and death of some of them, produced injuries commensurate to the damages recovered. The assignment that the verdict is excessive is therefore overruled.

The testimony of appellee as to the market value of the horses in good condition at Waskom fully warranted the charge complained of in second assignment, on the measure of damages, and that assignment is consequently overruled.

We approve the charge defining negligence, and therefore overrule the last assignment, complaining of it.

A suggestion of delay would have entitled appellee to damages in this case, as in quite a number of other simple damage suits brought before us by this appellant and some others; but, as the party interested has not seen fit to make the suggestion, we have hitherto hesitated, and still hesitate, to affirm with damages, especially as the verdicts fixing the amount of damages in such cases are usually about all that the evidence most favorable to recovery will warrant.

Judgment affirmed.

HUNTER, J., not sitting.



TEXAS & N. O. R. CO. v. BIGHAM *et al.**(Court of Civil Appeals of Texas, March 19, 1902.)*

[67 S. W. Rep. 522.]

**Carriers—Delay in Delivery—Pleading Damages.**

A complaint against a carrier for delay in delivering a shipment of rice, alleging the difference between its value as delivered and as it should have been delivered, and praying for such difference as damages, is sufficient, though such damages be special damages because of the rice being wet when delivered to the carrier.

Appeal from Jefferson county court; Geo. C. O'Brien, Judge.

Action by Bigham Bros. against the Texas & New Orleans Railroad Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett, and Watts, Chester & Ellison, for appellant.

NEILL, J. The appellees, plaintiffs below, alleged in their petition that on the 23d day of November, 1900, they delivered to the Gulf & Interstate Railway Company of Texas 198 sacks of rough rice, at Fennett, a station on said road, to be transported thence to the town of Beaumont, and there delivered to the Beaumont Rice Mills; that said railway company promptly carried the shipment of rice from Fennett to Beaumont, and there delivered the same to the Texas & New Orleans Railroad Company, appellant, a connecting carrier, which undertook and promised to carry the rice over its road, and promptly deliver it to the Beaumont Rice Mills; that, after receiving the shipment, appellant wrongfully and negligently carried and delivered it to the Atlantic Rice Mills Company, where it wrongfully and negligently withheld the entire shipment of rice from the Beaumont Rice Mills until the 22d day of December, 1900, on which date appellant carried and delivered the rice to the Beaumont Rice Mills, and there received as its consideration for such transportation charges the sum of \$5; that the rice was sound and in good condition when it was received by appellant for transportation over its line, but when finally delivered to the Beaumont Rice Mills it was, by reason of its having become wet since its delivery to the Gulf & Interstate Railway Company at Fennett, and while in transit, greatly damaged, and its market value greatly depreciated; that when delivered by appellant to the Beaumont Rice Mills the rice was mildewed, sour, partly rotten, and unfit for sale. So that the aggregate net market value of the entire shipment, when delivered to the Beaumont Rice Mills, was only \$439.01, which is \$301.51 less than the rice would have been worth on the market at its destination had it been safely carried and promptly delivered. After excepting to the petition and filing a general denial, appellant answered specially that the rice was loaded by appellees at

Fennett during a heavy rain, and was wet and damp when received by it from the Gulf & Interstate Railway Company, and was then damaged, which was caused by the dampness resulting from being loaded during the rain. The cause was tried without a jury, and the trial resulted in a judgment against appellant in favor of appellees for \$300, from which it has appealed.

It is urged under the first assignment of error that as the petition alleged the goods were shipped in good condition, and became damaged by reason of appellant's neglect during transportation, appellees cannot recover under evidence showing that they were shipped in a bad and precarious condition, necessitating unusual promptness in delivery in order to prevent damage, because (1) the case made would be for special damage, not ordinarily the result of delay, and (2) would be at variance with the cause pleaded.

Under the allegations in appellees' petition, as is seen from the statement of the case, appellant undertook and promised to carry the rice over its road, and promptly deliver it to the Beaumont Rice Mills, and after receiving it in good condition it wrongfully and negligently withheld the shipment from the mills until the 2d day of December, 1900, which was 30 days after it was received and should have been delivered. As to the condition of the rice when delivered, the testimony is conflicting. According to that of appellees, it was kept dry, and not taken from their wagons, where it was covered with good tarpaulins, amply protected from the rain, and not loaded on the car of the Gulf & Interstate Railway until the rain was over, and that it was dry and in good condition when unloaded from the wagons and loaded upon the railroad car. On the contrary, appellant's witnesses testified that the rice was taken from the wagons and placed upon the car by appellees' servants during a heavy rain, to which it was exposed during such removal; that the car in which it was loaded was dry and secure against rain.

If the weight of testimony were to be determined by the number of witnesses, it would preponderate in favor of appellant. But in weighing testimony that of a greater number of witnesses does not necessarily outweigh that of a lesser. The test is truth, not numbers. It is for the jury, or, in its absence, the trial judge, to sift the testimony, and from it find the truth and determine the issuable facts. When this has been done by the trial court, and its findings crystallized into a judgment, it will not be disturbed on appeal, if there is evidence reasonably sufficient to sustain it. Facts upon which a judgment rests are determined by the court which renders the judgment upon them, not by the one which reviews it upon appeal. It only looks to see whether there is any testimony from which the facts entering into the judgment could be found. If it sees such testimony as reasonably tends to support the findings of the lower court, its duty as to the facts

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is at an end. Such testimony we have found in the record before us. The trial court has weighed it for the purpose of determining the question "wet or dry," and has said the rice was dry and in good condition when appellant received it, and became wet afterwards, and was in a damaged condition when delivered to the Beaumont Rice Mills. There was at least evidence from which the trial court could have made these findings, and, if necessary to sustain its judgment, it should be presumed in its favor that it did so find.

But there is another combination of facts that might have been found by the court, warranted by the evidence, which, in our opinion, would sustain the judgment. It may have found (1) that the rice was exposed to the rain and became wet during the time it was transferred from the wagons to the car; (2) that, if the appellant had promptly transported and delivered it, it would not have become damaged from the dampness; (3) that the appellant negligently failed to transport and deliver it within a reasonable time; and (4) that in consequence of such negligence the rice was in a damaged condition when delivered. But appellant says that such findings would make a case of special damages, not ordinarily the result of delay, and would be at variance with cause pleaded.

Where goods are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is, ordinarily, the difference, if the cost of transportation, as in this case, has been paid, between the value as actually delivered and as they should have been delivered, with interest. These damages are such as the law implied or presumes to have accrued from the wrong complained of, and are such as might have been reasonably contemplated by the parties to flow from the negligent failure of the appellant to perform its contract to deliver the goods within a reasonable time. Such are denominated general damages, and need not be specially pleaded in order to prove them. But, whether considered general or special, it can make no difference, so far as this case is concerned; for the difference between the value of the goods as actually delivered and as they should have been delivered was pleaded, and such difference in value prayed for as damages.

Therefore, in our opinion, it can make no difference upon what theory the court found,—whether the rice was wet when delivered to appellant or became so afterwards,—its judgment finds support in the evidence; for the negligent failure of appellant to deliver to the consignee is the proximate cause of the injury to the goods and their consequent depreciation in value.

What we have said disposes of all the assignments of error, and, we think, demonstrates that none is well taken. Therefore the judgment is affirmed.

COLLINS *et al.* v. ILLINOIS CENT. R. CO.*(Court of Appeals of St. Louis, Mo., April 15, 1902.)*

[67 S. W. Rep. 943.]

**Carriers of Goods—Conversion—Evidence—Sufficiency.\***

In an action by a consignor against a railroad company for conversion by failing to deliver a shipment of merchandise to the consignee, the evidence showed that the consignor's agent sold the goods to the consignee; that the goods were delivered to defendant for shipment under a bill of lading binding defendant to transport and deliver them to the consignee; that the consignee paid \$10 on account, and refused to pay the balance, for which a suit was pending; that the consignee had not complained to the consignor about the company's delivery of the goods to a third person: *held*, that the evidence failed to establish a conversion.

Appeal from circuit court, Cape Girardeau county; Henry C. Riley, Judge.

Action by Wm. M. Collins and others against the Illinois Central Railroad Company. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. E. Burrough and R. H. Whitelaw, for appellants.

R. Burett Oliver, for respondent.

GOODE, J. Plaintiffs in this case are a firm doing business in Louisville, Ky., and the petition states that on two dates in August, 1899, they delivered to the defendant company at that place certain cases of whiskey and other spirituous liquors which they had theretofore sold to P. R. Van Frank, who was engaged in business in Cape Girardeau, Mo., to be transported to the point last named, and there delivered to Van Frank; that the defendant company did transport said property to Cape Girardeau, but, instead of delivering the same to Van Frank, converted it to its own use, to the damage of plaintiffs in the sum of \$511, together with interest from the date of the conversion. The answer was a general denial.

This case must fail because the record is absolutely barren of testimony or evidence of any kind tending to prove the liquors were not delivered to Van Frank in accordance with the terms of the bills of lading. The only evidence introduced at the trial was the deposition of Graeme McGowan, one of the plaintiffs, who testified to the sales by their commercial traveler, Sugg, of the goods in question to Van Frank, the delivery of them to the Illinois Central Railway Company for shipment, the payment of \$10 on account by Van Frank to the traveling salesman, and his refusal to pay the balance. To the deposition are attached the order written by Sugg and sent in to his house, and also the railway company's bills of lading, which are in the usual form, and bound the company to transport the goods in question to the consignee.

\*See notes, 55 Am. & Eng. R. Cas. 674, and 35 Am. & Eng. R. Cas. 656. Also, see 2 Rap. & Mack's Dig. 75, 125.

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P. R. Van Frank, at Cape Girardeau. The only gleam of evidence which throws any light on the conversion of the property by the defendant, or its failure to deliver it to the consignee, is the following question and answer contained in said deposition: "Q. Did P. R. Van Frank ever make complaint to you about the delivery of the whiskey for which you have sued the Illinois Central Railway Company,—that it was delivered to Dunlop? A. Not to us." It further appears by the testimony of McGowan that the plaintiffs have a suit pending against Van Frank now for the purchase price of the very merchandise alleged to have been converted by the railroad company as the basis of the present action. At the conclusion of the testimony the circuit court gave a peremptory instruction to the jury to return a verdict in favor of the defendant, which was done, and an appeal taken to this court.

The appellants' statement says that when the goods arrived at Cape Girardeau the defendant delivered them to another party, who was wholly irresponsible, without notifying Van Frank. If that were proven, it would make a case of conversion; but there is not a syllable of proof that it was done, and, for aught the record discloses, the goods were delivered to the proper consignee. At least, that is the legal presumption in the absence of evidence to the contrary. A party cannot make out a case of conversion by showing that he turned over property to a bailee for a certain purpose. He must go further, and show the purpose was not carried out.

The court very properly nonsuited the plaintiffs on the testimony adduced, and the judgment is affirmed. All concur.

STATE *ex rel.* WABASH R. CO. v. BLAND *et al.*

(*Supreme Court of Missouri, March 19, 1902.*)

[67 S. W. Rep. 580.]

**Certiorari—Federal Question—Carrier—Payment of Duties—Subrogation to Lien.**

Goods shipped in bond from Japan to St. Louis, with freight paid to destination, were, through fault of a railroad company, sent first to St. Paul, where the goods were opened and assessed, and duties paid by the connecting railroad. When the goods reached St. Louis the consignee refused to pay such sum to the railroad company until he had inspected the goods,—the box showing that they had been opened,—and, on the company refusing such inspection, replevied the goods, and recovered judgment in the trial court, which was affirmed by the St. Louis court of appeals. The defendant then applied for certiorari, claiming that under Rev. St. U. S. §§ 3100, 3102, and 1 Supp. Rev. St. U. S. 1891, pp. 294, 540, regulating the importation of goods in bond, and providing ports to which importation may be so made, it was entitled to subrogation to the lien of the government for the duties so paid, and that such court of appeals had no jurisdiction over such question: *held*, that such statutes give no such right, and that no federal question, or other question not within the jurisdiction of the court of appeals, was raised in the replevin action, and hence the case was not reviewable by the supreme court by certiorari.

## State v. Bland

In banc. Proceeding by certiorari by the state, on the relation of the Wabash Railroad Company, against C. C. Bland and others, to review the decision of the St. Louis court of appeals on the action of Charles E. Pearce against the relator. Writ of certiorari quashed.

This is an original proceeding, by certiorari, whereby the cause of Charles E. Pearce against the Wabash Railroad Company was removed from the St. Louis court of appeals to this court after final judgment in that court in favor of the plaintiff. The petition for the writ of certiorari was based upon the allegation that the St. Louis court of appeals had exceeded its jurisdiction, or was without jurisdiction because "the validity of a treaty or statute of, or authority exercised under the United States, is drawn in question" in the case of Pearce against the railroad, aforesaid, and that the defendant in that case had invoked and been denied the protection of such federal statute or authority. And it was upon this showing and claim that the writ of certiorari was issued. The record in the case of Pearce against the relator, certified to this court under said writ, presents this state of facts: Pearce shipped four boxes of curios, of the value of \$1,000, from Yokohama, Japan, to Wilfred Schade & Co., at St. Louis, in bond, by the Canadian Pacific Railway Company, prepaying the freight. The port of entry specified in the clearance certificate of the United States deputy consul general was St. Louis, where the duties were to be paid. The goods were carried by said railroad company, on the steamer Empress of China, from Yokohama to Vancouver, British Columbia. There the said railroad placed them in a properly bonded car on its road, and consigned these goods, with others, to: "F. Jones, St. Paul. For Wilfred Schade & Co., St. Louis." That railroad transported said goods over its own road and over its connecting road, the Minneapolis, St. Paul & Sault Ste. Marie Railway, to St. Paul. At St. Paul the United States custom officers opened the goods, assessed the import duties at \$264.31, and repacked the goods. The Minneapolis, St. Paul & Sault Ste. Marie Railway paid said duties, and then turned over the goods, out of bond, to the Chicago, Milwaukee & St. Paul Railway Company, for transportation to St. Louis, and collected from that railway the duties it had paid. The Chicago, Milwaukee & St. Paul Railway Company transported the goods to Given, Iowa, and there delivered them to the Wabash Railroad Company, to be by it transported to St. Louis. That company transported them to St. Louis. Schade & Co. had assigned the bill of lading to the real owner, Pearce; and when the goods reached St. Louis the Wabash Company refused to deliver the goods to Pearce unless he would first pay the \$264.31 duties, which the Wabash then thought were simply advanced charges, but which it ascertained, before it paid it, was the duty on the goods, and \$1.24 freight. Pearce noticed that the boxes had been opened,

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and refused to pay anything unless he was allowed to first examine them and see their condition; promising, however, if they were intact and in good order, to pay said duty and freight. The railroad refused to permit such an inspection, or to deliver the goods until the charges were paid, and thereupon Pearce instituted a replevin suit against the railroad and secured possession of the goods. He then ascertained that some of the goods were missing, and others damaged; his total loss being stated to be over \$300. The answer of the railroad sets up these facts, and alleges that it was necessary to pay the duty in St. Paul in order to complete the transportation, and asks that it be subrogated to the right of the United States government in respect to said duty, and that it be decreed an equitable lien on the goods therefor. The reply claims that the goods were shipped in bond, and that St. Louis was the port of entry, and that the goods would never have been unpacked or damaged, and no duty would have been collected or demanded by the United States anywhere until the goods arrived in St. Louis, if it had not been for the wrongful act of the Canadian road, at Vancouver, in changing the destination from St. Louis to St. Paul, and that such conduct amounted to a conversion, and hence the Wabash (and no other) road was authorized to pay any such import duty, and that the freight was prepaid, and hence the charge of \$1.24 was unlawful. The plaintiff obtained judgment in the circuit court. The railroad appealed to the St. Louis court of appeals, where two hearings were had. The first decision was unanimous in favor of the plaintiff. Upon a rehearing being granted, the majority again decided in favor of the plaintiff. The court refused to certify the case to this court, and the dissenting judge joined in that refusal. Then this writ of certiorari was issued. The plaintiff, Pearce, moves to quash the writ on the ground that no federal right has been denied the relator.

Geo. S. Grover, for relator.

Chas. E. Pearce and E. C. Kehr, for respondents.

MARSHALL, J. (after stating the facts). The contention of the relator is that, under the statutes of the United States, it is subrogated to the rights of the United States, and has a lien upon the goods for the import duties that were paid by its connecting road in St. Paul. It is claimed that sections 3100, 3102, Rev. St. U. S. (2d Ed.) 1878, and 1 Supp. Rev. St. U. S. 1891, pp. 294, 540, give this right of subrogation. An examination of these statutes fails to support this contention. There is not a word in any of them, and there is nothing in the context, spirit, or purpose of any of them, that gives countenance or color to the contention. On the contrary, they provide a method whereby goods may be imported into the United States from foreign countries in bond, and transmitted to interior ports of entry, so that they will not

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have to be opened or examined, or the duties collected, at the first port of arrival, but only a record kept at such port of arrival of the fact, and the inspection and assessment and collection of the duty be made at the interior port of entry. The whole scheme contemplates that nothing such as happened in this case shall occur. Instead of covering or embracing any idea that the carrier shall pay the import duty at any point or at any time, the method provided by the statute is that, when the goods arrive at the port of entry specified in the manifest or clearance certificate, they shall be turned over to the governmental officers, and the consignee shall pay the duty to the government. This being the law, and this the state of facts presented by the record certified to this court, it follows that no statute of, or authority exercised under, the United States, is drawn in question in the case of Pearce against the Wabash Railroad Company; that the laws of the United States do not contemplate that the carrier shall pay the import duties at all, at any time or place, but that they shall be paid at the port of entry by the consignee; and that no right of subrogation to the right or lien of the United States is conferred, either expressly or impliedly, by the laws of the United States, upon a carrier, or upon any one else. It also follows that no such right was asserted by the defendant in the circuit court by its pleadings, but that the right of subrogation asserted in its answer is an alleged equitable right of subrogation, and not a legal or equitable right conferred by the statutes of the United States. The right of the government of the United States to inspect, to prevent frauds on the revenue, at any point in transit, is reserved by section 3102, Rev. St. U. S. 1878; but no such question is present in this case, as no such inspection for such a purpose was made in this case. The case resolves itself, then, into this: No federal protection has been invoked, and denied to the defendant by the lower courts. The case does not fall within the appellate jurisdiction of this court. The question involved is a simple question of the right of subrogation in equity. The St. Louis court of appeals has final appellate jurisdiction in such cases, where the amount involved does not confer jurisdiction upon this court, and such is not the case here. Is, this, then, a proper case for the exercise of the original and superintending jurisdiction of this court over all inferior courts of record, by the use of the writ of certiorari, under section 12, art. 6, Const. Mo.? If it is, then any litigant who loses in any ordinary action, involving no federal or constitutional right, would have a right to have the decision of any court reviewed by certiorari. The writ of certiorari never was intended to perform such functions. It reaches only questions of jurisdiction. It does not deal with the merits of controversies between the litigants. It acts upon judicial bodies and their proceedings, not upon private controversies. For these reasons, it is beyond dispute that



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the writ of certiorari was issued in this case upon a misconception of the questions presented to, and decided by, the St. Louis court of appeals, and hence that the motion to quash the writ should be sustained. Under these conditions, it would be improper to consider the merits of the case of Pearce against the Wabash Railroad Company at all.

The writ of certiorari is therefore quashed. All concur.

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ANDERSON v. ATCHISON, T. & S. F. RY. CO.

(*Court of Appeals of Kansas City, Mo., April 7, 1902.*)

[67 S. W. Rep. 707.]

**Carriers of Freight—Limiting Liability for Loss by Delay\*—Burden of Proof.**

When a carrier not capable of contracting against liability for negligence contracts against liability for loss by delay in a shipment of freight, the shipper, in an action for damages resulting from delay, has the burden of showing that the delay was caused by the carrier's negligence.

**Same—Delay—Sufficiency of Evidence to Raise Presumption of Negligence.**

Evidence that it took 24 hours to transport cattle to a certain place, when the usual time was from 13 to 15 hours, and that the train was delayed at more than one place from 2 to 4 hours, is sufficient to raise a presumption of the carrier's negligence, in an action by the shipper for damages.

Appeal from circuit court, Linn county; Jno. P. Butler, Judge.

Action by H. Anderson against the Atchison, Topeka & Santa Fe Railway Company for damages in delay of shipment of stock. From a judgment for plaintiff, defendant appeals. Affirmed.

Gardner Lathrop and Saml. W. Moore, for appellant.  
W. B. Clark and Benj. L. White, for respondent.

ELLISON, J. Plaintiff shipped over defendant's road three car loads of cattle from Marceline, Mo., to Chicago, Ill., for the market at that point. They were not delivered in time for the market of the day next after shipment, and the delay, which plaintiff charges was negligent, caused a loss to the plaintiff. No evidence was introduced by defendant. Plaintiff recovered judgment in the trial court.

The shipment was under a special contract which exempted the defendant from liability on account of delay. But as the

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\*See *White v. Great Western R. Co.*, 2 C. B. N. S. 7, 26 L. J. C. P. 158; *Webb v. Great Western R. Co.*, 26 W. R. 111; *Manchester S. & L. R. Co. v. Brown*, 8 App. Cas. 703, 53 L. J. Q. B. D. 124, 4 Ry. & C. T. Cas. XVIII; *Dawson v. Chic. & Alton R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296; *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318. See also, *Gulf, C. & S. F. R. Co. v. Gatewood* (Tex. Sup. Ct. sec. 1890), 14 S. W. Rep. 913.

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defendant cannot make a binding contract which will exempt it from liability for its negligence, the question in this case is, on whom is the burden of proof of negligence, and, if on plaintiff, did he show it? The law is that if a carrier of freight contracts for an exemption to its ordinary liability, and it is shown that the damage charged against it was caused by one of the causes excepted in the contract, the plaintiff must then take the burden of showing that, notwithstanding the contract, the injurious thing happened by reason of the carrier's negligence; for in such case the contract, by force of public policy, must give way: *Witting v. Railway Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636; *Otis Co. v. Missouri Pac. Ry. Co.*, 112 Mo. 622, 20 S. W. 676. No specific act or acts of negligence were made to appear. That is to say, no cause for the delay was shown. But plaintiff did show the following: That he shipped the cattle at 11 o'clock a. m. on the 13th at Marceline, and that they arrived at 11 o'clock a. m. the next day; that from 13 to 15 hours was the usual time for transportation between the two points; that delays occurred at more than one point of from 2 to 4 hours; and that other trains going towards Chicago passed them while thus delayed. We regard this as sufficient to raise a presumption of negligence. The supreme court held in the cases cited *supra* that it was "enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence, and especially is this so" where the means of showing how the delay "occurred is with the defendant, and not the plaintiff." The cases of *Leonard v. Railway Co.*, 54 Mo. App. 293, and *Blanchard v. Railway Co.*, 60 Mo. App. 267, are in many respects quite applicable to this case, and are controlling authority against defendant's position, considered in connection with the evidence. The judgment should be affirmed. All concur.

## FREDERICK v. LOUISVILLE &amp; N. R. Co.

(*Supreme Court of Alabama, April 24, 1902.*)

[31 So. Rep. 968.]

## Refusal of Carrier to Deliver Goods\*—Liability as Warehouseman.†

Where defendant refused to deliver goods carried by it unless the consignee would accept all, which he refused to do, on account of damage to some of them, and two weeks later the goods were destroyed by the burning of the depot, the action for the value thereof should have been against defendant as a warehouseman, and not as a carrier.

## Same—Loss of Goods—Negligence—Burden of Proof.

Under a count seeking recovery against a railroad company as a

\*See generally, extensive note, 2 Am. & Eng. R. Cas., N. S., 719.

†See *Walker v. Eikleberry*, 13 Am. & Eng. R. Cas., N. S., 253, and note at end of case. Also, see *Dixon v. Central of Georgia Ry. Co.*, 17 Am. & Eng. R. Cas., N. S., 380, and note at end of case.

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voluntary bailee of goods which were destroyed before delivery to the consignee, the burden of proof was on the plaintiff to show the negligence averred.

Appeal from circuit court, Bibb county; John Moore, Judge.

Action by Louis Frederick against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This action was brought by the appellant against the appellee. The complaint contained two counts. In the first count the plaintiff claimed \$100, for that upon a specified day the defendant received at Nashville, Tenn., six stoves, to be delivered at Blocton, Ala., and it was then averred in said count that the defendant undertook to deliver the stoves, but the same were destroyed at Blocton, Ala., while in the charge of the defendant as a common carrier. In the second count it was alleged that "the defendant had in its possession and under its control, for the use and benefit of the plaintiff, the following described property, to wit, six stoves, of the value of, to wit, one hundred dollars; that the defendant so negligently and carelessly conducted itself in the possession and control of said property that the same was destroyed by fire, to the plaintiff's loss as aforesaid; hence this suit." The defendant pleaded the general issue, and the cause was tried upon an agreed statement of facts, which were substantially as follows: The stoves were transported from Nashville, Tenn., to Blocton, Ala., and consigned to the plaintiff. Defendant notified plaintiff of the arrival of the stoves, and the plaintiff went immediately to the depot of the defendant in order to get the stove. On inspecting them he found that three were badly broken, and of no value. Thereupon plaintiff demanded the stoves that were not broken, and refused to take those that were injured. The defendant refused to deliver any of the stoves unless all of them were delivered. About two weeks thereafter the depot at Blocton, wherein the stoves were stored, was burned, and all of the stoves were destroyed. The cost price of the stoves was \$89, and the market price at Blocton was \$100. The bill of lading was introduced in evidence, and was such a one as is usually given by railroads for the transportation of freight. Upon the introduction of all the evidence the court rendered judgment for the defendant. From this judgment the plaintiff appeals, and assigns as error the rendering of judgment in favor of the defendant.

J. M. McMaster, A. L. Arnold, and W. H. Logan, for appellant.

J. M. Falkner, for appellee.

DOWDELL, J. The case was tried by the court without the intervention of a jury, and a judgment was rendered in favor of the defendant. There are only two assignments of error, both of which relate to the judgment rendered. No

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exception was taken to the judgment in the court below, so far as the bill of exceptions shows, and the exceptions, if any were taken and reserved, should be shown by the bill of exceptions. This being so, there is nothing in the record upon which to base the assignments of error. It may be said, however, that the judgment appealed from was properly awarded under the pleadings upon the agreed statement of facts on which the case was tried.

The first count in the complaint declared against the appellee as a common carrier. Under the agreed statement of facts the liability, if any, of appellee was that of warehouseman, and not common carrier. *Railroad Co. v. Grabfelder*, 83 Ala. 200, 3 South. 432; *Kennedy v. Railroad Co.*, 74 Ala. 430; *Railroad Co. v. McGuire*, 79 Ala. 396.

The second count, if it is good for any purpose, seeks a recovery against the defendant as a voluntary bailee. Under this count, the burden of proof was on the plaintiff to show negligence, which was averred. The record does not show that any evidence was offered to support the averment of negligence.

We find no error in the record, and the judgment is affirmed.

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GILLETT v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(*Court of Civil Appeals of Texas, March 19, 1902.*)

[68 S. W. Rep. 61.]

**Goods Injured by Cold\*—Defenses—Following Consignee's Directions.**

Where a shipment of vegetables was made in the month of February, when freezing weather is not unusual, and the consignors directed the carrier to leave open a vent in the car, they could not recover for loss caused by severe, but not unprecedented, cold weather.

Error from Bell county court; D. R. Pendleton, Judge.

Action by J. T. Gillett against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant, and plaintiff brings error. Affirmed.

W. R. Butler, for plaintiff in error.

Geo. W. Tyler, for defendant in error.

KEY, J. Suit for damages to a car load of cabbage shipped from California to Temple, Tex. From a judgment in favor of the defendant, the plaintiff has appealed. The shipment was made early in the month of February, and the consignors directed the carrier to keep the vent in one end of the car open to the point of destination. On account of cold weather, some of the vegetables froze. Freezing weather is not unusual in this state in the month of February, and it is

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\*See generally, extensive note appended to *Allan v. Penn. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 347.

*Gillett v. Missouri, etc., Ry. Co. of Texas*

presumed that the consignors knew that fact when they gave the directions referred to, and were willing to take the risk of injury from such weather. While the testimony shows that the cold spell referred to was severe, it does not show that it was unprecedented; and, such being the case, we hold that it was not the duty of the carrier to disregard the consignor's instructions, and close the vent which they directed to be left open.

Judgment affirmed.

On Rehearing.  
(May 7, 1902.)

In his argument on behalf of the motion, counsel for plaintiff in error contends that inasmuch as defendant in error pleaded that the damage, if any, was caused by an unusual and unprecedented spell of cold weather during the transportation, such plea constitutes an admission of the facts so averred, and plaintiff in error is entitled to have the case decided by this court the same as if the trial court had found the fact to be as averred in defendant in error's answer. Plaintiff in error, who was the plaintiff in the court below, sought to recover damages on account of negligence charged against the defendant in error, who was the defendant in that court. The defendant filed a general denial, and followed that plea with several special pleas, one of which contained the averments referred to. It is settled doctrine in this state that when a defendant files a general denial, and follows that with a special plea, the matters averred in the latter plea are not to be taken as confessed, in support of the plaintiff's cause of action. The general denial puts the burden upon the plaintiff to prove all the material allegations in his petition, regardless of what may be averred by the defendant in a special answer following a general denial. *Fowler v. Davenport*, 21 Tex. 627; *Duncan v. Magette*, 25 Tex. 245; *Printing Co. v. Copeland*, 64 Tex. 354; *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391. The trial court found as a fact that the vegetables shipped were damaged by a severe spell of cold weather, but did not find that it was an unusual or unprecedented spell of weather, and the testimony sustains the finding made. Under the authorities cited, the testimony, and not the defendant's answer, is to be looked to in determining the character of the weather. The court also found as a fact that the vegetables froze because the ventilator in one end of the car was left open, but that it was not negligence on the part of the defendant to leave the ventilator open, under the circumstances.

Appellant did not ask for a new trial, and therefore the case comes within the ruling of this court in *Black v. Black*, 67 S. W. 928, 4 Tex. Ct. Rep. 178, where it was held that even in a nonjury case a judgment cannot be assailed on account of insufficiency of testimony when no motion for a new trial

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has been made. But looking to the testimony, we are not prepared to say that the finding is wrong, and that the carrier should have disregarded the shipper's instructions, and closed all the vents in the car.

The motion for rehearing is overruled.

## SOUTHERN RY. CO. v. HORNER.

(Supreme Court of Georgia, April 29, 1902.)

[41 S. E. Rep. 649.]

## Injury to Freight—Pleading—Joinder of Action Ex Delicto with Statutory Action.

Where a petition against a railway company contained two counts, one setting out a cause of action arising ex delicto (being for a breach of its public duty as a carrier), and the other alleging a liability under the statutory obligation imposed by section 2298 of the Civil Code (which provides that the last connecting carrier who receives goods in good order shall be liable), a demurrer to the petition undertaking to point out as defects therein that it set forth in one count an action ex contractu, and in another the statutory liability above referred to, was not well taken, inasmuch as such a petition does not undertake to join two such causes as those referred to in the demurrer. It in fact joins a cause of action ex delicto with a statutory right of action, and not a cause of action ex contractu with the statutory right. (a) Properly construed, the first count in the petition filed in this case set forth a cause of action ex delicto.

## Same—Agreement as to Value of Horse—Limiting Liability.\*

Presumptively, the court properly submitted to the jury the question whether, under the evidence, there was an actual agreement as to the value of the horse, or whether the bill of lading introduced in evidence was merely an arbitrary preadjustment of damages, in case the property shipped was lost or damaged, for the purpose of limiting the liability of the carrier against the consequences of its own negligence. (a) Such an issue properly arose in the present case because of the wording of the bill of lading. *Railway Co. v. Murphey*, 38 S. E. 970, 113 Ga. 514, 53 L. R. A. 720. (b) There was sufficient evidence to support the finding that there was no actual agreement as to value.

## Damages—Interest.

While a verdict for damages in an action ex delicto cannot lawfully embrace interest as such, no such point was properly made on the verdict returned in the present case; for it was attacked only by a general assignment that it was contrary to law and evidence, which does not present the specific objection that it unlawfully embraced interest as well as principal.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by T. M. Horner against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dorsey, Brewster & Howell, Arthur Heyman, and Sanders McDaniell, for plaintiff in error.

Arnold & Arnold, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

\*See note, 13 Am. & Eng. R. Cas., N. S., 170; *Loeser v. Chicago, M. & St. P. Ry. Co.* (Wis.), 8 Am. & Eng. R. Cas., N. S., 421.

SUSONG *v.* FLORIDA CENT. & P. R. CO.*(Supreme Court of Georgia, April 28, 1902.)*

[41 S. E. Rep. 566.]

**Carriers—Injury to Freight—Live Stock Shipment\*—Evidence.**

The evidence authorized the verdict. The requests to charge which were refused were, so far as legal and pertinent, covered by the general charge, which fairly submitted to the jury the issues involved in the case, and the charges excepted to were substantially correct. The judgment of the trial judge refusing to grant a second new trial will not be disturbed.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by W. A. Susong against the Florida Central & Peninsular Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Alexander & Hitch, for plaintiff in error.

Adams, Freeman, Denmark & Adams, for defendant in error.

COBB, J. Susong sued the Florida Central & Peninsular Railroad Company for damages alleged to have been sustained by the failure of the defendant to safely transport and deliver certain live stock which it had contracted to deliver to the plaintiff. The trial resulted in a verdict in favor of the defendant, and the case is here upon a bill of exceptions sued out by the plaintiff, complaining that the court refused to grant him a new trial.

While the evidence was conflicting in some particulars, the jury could have found therefrom the following state of facts: The plaintiff delivered to the Southern Railway Company, at Newport, Tenn., a car load of horses, in which were a certain red bay horse, about six or seven years of age, and a certain chestnut mare, about five years of age, to be transported by the Southern Railway Company and its connecting carriers to Savannah, Ga. The car was unloaded and reloaded at different points between Newport, Tenn., and Columbia, S. C. At the latter point the car was unloaded and reloaded, and the seals of the Southern Railway Company placed upon the doors of the car, and in this condition was delivered to the defendant. The defendant did not receipt for the car "as in good order," but received the same without exception. The car was transported to Savannah in exactly the same condition in which it was received from the Southern Railway Company at Columbia, and the horses which were thus received from the Southern Railway Company were delivered to the plaintiff at Savannah in exactly the same condition in which they were received. The red bay horse above referred to, which had been placed in the car at Newport, Tenn., was not in the car when it was received

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\*See generally, 1 Rap. & Mack's Dig. 737 et seq.

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in Savannah; and the chestnut mare, when received at Savannah, was in a damaged condition. The shipment was made under a special contract entered into in consideration of a reduced rate of freight, wherein it was agreed that the "owner and shipper is to load, transfer, and unload said stock, with the assistance of the company's agent or agents, at his own risk," and "that the owner and shipper, or his agent or agents in charge of stock, shall ride upon the freight train on which the stock is transported"; and the owner or shipper releases the carrier "from all injury, loss, and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping or injuring itself or themselves, or each other, \* \* \* and from all other damages incidental to railroad transportation which shall not have been caused by the fraud or gross negligence of said railroad companies." Neither the plaintiff, who was the owner, nor any one representing him, accompanied the stock upon the freight train upon which they were carried. The jury being authorized, under the evidence, to find that the facts were as above stated, were these facts sufficient to justify a finding in favor of the defendant? It seems to us that the verdict in favor of the defendant can be justified, under the evidence, upon either one of two theories: First, that the loss of the animal which was not delivered at all, and the injury to the animal which was delivered in a damaged condition, both occurred before the car containing the horses which were delivered to the plaintiff was received by the defendant company; and, second, that the loss of the one animal and the injury to the other would probably not have occurred if the defendant had, in compliance with his contract, either accompanied the stock, or had had some one as his representative to accompany the same, on the train upon which his stock were transported. The Code provides that when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one, each company is responsible only to its own terminus before delivery to the connecting railroad, and that "the last company which received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability." Civ. Code, § 2298. If a railroad company receives from another railroad company goods to be transported, and receipts for them "as in good order," the company so receiving and receipting is, under the terms of this section, concluded by the receipt from setting up, as against the consignee, that the goods were in fact not in good order when received. If such company receives the goods without receipting for the same "as in good order," there is still a presumption that the goods were so received; but this presumption may be rebutted by showing that no receipt



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was given, and that the goods were in fact not in good order when received. The company may in such a case show, when sued by the consignee, either that the goods were delivered to him in exactly the condition in which they were received from the other railroad company, and that their damaged condition was not due to any act on the part of the defendant or its agents, or that they had become damaged after shipment, without fault on the part of any of the carriers. See *Forrester v. Railroad Co.*, 92 Ga. 699, 19 S. E. 811, 2 Am. & Eng. R. Cas., N. S., 648; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 523, 7 S. E. 916, 2 L. R. A. 102 (2). The defendant company having received the car load of horses from the Southern Railway Company at Columbia without exception, there was a presumption that they were received as in good order; and, so long as this presumption prevailed, the onus was upon the defendant to account for the horse which was missing when the car arrived at Savannah, and to explain the injuries to the horse which was then in a damaged condition. There was evidence from which the jury could find that this presumption was rebutted, that the missing horse was not in the car when it was delivered to the defendant company at Columbia, and that the damaged horse was in that condition when it was received by the defendant at that point. Such being the case, a finding in favor of the defendant was authorized. The special contract which was entered into between the plaintiff and the Southern Railway Company in behalf of itself and its connecting carriers was, so far as the stipulations above referred to are concerned, a valid and binding contract. *Boaz v. Railroad Co.*, 87 Ga. 463, 13 S. E. 711; *Steamship Co. v. Paige*, 108 Ga. 296, 33 S. E. 969; *Cooper v. Railroad Co.*, 110 Ga. 659, 36 S. E. 240, 18 Am. & Eng. R. Cas., N. S., 412, and cases cited. There was evidence from which the jury could find that if the plaintiff had accompanied the stock upon the train upon which it was transported, or had had upon that train some one representing him, in charge of the stock, the plaintiff or such representative would have been able to have prevented the loss of the horse which was missing, and the substitution of another horse of inferior quality, which seems to have been done. The presence of the plaintiff, or some one representing him, at the place where the car was unloaded and reloaded, would have undoubtedly prevented the commission of the fraud which appears to have been perpetrated upon the plaintiff in this case, by taking from among the horses a valuable horse, and substituting another of comparatively little value in its place. It is just such risks as this that the contract is intended to cover, and the plaintiff's loss in the present case can be directly accounted for by his failure to be present when the car was unloaded and reloaded along the route, or a failure to have some one representing him to see that all of the horses which were delivered at

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Newport, Tenn., were each time placed in the car. There was also evidence from which the jury could find that the injury to the horse which was damaged resulted from the incidents of transportation, which were stipulated against in the special contract entered into by the plaintiff. The verdict for the defendant being amply supported, the judgment refusing a new trial will not be interfered with unless there was some error of law requiring a reversal of such judgment.

Complaint is made that the court erred in refusing to give certain requests which are set out in certain grounds of the motion for a new trial, and error is assigned upon different portions of the charge. A careful examination of the charge, which is contained in the record, discloses, we think, that the case was fairly submitted to the jury; and, if there were any errors at all in the charge, they were not of such a character as to require the granting of a new trial. The requests which were refused were, so far as they were legal and pertinent, substantially covered by the charge. It was argued that because the agent of the Southern Railway Company at Newport, Tenn., delivered to the plaintiff, at the time the contract was signed, a pass to go upon a train other than the freight train upon which the stock was transported, this was a waiver on the part of the railroad company of that stipulation in the contract which provided that the plaintiff, or some one representing him, should accompany the stock upon the freight train. Even if the agent had the right to make any such waiver, the delivery of the pass would not have this effect, though accompanied by an express oral understanding at the time that plaintiff need not go upon the freight train, for the simple reason that all antecedent or contemporaneous oral agreements between the parties would be merged in the writing; and, in addition to this, there is nothing inconsistent in the agreement alleged to have been made by the agent with the plaintiff, and his undertaking to either accompany the stock himself, or have some one else to do so, as his representative. Even if the plaintiff was himself relieved from accompanying the stock, he was still under obligation to have some one else, representing him, do so. It was further argued that upon proof of loss of one animal, and of damage to another, a presumption arose against the defendant that it was negligent. This is true, but this presumption is subject to be rebutted, and there was evidence from which the jury were fully authorized to find that it was rebutted in the present case. There was no error requiring the granting of a new trial.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

FT. WORTH & D. C. RY. CO. *v.* BEAUCHAMP.*(Supreme Court of Texas, May 26, 1902.)*

[68 S. W. Rep. 502.]

**Car of Explosives—Delay in Delivery—Nuisances\*—Liability for Injury to Adjacent Property.**

Where a railroad company, by failing to use ordinary care, allows a car of explosives to be unnecessarily or unreasonably delayed at a station, or fails to use ordinary care in keeping or caring for such car, it creates a nuisance rendering the company liable for damages resulting to adjacent property from an explosion thereof.

**Same—Same—Same—Same—Evidence.**

Where there is evidence, in an action against a railroad for damages resulting from the explosion of a car of explosives, that the company was negligent in allowing the car to be delayed, or in failing to properly guard it, the question of the negligence of the company in such respects is for the jury.

Certified questions from court of civil appeals of Second supreme judicial district.

Action by W. H. Beauchamp against the Ft. Worth & Denver City Railway Company, for injury caused by the explosion of a car load of explosives. From a judgment for plaintiff the defendant appealed to the court of civil appeals, which certified questions to the supreme court. Questions answered.

Stanley, Spoons & Thompson and Robert Harrison, for appellant.

Jas. A. Graham and Speer & Speer, for appellee.

**WILLIAMS, J.** This case comes before us upon questions certified by the court of civil appeals for the second district. The action was begun by appellee to recover of appellant for damages done to appellee's residence by an explosion of dynamite or powder in a car belonging to appellant. The facts found by the trial judge, and his conclusions therefrom, are as follows: "(1) I find that on the 5th day of April, A. D. 1901, the plaintiff resided in Montague county, Texas, and was the owner of a tract of land, with the residence house thereon, situated in the suburbs of the city of Bowie, in said county. (2) That on and prior to the said 5th day of April the defendant was a railway corporation owning and operating a line of its road through said city of Bowie. (3) That on the 3d day of April, 1901, the Chicago, Rock Island & Texas Ry. Co., which company also owned and operated a line of its

\*Carrier not bound to receive certain goods, see Nitro-Glycerine Cases, 15 Wall. (U. S.) 524; Boston, etc., R. Co. *v.* Shanley, 107 Mass. 568.

Duty to give carrier notice, see Boston, etc., R. Co. *v.* Shanley, 107 Mass. 568; Barney *v.* Burstenbinder, 64 Barb. (N. Y.) 212; Standard Oil Co. *v.* Tierney, 92 Ky. 367, 49 Am. & Eng. R. Cas. 117.

Criminal liability, Herne *v.* Garton, 2 El. 66, 105 E. C. L. 66; Farren *v.* Barnes, 11 C. B. N. S. 553; Williams *v.* East India, 5 East 192; Alsten *v.* Herring, 11 Exch. 822, L. R. 5 Exch.

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road through said city of Bowie, and was a connecting carrier with defendant, brought into the vicinity of said city a car containing 28,200 pounds of blasting powder and giant powder, and delivered to defendant said car of powder on said day, taking its receipt therefor, and left the said car upon a transfer switch in the charge and under the control of the defendant. (4) That said car of powder was contained in a single wooden box car, closed up, with no covering or sheeting of iron or other metallic material, but was otherwise of comparatively recent construction, and was in good condition and not differing from those in ordinary use by railway companies generally; that the manner of the storing of said powder within said car was not shown. (5) That from said date of the receipt of said car until the date of the explosion, as hereinafter found, it was permitted by defendant to stand upon its transfer switch connected with two empty box cars to the north or west, and a car of hay immediately to the south or east, and yet another car, with contents not shown, to the east or south; that the car immediately to the north or west of said car of powder and connected therewith was an empty box car in which was some hay from Kaffir corn scattered about the floor, the door of which car was standing open. (6) That said transfer upon which said cars stood was of length sufficient to hold thirteen cars, and was situated at the intersection of the said C., R. I. & T. road with the defendant, which said intersection was upon the line of the incorporation of said city, but the switch on which the car was standing was outside of the corporation; that said cars stood about the center of said switch and within a radius of one-fourth mile of some forty residence houses, and within a radius of three-fourths of a mile of the greater portion of the residence and business houses of said city, said city having a population of about twenty-six hundred inhabitants; that a public road or highway ran within a few feet, and the main line of the defendant within about twenty feet, and that of the C., R. I. & T. Ry. within about two hundred feet, of where the said car of powder was permitted to stand, and, further, that there were scheduled to pass said point, upon said two roads, sixteen trains daily, besides extras. (7) I find that defendant placed no guard or watch about said car of powder, that its contents was known to the agent who receipted for said car, and that there was placarded upon the walls of said car the following, viz.: 'High Explosives. Handle with Care'; and, further, I find that the locality where said car was permitted to stand was one frequented by tramps, who were in the habit of building fires, and entered into the empty cars left standing thereabouts. I find that on as many as two occasions, while said car was upon said switch, an employee of defendant inspected said cars, the last time being about nine o'clock a. m. on the morning of the explosion, as hereinafter found, going within two hundred feet

for such purpose. (8) I find that defendant permitted said car of explosives to stand, situated as hereinbefore stated, upon said switch, from the date of its receipt till about 9:47 a. m. of the 5th day of April, at which time it exploded; that there were two scheduled freight trains daily upon the line of defendant, and that trains passed in the direction said car was billed to go after its receipt and prior to its explosion; and that other cars placed upon said switch on the day preceding said explosion were by defendant picked up and carried away in the direction in which said car of explosives was billed. (9) That on the morning of the 5th of April, about thirty minutes before the final explosion, a fire was discovered to have originated in the empty box car immediately to the north or west of said car of explosives; that at said time the doors upon both sides of said cars were open; that the fire was communicated from said car to the wooden car containing said explosives, violently exploding the same and injuring and damaging the property of plaintiff as hereinafter found. (10) I find that the place where said car was left standing and where said explosion occurred was distant from the property of plaintiff about eight hundred yards. (11) I further find that, by reason of said explosion, plaintiff's property described in his petition was injured and damaged in the sum of nine hundred and ninety-five dollars, that it will cost the said sum of nine hundred and ninety-five dollars to repair the said injuries occasioned by said explosion, and that plaintiff's said property is worthless by said amount by reason of said explosion and said injuries, and that no portion of said amount has ever been paid to plaintiff. (12) I find also, as a matter of fact, that the receiving and storing of such quantity of explosives in the manner, for the time, and in the locality as shown, by the defendant, constituted a public and private nuisance. (13) I also find as a fact that defendant was guilty of negligence in receiving, storing, and handling said car of explosives as it did, and in permitting said explosion, and that said negligence was the immediate and proximate cause of said explosion and injuries, and but for which negligence said explosion and injuries would not have occurred."

The court of civil appeals propounds the following questions: First, whether or not the facts found by the trial judge warranted the legal inference of nuisance. Second, whether or not those facts afford any evidence of negligence. Third, whether or not, if the acts of defendant constitute negligence, the damage to appellee was the proximate result thereof.

The answer to the first question, we think, will be found by a decision of the second; for it is not contended, and cannot be held, that the mere fact that a railroad company has in its cars, for transportation, explosives of this character, makes it guilty of creating a nuisance, either public or private, even though danger to persons or property along its line be necessarily incident to such transportation. Such articles

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are property useful for some purposes, and common carriers are under legal obligation to receive and properly carry them. *Walker v. Railroad Co. (Iowa)* 33 N. W. 224. In this the case of a common carrier differs from those of owners of mills, magazines, or other places where such explosives are voluntarily manufactured or stored in such way as to unreasonably endanger the persons or property of the public or of neighboring property owners. Such places are generally held to be nuisances, the mere existence and maintenance of which render their owners liable for damages resulting from explosions, without regard to the degree of care exercised in keeping them. *Wier's Appeal*, 74 Pa. 230; *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. But a railroad company must carry freight of this character over its road, and such dangers as necessarily result to others from the proper and reasonable performance of this duty must be borne by them as an unavoidable incident of the proper transaction of legitimate business. But a nuisance may result from the negligent exercise of a right or performance of a duty with respect to one's own property or property in his charge. 1 Wood, Nuis. § 4 and notes. A nuisance to others may thus arise from the careless discharge by a common carrier of its duty in the transportation of such dangerous articles as are here in question. The right to carry them does not include the right to subject persons along the route to dangers from explosions for a longer time or in a greater degree than is reasonably necessary to the proper performance of the carrier's duty. This is an obvious deduction from plainest principles. If, therefore, the car was unnecessarily and unreasonably delayed at the place where it exploded, so as to subject plaintiff's property to such danger for a longer time than would have attended a transportation made with reasonable dispatch, such keeping of the car at that place was a nuisance. The case thus supposed would not differ essentially from those of other keepers of dangerous explosives; or if ordinary care was not exercised by the appellee in keeping and caring for the car, and the absence thereof gave rise to a degree of danger such as would have been avoided by the exercise of it, such negligence would make the presence of the car so negligently kept a nuisance. Ordinary care is the measure of appellee's duty, but, of course, the degree of diligence and the nature of the precautions to be used depend upon the nature and circumstances of the situation and the danger to be avoided. The finding of the trial court that there was such negligence will, if supported by evidence, sustain its conclusion that the car, under the circumstances stated, constituted a nuisance. We are of the opinion that there was evidence from which the court could properly conclude that, considering the very dangerous contents of the car, there was negligence both in leaving it so long at that

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place and in not properly caring for it while there. No reason for the delay is shown, and the circumstances stated by the judge might have been held by him sufficient to call for a showing on the part of the defendant of any circumstances which made the delay necessary or reasonable, and to justify the conclusion, in the absence of such a showing, that there were none. This, and the further question as to the precautions which ordinary prudence required in keeping the car, are questions of fact which this court cannot resolve. We merely hold that there was evidence tending to sustain both conclusions of the trial judge, and this answers the first and second questions as far as we can answer them.

To the third we answer that, if there was negligence such as we have indicated, the evidence justifies the conclusion that it was the proximate cause of the damage to plaintiff's house.

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LOUISVILLE & N. R. CO. v. HULL.

(*Court of Appeals of Kentucky, May 29, 1902.*)

[68 S. W. Rep. 433.]

**Delay in Shipment of Corpse—Damages—Mental Suffering.**

In an action against a carrier to recover damages for delay in the shipment of a corpse, there may be a recovery for mental suffering.

**Same—Excessive Verdict.**

A verdict for \$1,640 for a delay of a few hours in the shipment of the corpse of plaintiff's wife, resulting in a delay in the interment only from one afternoon until the next morning, is excessive; plaintiff being treated with proper courtesy, and there being no intimation that the condition of the corpse rendered a speedy interment necessary.

Appeal from circuit court, Webster county.

"To be officially reported."

Action by George W. Hull against the Louisville & Nashville Railroad Company to recover damages for delay in the shipment of a corpse. Judgment for plaintiff, and defendant appeals. Reversed.

Yeaman & Yeaman, Gordon & Gordon, H. W. Bruce, E. W. Hines, and B. D. Warfield, for appellant.

L. P. Little, W. A. Taylor, G. W. Hickman, and Baker & Baker, for appellee.

HOBSON, J. The wife of appellee, G. W. Hull, died at Ashville, N. C., on May 26, 1900. He lived at Slaughtersville, Ky., and started home with the corpse of his wife. He bought tickets to Nashville for himself, child, and the corpse. About sunup, as he was approaching Nashville, he saw the conductor, and had him to telegraph to the ticket agent at Nashville to have the tickets ready for him. He did this for fear of want of time between the arrival of his train and the departure of the train for Slaughtersville. When he got to Nashville he went immediately with his little girl to the ticket office,

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and told the agent he wanted two whole tickets and a half ticket to Slaughtersville. The agent said to him to get back in line, and wait until his turn came. He said "Didn't you get a telegram to have these tickets ready?" The agent answered, "Yes; but I knew you had plenty of time, and didn't get them ready." Hull then took his place in the line, and after a while got up to the window and received his tickets. He then said, "One of these tickets is for a corpse." The agent answered, "I know it, and have it already marked." Hull then asked, "What must I do with the corpse ticket?" The agent said, "Take that and show it to the baggage master in the baggage room." Hull went immediately to the baggage room, and handed the baggage master the corpse ticket, telling him he had a ticket for a corpse. The baggage master punched it and handed it back to him. Hull then said, "Now, who must I give it to?" He said, "Keep it and give it to the conductor on the train. That is all you have to do. You need not be uneasy. Everything will be all right." The corpse was then between the baggage-room door and the gate, setting on a truck between the door and the fence on the platform. Hull got on the train, and sat there some minutes. Presently he saw his trunk pass to the baggage car, and, not seeing the corpse go by, went out to the conductor, who was standing beside the train, showed him his tickets, and told him he had a ticket for a corpse, and wanted to be sure that everything was all right. He wanted to know who to give the ticket to. The conductor said: "That is all right. Whenever you get a ticket like that, that is all you have got to do. I will take that ticket up on the train." Hull replied: "I am uneasy. I am afraid everything isn't all right. I have seen my trunk pass along, but I haven't seen the corpse." Then the conductor halloed to the porter, and asked if there was a corpse on the train. The porter said, "No." The conductor ran into the baggage room to see about it. He was gone probably two minutes, and when he came out the train started immediately. He came into the coach where Hull was, and told him that his wife's remains had been sent off on the Northwestern. Hull said: "How did this happen? This is an awful thing." He said: "I don't know. It is a terrible blunder. It is an inexcusable mistake." Hull asked what he was going to do about it, and he said that he would telegraph to the superintendent, and get the box brought back and sent up on another train. At Earlington he brought Hull a telegram, stating that he had found the corpse; had secured it on some other road; that it would be sent up on the first passenger train; and for him to extend to Hull any courtesy he could. Hull reached Nashville at 6:40 a. m. The train for Slaughtersville left at 7:10 a. m. The conductor was still looking for the corpse, when he was ordered by the station master to pull out, as it was then two minutes past leaving time. The box containing the



corpse had tacked upon it a card reading: "Mrs. G. W. Hull, Slaughtersville, Kentucky." Hull had telegraphed to Slaughtersville that he would come on the morning train, and have the burial that evening. The train was due at Slaughtersville at noon. They got everything in readiness for the funeral, and, when the train arrived without the corpse, the relatives who had come to the station returned home, and those who had come to the church for the funeral, three miles in the country, were sent home. Some time after midnight the corpse reached Slaughtersville, and it was buried the next day. It rained the next morning, and a great many did not come. Quite a concourse had assembled the day before. Hull had been nursing his sick wife six months. His vitality was much exhausted, and he was in a weakened condition, so that it was only by a strong effort of the will that he was able to be on his feet. He seemed a good deal confused, looked like he was almost broken down, and was terribly worried over his trip, and the way he had been disappointed. He filed this suit to recover damages of the railroad company, and proved on the trial substantially the above facts. The proof for the company was to the effect that when the corpse reached Nashville it was placed on a truck by the side of the train, and remained there until after the Slaughtersville train left. After this it was taken to the baggage room of the road over which it had come, and later in the day, when the mistake was found out, was taken over to the baggage room of appellant. The baggage master and the conductor denied the statements of Hull given above, and testified that the corpse was not in charge of appellant's agents until after the train for Slaughtersville had left. Their testimony is confirmed by a number of employees about the station. Hull's version of the transaction is confirmed by his little girl, by the punched marks in the corpse ticket, and some other circumstances. The jury to whom the case was submitted returned a verdict in favor of Hull for \$1,640, and the defendant appeals.

The court instructed the jury that if, after Hull purchased the tickets, the box containing the corpse was placed in charge of the defendant in reasonable time for shipment on the train, and defendant agreed to ship it on that train, and negligently failed to do so, or if defendant had a reasonable time after receiving the corpse to ship it on the morning train by the exercise of proper diligence, and for the lack of such diligence it was not so shipped, and its arrival at Slaughtersville was delayed on account thereof, they should find for the plaintiff such an amount in damages as would reasonably compensate him for the trouble, inconvenience, and cost caused by the delay, and they might also allow a reasonable amount for any mental anguish the plaintiff suffered by reason of the delay. But if he failed to inform the agents of the defendant as to the whereabouts of the corpse, or failed to notify them to put the same on the morning train for Slaughtersville, the

jury should find for the defendant, unless the defendant's baggage agent assured him when he punched his ticket that defendant would look after putting the corpse on the train. The jury were also told to find for the defendant if, after receiving the box, its agents did not have a reasonable time, by the exercise of proper diligence, to put it on the train and ship it to Slaughtersville, and that they could in no event award anything to the plaintiff on account of the delay, inconvenience, or distress suffered by those who attended at the depot or graveyard, or who were prevented from attending the burial by the delay in the arrival of the corpse.

It is earnestly insisted for appellant that there is no property in a corpse (*Keys v. Konkell*, 119 Mich. 550, 78 N. W. 649, 44 L. R. A. 242, 15 Am. St. Rep. 423), and that mental suffering cannot be recovered for in a case of this character. In *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850, which was a suit for damages for delay in the shipment of a corpse, the court said: "We are unable to distinguish, in principle, this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for the breach of a contract, or in an action for tort, founded upon a right growing out of a contract. Ordinarily the object in sending a telegraphic message announcing the death or sickness of a relative is to afford the person to be benefited the solace that may result from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor." This case was followed in *Wells, Fargo & Co.'s Express v. Fuller* (Tex. Civ. App.) 35 S. W. 824. The right to recover for mental anguish for failure to deliver a telegram in the class of cases referred to was upheld in *Chapman v. Telegraph Co.*, 90 Ky. 265, 13 S. W. 880, and after reconsideration his case was adhered to in a number of recent cases. In *Telegraph Co. v. Vancleve* (Ky.) 54 S. W. 827, the court said: "It is probably in accordance with the views of the majority of the state courts that mental anguish and injured feelings alone, and unaccompanied with physical injury, do not furnish ground for recovery. But in this state the rule has been announced otherwise. And so, likewise, a recovery in this class of cases can be had under the decisions in the states of Texas, Alabama, Indiana, Iowa, North Carolina, and Tennessee. It may be admitted that there are difficulties in the way of an exact measurement of such damages, but it does not seem to us that this is a sufficient reason why a negligent public carrier should escape with

merely nominal damages. The same difficulty of accurately measuring such damages arises in cases of slander, breach of marriage contract, and in cases where mental suffering is accompanied with physical pain. If, as argued, the law does not deal generally with the feelings and emotions, it may be answered that here the parties themselves have contracted with respect to those very things, or at least have contracted with respect to those things which naturally affect the feelings and emotions." No sound distinction can be maintained between the Telegraph Cases and this case. They rest upon the principle that damages naturally resulting from a wrongful act, and fairly within the reasonable contemplation of the parties, may be recovered. The logic of appellant's position, if followed, would lead to the conclusion that if it had lost this corpse, however negligently, no action could be maintained, at least for any substantial recovery. For if there is no property in a corpse, and there can be no recovery for mental suffering for the failure to carry and deliver it at the proper time, then for a very great wrong there would be practically no remedy. The tenderest feelings of the human heart cluster about the remains of the dead. The duty of Christian burial is one which loving hands perform as a privilege. An indignity or wrong to a corpse is resented more quickly than a wrong to the living, and, if mental suffering may be recovered for in the one case, it is hard to see why it may not be recovered for in the other. The damages for the loss of a corpse and those for the delay in delivering it differ only in degree. In actions for breach of a marriage contract, damages for mental suffering are allowed because these are the natural result of the defendant's wrong, and in no other way can proper compensation for it be had. The same rule must apply in actions for negligence in carrying a corpse, if the carrier is to be held to proper responsibility in this class of cases. We therefore conclude that there was no error in the instructions of the court.

The question of negligence was for the jury, and, while the evidence was very conflicting, we do not feel at liberty to disturb the verdict on the ground that it is against the evidence.

It is earnestly insisted that the damages are excessive, and that the plaintiff's counsel was guilty of misconduct in his closing argument to the jury. The plaintiff was treated with proper courtesy. There was only a delay in the interment of his wife's body from one afternoon until the next morning. The corpse remained at the baggage room from the time his train left until that evening, when it was put on the next train, and taken safely to Slaughter'sville. There is no intimation that the condition of the corpse rendered a speedy interment necessary. Appellant was not treated with indifference, but the conductor seems to have done all that he could; and, on all the evidence, it is hard to escape the conviction that the

damages awarded are palpably excessive, and given under the influence of passion or prejudice. In making the closing argument to the jury, the attorney for the plaintiff commenced reading from the defendant's answer in the case, informing the jury that the defendant had entirely changed its theory of defense since it had taken its depositions, and that the plaintiff was not prepared to meet fully its present theory. On the objection of the defendant that this was a matter for the court alone, the court requested the attorney to desist from this course. Thereupon he proceeded with his speech by beginning to state the substance of the answer, and, on the objection of the defendant, the court again required him to desist. He then said the issues had been changed by the defendant. On the objection of the defendant, the court directed him to confine his discussion to the facts of the case, and the law as embodied in the instructions of the court, whereupon he said to the jury: "We have nothing in our pleadings that we wish to conceal from the jury. We do not have to ask the court to conceal our pleadings for us." All this was objected to, and the court refused to exclude it. It was improper. If it was desired to get before the jury the statements in the pleadings of the defendant, these pleadings should have been given in evidence on the trial, so that the defendant might have an opportunity to explain any inconsistency. When this was not done, they should not have been referred to in the concluding argument, which should have been confined to the evidence heard before the jury, and the law of the case as given in the instructions of the court. The attorney also said, in his concluding argument, this: "Time is precious with railroad companies sometimes. Mr. Hull telephoned me to meet him in Slaughter'sville to come here. I started there, and found that the Texas train was an hour late, and I was told that they had stopped the train at Louisville to load a negro minstrel show. I do not know this. I was told this. Stopped that train, wasted precious time, loading Ward & Howes' or some other negro minstrel show. That train carried the mail, too. That shows how railroads do. They are exceedingly accommodating when there is any money in sight. They will hold a train an hour for a negro minstrel show, but it could not hold its train three minutes to get a corpse on the train. There was no money in that." Again he said: "I am told that when a railroad company gets into trouble they get all their witnesses together to take their affidavits. I am no railroad lawyer. I do not know this, but railroad lawyers tell me that they just have to do this to hold their witnesses to the mark, —to keep them from forgetting. Mr. Fisher and Mr. Summerhays doubtless gave their affidavits when this matter came up." Again he said: "If I had been at fault in this case, it was in asking so little damages. Mr. Hull and I visited Nashville to take depositions in the case. We were in the magnificent depot of defendant at Nashville (defendant's

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counsel suggested that defendant owned no depot in Nashville, to which he said that it is true he referred to the Central Station), which is more magnificent than Solomon's Temple. The ticket office there cost more than this court house, I reckon; and the doors of that station, more than plaintiff asked for his damages in this case, I imagine." All this the defendant objected to, and moved the court to exclude it from the jury, which was refused. It was improper for the attorney to go outside of the evidence heard by the jury, and the law of the case as given by the court. It was especially improper for him to state facts of his personal experience which had not been testified to, and were calculated to prejudice the jury against the defendant, or to swell the amount of the verdict. Considering the size of the verdict, in connection with the argument of the counsel, we are clearly of opinion that a new trial should be granted.

It is certified in the bill of exceptions that it contains all of the evidence heard on the trial. This is conclusive, as the record is presented, that the bill contains all the evidence heard by the jury, although, from the grounds for new trial, it appears, complaint was made as to the reading of certain depositions, which are not incorporated in the bill of exceptions.

Judgment reversed and cause remanded, with directions to grant appellant a new trial.

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PITTSBURG, C., C. & ST. L. RY. CO. v. VIERS *et al.*

(*Court of Appeals of Kentucky, May 28, 1902.*)

[68 S. W. Rep. 469.]

**Carriage of Live Stock—Liability for Injury on Connecting Line.\***

As a carrier at common law was under no liability beyond its own line unless it undertook to carry beyond its own line, Const. § 196, providing that no common carrier shall be permitted to contract for relief from its common-law liability has no application where a carrier receiving live stock to be transported to a point beyond its own line stipulates that its liability as carrier shall cease at its terminus when the stock is ready to be delivered to the connecting carrier, and such stipulation is therefore valid.

**Same—Ratification by Connecting Carrier of Original Contract—Venue of Action.**

Where a connecting carrier receives live stock from the initial carrier or an intermediate carrier without limiting its liability, it must be assumed to have accepted the stock under the terms of the original contract made with the initial carrier on behalf of itself "and con-

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\*See *Pennsylvania R. Co. v. Jones* (U. S.), 2 Am. & Eng. R. Cas., N. S., 390; *Page v. Chicago, St. P., etc., R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 622. See also, notes, 20 Am. & Eng. R. Cas., N. S., 728; 13 Am. & Eng. R. Cas., N. S., 187; 17 Am. & Eng. R. Cas., N. S., 289; 13 Am. & Eng. R. Cas., N. S., 194; 11 Am. & Eng. R. Cas., N. S., 586; *Va. Coal & Iron Co. v. Louisville & N. R. Co.* (Va.), 21 Am. & Eng. R. Cas., N. S., 261.

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necting lines," and, having thus ratified the contract, may be sued on it in the county in which it was made, as if it had originally signed the contract.

Appeal from circuit court, Hardin county.

"To be officially reported."

Action by Viers & Patterson against the Louisville & Nashville Railroad Company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company to recover damages for injury to cattle in transportation. Judgment for plaintiffs against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, and that defendant appeals. Affirmed.

W. H. Marriott and C. H. Gibson, for appellant.

J. P. O'Meara, S. M. Payton, and S. H. Bush, for appellees.

DU RELLE, J. The appellees shipped 68 head of cattle at Sonora, on the line of the Louisville & Nashville Railroad Company, to be transported to Indianapolis. The cattle appear to have been injured in the course of transportation, but not while on the line of the Louisville & Nashville Railroad. Suit was brought by the shippers against the Louisville & Nashville Railroad Company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company for damages for the injury to the cattle in transportation. The Louisville & Nashville Railroad Company set up its contract, which contained a stipulation that all liability upon it as a carrier of the stock should cease at its terminus, when the stock should be ready to be delivered to the carrier whose line might constitute a part of the route to destination, denied all injury to the cattle while in course of transportation over its line, and pleaded certain other matters not necessary to be here considered. By reply to the answer of the Louisville & Nashville Railroad Company, the appellees set up section 196 of the constitution, as avoiding the stipulation against liability for injury to the stock except upon its own line. A demurrer to the reply was sustained, and the petition dismissed, as to the Louisville & Nashville Railroad Company.

The action of the circuit court in sustaining the demurrer of the Louisville & Nashville Railroad Company to the reply was correct. The provision of the contract is not one limiting the company's common-law liability. At common law the carrier was under no liability beyond its own line. Such liability could be created by contract. If so, it was the result of the contract, and was not imposed by the common law. Therefore, whether the company contracted to be liable or to be exempt from liability, the contract was not in reference to any common-law liability, and section 196 of the constitution can have no application. This was distinctly recognized in *Ireland v. Railroad Co.* (Ky.) 49 S. W. 188, where, in an opinion by Chief Justice Hazelrigg, it was said: "It is urged that the clause is an attempted limitation of the carrier's common-law liability, and is therefore void. We do not think

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so. At the common law, without a contract to the contrary, there was no liability beyond the carrier's own line. About this there is no dispute. The carrier, however, might contract to carry beyond its own line, and then it became, of course, liable beyond its terminus." And in *Railroad Co. v. Tarter* (Ky.) 39 S. W. 698, it was said: "The general rule is that a carrier is not liable beyond its own line, unless by contract to that effect, express or implied." *Elliott, R. R.* § 1433; *Bryan v. Railroad Co.*, 11 Bush, 597. To the same effect is the decision in *Railroad Co. v. Cooper* (Ky.) 42 S. W. 1134, and *United States Mail Line Co. v. Carrollton Furniture Mfg. Co.* (Ky.) 42 S. W. 342. And see *Hutch. Carr.* § 149b, and note to *Wells v. Thomas*, 72 Am. Dec. 231.

The appellant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, pleaded to the jurisdiction. It also answered, traversing practically all the averments of the petition, except the averment of the contract with the Louisville & Nashville Railroad Company; and a trial was had, resulting in a verdict for appellees for \$425, on which judgment was entered.

The principal question presented upon this appeal is as to the jurisdiction of the court. The contention for appellant is that it had no agent or office in Hardin county, where the contract of shipment was made, and that the appellees cannot give jurisdiction to the Hardin circuit court of an action against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company by joining the Louisville & Nashville Railroad Company as a defendant,—it being a resident of Hardin county,—unless it shows a cause of action against the resident defendant. *Meguiar v. Rudy*, 7 Bush, 432; *Fernold v. Speer*, 3 Metc. 459; *Stamper v. Lumber Co.* (Ky.) 4 S. W. 330. See, also, *Eichhorn v. Railroad Co.* (Ky.) 65 S. W. 797. This contention may be conceded. Under section 73 of the Civil Code, it is provided that an action of this character must be brought in the county in which the defendant, or either of several defendants, resides, or in which the contract is made, or in which the carrier agrees to deliver the property. It therefore follows that as appellant denied residence in Hardin county, and was not to deliver the property in that county, the circuit court did not have jurisdiction, unless, within the meaning of the Code provision, the contract was made in that county; for the cause stands as it would if appellees had sued the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company alone, without joining the Louisville & Nashville Railroad Company as a defendant.

The contract, which is on the form of the Louisville & Nashville Railroad Company, and signed by the agent of the company and by the appellees, begins:

"Received by the Louisville and Nashville Railroad Company the following described live stock, to be transported in

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accordance with the terms and conditions of the contract entered into below:

Consignee, Destination, &c.	Description of Stock.	Car No.
Viers & Patterson, Care of Jeffreys, Kershaw & Co., Union Stock Yards, Indianapolis, Ind.	68 cattle	19,012 19,518

"Tariff rate on this shipment from Sonora to Louisville is \$32.00 per car.

"Contract for Transportation of Live Stock. Sonora, Ky., Station, Dec. 28th, 1899. This agreement, made between the Louisville and Nashville Railroad Company and its connecting lines, of the first part, and Viers and Patterson, of the second part, witnesseth," etc.

Then follows a provision for transportation to Louisville at the rate of \$16 per car, and a release of liability beyond the Nashville Railroad's terminus.

Clause 13 of the contract is as follows: "And it is further agreed that, when necessary for said animals to be transported over the line or lines of any other carrier or carriers to the point of destination, delivery of such animals may be made to such other carrier or carriers for transportation upon such terms and conditions as the carrier may be willing to accept: provided, that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate, but in no event shall one carrier be liable for the negligence of another."

Now appellant insists that this contract does not undertake to cover the transportation of the stock beyond Louisville; that its application is limited to the terminus of the Louisville & Nashville road at Louisville; that the charges stipulated did not cover any transportation beyond that point; that there is no agreement that the stock should go over the appellant's road; that the agent at Sonora had no authority to contract for it, and never undertook to do so, and that no traffic arrangement or agreement existed or was shown which authorized the Nashville Railroad Company to make a contract of this or any other kind, binding upon the appellant; that there was no express contract by the appellant regarding this shipment, but that it received the cattle from the Louisville Bridge Company, to which company they had been delivered by the Louisville & Nashville Railroad Company, transported them to the nearest point on its line to the Union Stock Yards, at Indianapolis, and there delivered them to the Belt Railroad Company, which collected from the consignees freight at the rate of 10 cents per 100 pounds for the transportation over appellant's line; that it received the cattle at



Jeffersonville, as a common carrier, for shipment, as it was required by law to do, and this reception created an implied contract between appellant and appellees that it should carry the cattle safely to the point on its line nearest to the point of destination, and that appellee should pay the regular tariff rate for such shipment; that this implied contract had no relation whatever to the contract made by the Louisville & Nashville Railroad Company, and was not affected by it; that therefore the contract was not made in Hardin county, and therefore the lower court had no jurisdiction to entertain the action. On the other hand, the appellees rely upon the recital in the contract that it was with the Louisville & Nashville Railroad Company and its connecting lines; that a connecting carrier is one of several carriers whose lines, or parts thereof, unite to constitute a route over which any particular shipment is to pass (Hutch. Carr. § 157); that interrogatory 6, attached to the petition and addressed to appellant, is as follows: "(6) State whether or not on or about December 28th, 1899, you had a traffic arrangement or any business arrangement with the Louisville & Nashville Railroad Company, under which you received freights brought into Louisville by it, destined and consigned to points along your lines north of the Ohio river; and, if so, state the nature of that arrangement, and state also whether this stock was received and transported by you under a general arrangement, or whether you made a special contract as to the transportation and delivery of these cattle?" To which appellant made the following response: "This defendant has no such arrangement with said company. Without any special or explicit arrangement, it receives traffic of said company, all of which must pass over the intervening tracks and bridge of the Louisville Bridge Company, and pay toll to that company. The stock in question came to this defendant from the Louisville Bridge Company, like any other shipment from a connecting carrier, destined to points on this defendant's lines, without any previous arrangement or understanding or contract that it should do so; and this defendant never, until it received said stock at Clarksville, was under any obligation or contract respecting it. When it received the stock it undertook to perform the duties of a carrier of live stock in transporting the stock to Indianapolis."

Appellees contend that this response shows a ratification of the contract made for the connecting lines by the Louisville & Nashville Railroad Company in Hardin county, and that this ratification is the equivalent of a previous direction, and renders appellant liable upon the written contract as made in Hardin county. In support of this contention the case of *Railroad Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177, is relied on. In that case it appeared that the contract was made with the Louisville & Nashville Railroad Company, "which undertook to transport the animals to Nashville, Tennessee, to be carried

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from there by the latter company [the Nashville, Chattanooga & St. Louis Railway Company], which appears to either own, or have in its possession and control, a continuous line of railway to Atlanta. It is, in substance, alleged that the Nashville, Chattanooga & St. Louis Company agreed to transport appellant's mules from Nashville to Atlanta, receiving therefor a proportion of the whole amount fixed in the contract with Louisville & Nashville Company for the whole distance, but, by negligence of its agents in operating the train on which the animals were placed, they were greatly injured." The action was dismissed as to the Louisville & Nashville Railroad Company, and the same question arose which is presented here, under section 73 of the Civil Code. In that case the court states that the Louisville & Nashville Railroad Company, in making the contract, was acting as the agent of the other company. It was there said: "But it seems to us the contract in this case, having been made in Marion county by the Louisville & Nashville Railroad Company, acting as appellant's agent, must, in meaning of that section, be regarded as made there by appellant itself. \* \* \* The record, in our opinion, shows the existence of each of the conditions of jurisdiction of the Marion circuit court, and validity of a service of summons prescribed by the Civil Code." So, in the case of *Railroad Co. v. Tabor* (Ky.) 32 S. W. 168, it was assumed by the court that the company which made the contract of shipment made it "under authority from appellant to contract for the carrying of the cattle over appellant's line." In *United States Mail Line Co. v. Carrollton Furniture Mfg. Co.* (Ky.) 42 S. W. 342, the English rule as to the liability of connecting carriers is discussed, and stated to be based upon the ground of want of privity of contract between the injured party and the connecting carrier; and, in denying the application of the English rule, *Hutch. Carr. § 150*, is quoted with approval, as follows: "And the mere fact that the auxiliary carrier acts in the transportation as the agent of the contracting carrier, and that there is no privity of contract between him and the owner of the goods, furnishes no legal reason why he may not be held liable to the owner for any loss which may arise either from negligence or misfeasance." And in the case of *Ireland v. Railroad Co.* (Ky.) 49 S. W. 188, the court is careful to state that "the connecting line, having entered its appearance, is also liable to the owner, if the damage occurred on its line."

These seem to be all the cases in this state which bear even remotely upon the question here presented. The question here presented for decision has therefore never been decided in this state. While, as an original proposition, it would seem that a contract though made, in terms, not only for the benefit of the parties thereto, but for the benefit of a third person, would neither bind nor benefit such person in the absence of an acceptance of its provisions, and that the mere receiving of

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goods by a connecting line, without anything to show information of the terms of the contract made with the initial carrier, should not be held to be an acceptance of the terms of such contract, because the law requires the connecting carrier to so receive the goods, and what is done in obedience to a legal requirement ought not to be construed to create any implied contract, other than that which the law implies, the current of authority has led us to a different conclusion. It may be conceded, however, that there is considerable authority for the proposition that there is no implied contract other than that created by the law from the receipt of goods for transportation by a common carrier, whether such receipt is required by statute, or by the provisions of the common law. *Railroad Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; *Same v. Baird*, 75 Tex. 256, 12 S. W. 667. And this has been held with special reference to the rate of freight contracted for by the initial carrier, which is held not binding, without showing some privity between the two carriers, or a knowledge of the contract on the part of the connecting line. *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 229. See, also, note to this decision on page 242. And see *Lawson, Carr.* §§ 244; *Express Co. v. Harris*, 120 Ind. 76, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. Rep. 315; *Bancroft v. Transportation Co.*, 47 Iowa, 262, 29 Am. Rep. 483. As might be expected, most of the cases which bear upon this question arise upon claims of connecting carriers to the benefit of provisions of contracts with the initial carrier. It is quite difficult at times to determine the reason for the distinction made in the cases. As matter of course, if the contract is held binding upon the connecting carrier, the stipulations must inure to its benefit. The obligation of the contract must be reciprocal. If the carrier is a party to the contract, and therefore bound under the contract, it must have the advantage of the stipulations which limit its liability, unless such limitation is forbidden. The carrier's liability in such case is deduced from its ratification of the original contract. In this case the Louisville & Nashville Company made the contract of shipment. It contracted on behalf of itself and connecting carriers, without stipulating what carriers should complete the transportation to the point of destination. It limited its own liability to such damages as should occur upon its own line. It also undertook to further limit its liability, and the contract provides that such limitations should inure to the benefit of connecting carriers. Although it is not shown that the Pittsburg, Cincinnati, Chicago & St. Louis Company had knowledge of these provisions, it must be charged with knowledge that the Louisville & Nashville Company received the cattle under some contract. Though, so far as the record shows, it did not know the terms of that contract, it could have ascertained them, or it could have limited its own liability by the terms of the receipt which it

gave for the cattle to the intermediate carrier, the Louisville Bridge Company, which received them from the Louisville & Nashville Company's terminus, and delivered them to the Pittsburg, Cincinnati, Chicago & St. Louis Company. Having received the cattle without any such limitation, we are of opinion that, under the authorities, it must be assumed to have accepted them under the terms of the original contract. The ratification was the ratification of the contract made in Hardin county. It bound the shipper as if it had been signed in Hardin county by him and by the connecting carrier. When ratified, it bound the connecting carrier as if it had been there signed by it or its agent, and it became a contract made in Hardin county between appellees and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. In Elliott, R. R. § 1446, the general doctrine is thus laid down, and a number of authorities cited: "If a connecting railroad company is designated as such in the initial carrier's bill of lading, or if the bill provides that all stipulations shall inure to the benefit of all the carriers, then, having accepted the goods thereunder without any separate agreement, it becomes virtually a party to the contract, bound by the undertakings therein, and benefited by the limitations. If, however, the connecting carriers are not designated, but are left to the initial carrier's selection, and there is no provision that the stipulations shall inure to the benefit of any other carrier, the connecting carrier may not claim the benefit of the original contract, and when it accepts the goods it does so under the law. So, where the connecting carrier, on receiving the goods, gave a receipt containing definite provisions, it was held that it thereby lost the right to avail itself of provisions for its benefit in the receipt given by the first carrier. And it has also been held that a connecting carrier cannot be considered as ratifying the original contract, where, in receiving and transporting the goods, it merely does what a valid statute requires it to do." In *Halliday v. Railway Co.*, 74 Mo. 159, 41 Am. Rep. 311, it was said: "When a carrier undertakes to transport to a point beyond the terminus of its own line, or to a point not on its line, it will be responsible, according to the terms of the contract of shipment, if it contain no prohibited exemptions, for loss or injury occurring upon the connecting lines, as well as upon its own line; and the connecting carrier will also be responsible to the shipper for its own fault or negligence, and according to the terms of the shipper's contract with the contracting carrier. The connecting carrier, by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing its contract with the shipper; and where, as in this case, the contract of the shipper contemplates the employment of connecting lines, the law will imply from this circumstance sufficient privity between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier on the contract. \* \* \* By simply

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accepting the stock from the receiver, Bond, to be transported to St. Louis, the defendant became entitled to claim the benefits of all valid exceptions he had made with the shipper. *Lawson, Carr. § 243.* And in *Express Co. v. Harris*, supra, the court, distinguishing the case before it, said: "If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should inure to the benefit of all the carriers, then the contention of the appellant would find strong support from the authorities. *Express Co. v. Harris*, 51 Ind. 127; *Railroad Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Halliday v. Railway Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Evansville & C. Railroad Co. v. Androscoggin Mills*, 22 Wall. 594, 22 L. Ed. 724; *Maghee v. Transportation Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Lamb v. Transportation Co.*, 46 N. Y. 271, 7 Am. Rep. 327." And see, also, *Evansville & C. Railroad Co. v. Androscoggin Mills*, 22 Wall. 594, 22 L. Ed. 724; *Fairbank v. Railway Co. (C. C.)* 66 Fed. 471. In *Railroad Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 111, it was held: "The appellant, by receiving the stock, became their agent to complete their contract to the extent of shipping the stock over so much of its road as formed a part of the route over which the shipment was to be made. From this fact the law implied a privity between the parties to this action sufficient to enable appellees to sue appellant for any losses sustained by reason of its failure to perform the contract, and gave to appellant the benefit of all valid limitations contained in the agreement upon the carrier's liability. So that, while the burdens were imposed, the benefits of the limitations in the contract inured to appellant. *Taylor v. Railroad Co.*, 39 Ark. 148-158; *Halliday v. Railway Co.*, 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433; *Hutch. Carr. §§ 251, 252, 254, 256.*"

For the reasons given, the judgment is affirmed.

UNITED STATES *ex rel.* COFFMAN v. NORFOLK & W. RY. CO.  
*et al.*

(Circuit Court, S. D. West Virginia, April 17, 1902.)

[114 Fed. Rep. 682.]

**Mandamus—Plea in Abatement.**

The pendency of another mandamus may be pleaded in abatement of a second mandamus proceeding instituted in the same jurisdiction, wherein the parties and the questions involved are the same.

**Same—Identity of Controversy.**

Where a final judgment has been rendered in a former proceeding, but an appeal has been taken, and such judgment suspended by a supersedeas bond, and the pendency of such appeal is pleaded in abatement to a second mandamus proceeding, upon consideration of such plea the court is not confined to the pleadings in the former proceeding for the purpose of determining what the real issue therein

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was, but may look to the pleadings, the evidence, and the opinion of the court filed in support of, and as a part of, the judgment appealed from.

## Same—Interstate Commerce.

C. instituted mandamus proceedings against the Norfolk & Western Railway Company et al. under an act of congress of March 2, 1889, alleging unjust discrimination against him, and in favor of C., C. & B. in the shipment of coal in interstate trade from the Pocahontas coal field, and procured an alternative writ commanding the railway company to furnish cars for the shipment of a specific cargo of coal. The railway company denied the allegations of the alternative writ, including the charge of unjust discrimination; and, by written stipulation, matters of law and fact were tried by the court. At the trial the railway company showed by the evidence that it had a system of car distribution, and that it furnished cars, under such system, uniformly to all shippers alike. The district judge found, as a matter of fact, that the system existed, and that it had been uniformly applied, and held, as matter of law, that such system was reasonable and lawful, and refused the peremptory, and discharged the alternative, writ of mandamus. The judge so finding filed a written opinion, as a part of the record, in support of his judgment. C. took a writ of error to the circuit court of appeals, and executed a supersedeas bond. Subsequently, the writ of error still pending, C. instituted another mandamus proceeding against the same respondents, alleging the same unjust discrimination, charging the same to be the result of the railway company's arbitrary and unlawful system of car distribution, and praying that a specific number of cars be furnished to him daily. The railway company pleaded the pendency of the first proceeding in abatement of the second: *held*, upon an inspection of the record upon a replication of nuli tiel record, that the parties and subject-matter involved in the two proceedings were the same, and that the second should be abated.

(Syllabus by the Court.)

## Mandamus.

Harold A. Ritz and B. M. Ambler, for relator.

Campbell, Holt & Duncan and Jos. I. Doran, for respondents.

KELLER, District Judge. This case comes up upon the alternative writ of mandamus issued therein, and upon a plea of abatement interposed by respondents to said writ, setting forth that on January 15, 1901, in the circuit court for the district of West Virginia, a certain other mandamus proceeding was instituted by the relator against the respondents to compel the furnishing of cars and shipping facilities for transporting coal for the relator, and that in said proceeding the same right of the relator and the same duty on the part of respondents were alleged which are averred in the petition filed in this proceeding, and recited in the alternative writ issued herein; that the respondents in said former proceeding made return, denying the allegations of relator's petition; that issue was joined thereon, a jury waived by written stipulation of attorneys for all the parties, and the issue tried by the Honorable John J. Jackson, judge of said court, in lieu of a jury; that evidence was taken on behalf of both relator and respondents, and the pleadings and proofs submitted to the court and argued by counsel; and that such proceedings were had thereon that on June 15, 1901, a judgment was entered

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against the relator, and in favor of respondents, denying the peremptory writ of mandamus, quashing the alternative writ, and ordering that the respondents recover of the relator their costs. 109 Fed. 831. The plea then alleges that the parties to the former action were the same as the parties to this action, and that the matter in controversy in that action was and is the same as the matter in controversy in this action, namely, the legality of the said Norfolk & Western Railway Company's basis and method of coal-car distribution in the Pocahontas coal region; that the said matter in controversy in said former action was determined on its merits therein by the final judgment of the circuit court of the United States for the district of West Virginia, and that said judgment still remains in full force and effect; that from said final judgment a writ of error was allowed, on the petition of the relator, to the United States circuit court of appeals for the Fourth circuit, at Richmond, Virginia, and is still pending, undetermined, in said last-mentioned court; and respondents proffer to verify this plea by the record remaining in said last-mentioned court, a certified copy whereof is filed with the plea, and asked to be taken and read as part of the plea. Under the practice prevailing in West Virginia, the respondents at the same time tendered a motion to quash the alternative writ herein, and a plea in bar vouching the record remaining in the United States circuit court for the district of West Virginia in the former mandamus. To the filing of these pleas and this motion the relator, by his attorneys, objected, and at the same time tendered his motion to strike out said pleas and motion, and, in the event said motions should be overruled, offered his replications of nul tiel record to the plea in abatement and plea in bar tendered. This action was taken for the convenience of both counsel and court, and it was understood and agreed that, while all the questions involved were argued, the decision of the court should take up the matter in legal sequence, and only such matters should be decided as were essential to a final determination of the pleadings herein.

We have first, then, the plea in abatement tendered by the respondents, with an objection interposed to its being filed, which I treat as a demurrer to the plea. The question, then, is whether a former action in mandamus, resulting in a final judgment adverse to relator, which judgment was carried by writ of error to an appellate court for review, and is still there undetermined, is sufficient to abate a subsequent action between the same parties, and involving the same subject-matter. The relator argues that the very terms of the statute (the interstate commerce act as amended; section 10, Act March 2, 1889) provide that the circuit and district courts of the United States shall have jurisdiction, upon the relation of any person or persons alleging such violation of said act as prevents relator from having interstate traffic moved by said

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common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus, etc., and that the terms of the statute contemplate the possible necessity and the certain power to issue more than one writ in favor of a relator. To this there may be several replies. It may be that the words "a writ or writs" were inserted to meet the grammatical necessities arising from the use, in the beginning of the section, of the words "upon the relation of any person or persons," as, if several persons asked the aid of the court, it might be necessary that several writs issue. Again, it may be that more than one writ might be awarded in favor of a single relator on account of repeated violations of the act in respect of such relator; and it might arise that a writ might be refused upon one application by a relator, and subsequently, upon a second application setting forth a different state of facts, a writ might be allowed. But the question now presented upon the objection to the filing of the plea is whether the pendency of a former mandamus proceeding in a court of competent jurisdiction is pleadable in abatement of a second action between the same parties, and with the same matter in controversy. I have no doubt that such is the law. As a general proposition, the pendency of a former suit between the same parties, and involving the same subject-matter, may be pleaded in abatement of a subsequent suit. Hogg, Pl. & Forms, pp. 168, 169, §§ 213, 308; *Id.*, § 245, note; *Insurance Co. v. Burne's Assignee*, 96 U. S. 588, 24 L. Ed. 737; *Cook v. Burnley*, 11 Wall. 659, 20 L. Ed. 29; *Stephens v. Bank*, 111 U. S. 198, 4 Sup. Ct. 336, 337, 28 L. Ed. 399. Merrill, in his work on Mandamus, says (page 343): "The pendency of another mandamus proceeding, wherein the parties and the questions involved are the same, may be pleaded in abatement." See, also, 13 Enc. Pl. & Prac. p. 728, and cases there cited; Merrill, Mand. § 315, and cases cited.

The question then arises as to the status of the mandamus proceeding referred to in the plea as pending in the circuit court of appeals of the United States for the Fourth circuit. From the allegations of the plea, it appears that the action was heard upon its merits, and resulted in a final decision by Judge Jackson adverse to the relator; that a writ of error was allowed to the relator, by virtue of which said proceeding is now in the circuit court of appeals. Is this proceeding now a pending proceeding, in which case it is pleadable in abatement, or a final judgment, in which case, under the authorities cited in Merrill, Mand. § 315, it would be pleadable in bar? The answer to this question can make but little difference, save as it causes us to examine and try the plea in abatement or the plea in bar. In *Boswell v. Tunnell*, 10 Ala. 958, it was held that where the suit was pending on appeal the same rules will apply as where it was pending in the original court. In



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Illinois a writ of error may be pleaded in abatement to an action on a judgment if the writ was sued out before the action was commenced, and the writ of error acts as a supersedeas. *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449. It appears from the record filed with the plea herein that a supersedeas bond was given, and hence the writ of error in the case now in the court of appeals acted as a supersedeas under section 1000, Rev. St. I think it unnecessary to refer to all the authorities cited to show that a supersedeas does not suspend the operation of a judgment as an estoppel. They are very numerous and conclusive. I cite *Ransom v. City of Pierre*, 101 Fed. 665, 41 C. C. A. 585; *Freem. Judgm.* §§ 328, 433; *Black, Judgm.* § 960.

For the foregoing reasons, I have overruled the objection to the filing of the plea in abatement, and also the motion to strike the same out. The plea in abatement now coming on for trial upon the replication nul tiel record thereto, I have examined the record vouched in the plea, and now offered in evidence in support of the allegations thereof, with considerable care. The gist of the contention is that the identical matter in controversy in this action was also in controversy and was decided in the former mandamus proceeding, tried in the circuit court of the United States for the district of West Virginia, the record of which case is now offered in evidence, and that said matter in controversy was the legality and reasonableness of the basis, system, or method of coal-car distribution for interstate traffic in what is known as the "Pocahontas Coal Field." Objection was made on behalf of the relator that the pleadings and judgment in the record do not show, or even tend to show, that this basis was at all in controversy in the former proceeding; that the only place where this becomes apparent is in the opinion of the court setting forth the reasons for its judgment; and that this opinion is neither in form nor effect a special finding of facts, and hence forms no part of the record, and cannot be looked to to determine what matters were actually in controversy in that proceeding. This conclusion does not appear to be supported in toto by the authorities cited, namely, *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Stone v. U. S.*, 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; *Egan v. Hart*, 165 U. S. 188, 7 Sup. Ct. 300, 41 L. Ed. 680. It is true that it has been held that an appellate court cannot, upon writ of error or appeal, refer to the opinion of the court below for the purpose of eking out, controlling, or modifying the scope of the findings of that court. *Stone v. U. S.*, *supra*. But the opinion of the court is to be treated as part of the record, and may be examined in order to ascertain the questions presented. *Egan v. Hart*, *supra*. To the same effect are *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 684, 688, 15 Sup. Ct. 733, 39 L. Ed. 859; *Baker v. Cummings*, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776, and the recent case of *National Foundry & Pipe*

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*Works v. Oconto City Water Supply Co.* (decided January 6, 1902, by the supreme court of the United States, and reported in advance sheets of the opinions of the United States supreme court) 22 Sup. Ct. 111, 46 L. Ed. —. In this case the opinion of the court in writing was made a part of the record by the order entered on June 15, 1901, and the order specifically says that, "in conformity to the views in said opinion expressed, doth order and adjudge that the peremptory writ of mandamus herein be, and the same is, denied," etc. If, therefore, the opinion of the court is ever a part of the record, it is in this case. Whatever may be the true scope of the rule when applied to appeals and writs of error (and I think the weight of recent authority is in favor of the doctrine that the opinion of the court may be looked to, to determine the questions in controversy), a somewhat different question is presented when the matter at issue is not whether the court committed any error in its findings, but whether it did in fact decide a certain matter, and whether that matter was in dispute. In such a case I think the opinion of the court is properly a part of the record, and might be looked to in order to ascertain what was decided. But in this case it is not necessary to do this. The evidence, or a great part thereof, has been made part of the record by bills of exception, and shows that the material question submitted to the court for decision was the legality and reasonableness of the "oven basis" of car distribution. See bills of exception Nos. 1 and 2, record.

It also appears, upon the hearing, and after the evidence was submitted, that the relator presented to the court 11 propositions of law, and requested rulings thereon in his favor; that the court overruled each and all of said propositions of law, and refused to affirm any of them. Several of these propositions of law embody the idea that under the evidence in the case of the relator, as a matter of law, is entitled to have awarded a writ of mandamus as prayed. The refusal to affirm these propositions is made the basis of numerous exceptions in the record. The tenth proposition refers in direct terms to the so-called coke-oven basis of distribution, and the eleventh proposition requested the court to find, as matter of law, that it was the duty of defendant to distribute its available cars upon a basis therein set forth. These propositions, all of which were rejected, taken in connection with the evidence detailed and set forth in the several bills of exception, show that the substantial matter in controversy was whether the so-called coke-oven basis of distribution, as operated by the respondent, was a legal and reasonable one; and I think that the court held, and intended to hold, as matter of law, that it was, and, by denying at the hearing all the propositions of law asked by relator, gave evidence, negatively it may be, of his findings of law upon the evidence. I may say further that the relator, in his twentieth exception (page 130 of record), evidently adopts

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the view that the court ruled and decided that the so-called coke-oven basis of car distribution did not work an unjust discrimination against relator. Quite a number of authorities were cited by counsel for the respondents to the proposition that the breadth of the issue determined by the court in rendering judgment in the former proceeding is not determined by the pleadings, but that the evidence heard on the trial may be looked to for the purpose of determining whether or not the questions in the two suits are the same. *Black*, Judgm. § 614; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Smith v. Town of Ontario* (C. C.) 4 Fed. 386; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Wandling v. Straw*, 25 W. Va. 692; *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152. I think this is the correct doctrine, and applying it, and looking to the evidence in the former proceeding, we easily ascertain that the whole question was as to whether the system of car distribution adopted by the railway company in the Pocahontas coal field was unjust and discriminative against relator.

A point was made by the relator in argument to the effect that the present suit should not be abated even though I held that the record showed that the former suit involved, as the great question, the so-called coke-oven basis of car distribution, because the present proceedings, in addition to charging that said basis is unjust and discriminative against relator, also charge a number of other matters violative of the interstate commerce act. For example, on page 9 of the printed alternative writ it is charged that the railway company has furnished transportation to relator so irregularly as to disorganize the force at the mine and subject the relator to disadvantage, while no such irregularities are inflicted on other shippers, to wit, *Castner, Curran & Bullitt*. I confess that this question has given me great difficulty, as it seemed possible that, although one of the questions presented by the present alternative writ had been decided adversely to relator, still, if the specific violations charged by him in it were not all referable to the system or basis upheld by the former decision, they might present a case for relief. I have made diligent search, in the limited time I have had for the investigation of the intricate questions presented, for authority directly upon this proposition, and I have found one case which seems directly in point. In *Buffum v. Tilton*, 17 Pick. 511, it was held, in a case involving the pendency of a former suit between the same parties, that "where it appears by inspection that the cause of action in the second suit is, in a material and substantial part, the same as in the first, although other causes of action are inserted in the second, it is, within the meaning of the rule of law, an action instituted for the same cause of action, and is a good cause of abatement." Upon reflection it has seemed to me that this

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decision is founded in wisdom, and I therefore adopt and follow it.

A further contention is made by the relator that it is a non sequitur that because the oven basis was reasonable in January, 1901, it is reasonable now; but I think, if it was not violative of law then, it cannot be now. If conditions have so changed that such basis is no longer reasonable or legal, such change should be averred, as otherwise the principle of res adjudicata between the parties is as applicable in the case of car distribution as in the case of any custom or usage of trade, or as I believe, in any other case,—even one involving the construction or validity of a positive law.

For the reasons given, I find for the respondents upon the issue joined upon the plea in abatement; and, so finding, it is unnecessary for me to consider the other matters presented.

## PENCE v. WABASH R. CO.

(*Supreme Court of Iowa, April 10, 1902.*)

[90 N. W. Rep. 59.]

## Injury to Passenger—Appeal—Review.

Though, in an action against a railroad company for injuries sustained by a passenger, the greater number of witnesses support defendant's theory of the manner in which the injuries were received, on appeal the supreme court cannot weigh the preponderance of evidence, such determination being with the jury.

## Same—Excessive Verdict.

Where, in an action against a railroad company for injuries sustained by a passenger, there is evidence of permanent disability, a verdict for \$1,750 is not excessive.

## Same—Damages—Pain and Suffering.\*

In an action against a railroad company for injuries sustained by a passenger, pain and suffering are to be considered as elements of damage.

## Same—Same—Loss of Earning Capacity.

In an action against a railroad company for injuries sustained by a passenger, it was proper to admit testimony as to an arrangement plaintiff had with her daughter, whereby plaintiff earned her living, her injury being such as to render her incapable of earning her living under such contract.

## Same—Evidence—Harmless Error.

Where, in an action against a railroad company for injuries, evidence regarding plaintiff's health before the accident, not strictly rebuttal in character, was admitted in rebuttal, over defendant's objection, it not appearing defendant was prejudiced, the order of the admission of evidence was no ground for reversal of a verdict for plaintiff.

## Same—Contributory Negligence—Getting Off Moving Car.

In an action against a railroad for injuries, defendant requested an instruction that if plaintiff, having stepped on the first step of one of the cars, and before getting into the car, attempted to get off, whether the train was in motion or not, and fell while attempting to

\*See *Schenkel v. Pittsburgh & B. Traction Co. (Pa.)*, 22 Am. & Eng. R. Cas., N. S., 904, and foot-note.

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get off, or just after getting off, and was injured, defendant was not liable for the injuries. The court gave the instruction, with the addition, "Unless she was directed to get off by an employee of defendant in charge of the train, and obedience to such direction would not lead her into any apparent danger, such as an ordinarily prudent person would not assume": *held*, that the charge, as given, was a correct statement of law.

**Same—Same—Boarding Train.**

Defendant requested the court to charge that if plaintiff undertook to board the train while in motion, and was injured, she was guilty of contributory negligence, and the court added, "Unless she was directed by some employee of defendant in charge of the train, and her obedience to such instruction would not lead her into apparent danger, such as a prudent person would not assume": *held*, that the instruction as given was a correct statement of the law.

Appeal from district court, Davis county; F. W. Eichelberger, Judge.

Action at law to recover damages for injuries sustained by plaintiff while attempting to board defendant's passenger train. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Geo. S. Grover and S. S. Carruthers, for appellant.

Payne & Sowers, for appellee.

DEEMER, J. Plaintiff went to Bloomfield, a station on the defendant's line of road, to board a passenger train, northward bound, for the town of Belknap. While there she was injured by being thrown, or falling, on the station platform. She claims that, as she was about to board the cars, the defendant's brakeman directed her to go further ahead and board the cars at the next opening; that she did as she was bidden, and after mounting the steps was again notified by the brakeman not to enter the car, but to get off and go to the next opening ahead; that she started to obey the order, and just as she was in the act of alighting the train started with a sudden jerk, threw her on the platform, broke her arm, and caused the other injuries of which she complains. Defendant denies these claims, and says that plaintiff's injuries were due, either to plaintiff's attempt to board the train while in motion, or to her swooning away from fright or excitement after she had safely alighted from the train. A number of special interrogations were submitted to the jury, the answers to which negatived the defendant's claim, and a general verdict was returned for the plaintiff.

Defendant contends that neither the answers to the special interrogations nor the verdict have support in the evidence. That there is a conflict in the testimony is conceded, but the contention is that the great weight of the evidence is with the defendant. While it is true that the greater number of witnesses support the defendant's theory, yet it is not our province to weigh the testimony and determine the preponderance. That, as counsel well know, is for the jury.

Claim is made that there is no evidence of permanent dis-

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ability, and that the verdict is excessive. We do not agree with counsel on either proposition. There was evidence of permanent disability, and the size of the verdict, it being for \$1,750, does not indicate passion or prejudice. Other matters than impairment of earning capacity were proper to be considered, e. g., pain and suffering.

Testimony as to the arrangement plaintiff had with her daughter and son-in-law for her board was properly admitted in evidence. Her injury was such as to forfeit her claims under this contract and destroy her capacity to earn a living.

Testimony was received in rebuttal over defendant's objection regarding the condition of plaintiff's health before receiving the injuries of which she complains. While not strictly rebuttal in character, the evidence was competent, and relevant to the issues, and we do not reverse because received out of order. Defendant did not ask permission to meet this evidence, and no prejudice resulted.

2. Defendant asked two instructions, which were given, with modifications shown in italics, as follows:

"(13) If the plaintiff, having stepped upon the first step of one of the cars of train in question, and before getting into the car, attempted to get off the same, whether the train was in motion or not, and fell while attempting to get off, or just after getting off, and received the injuries complained of from such fall, then the defendant is not liable for such injuries, *unless she was directed to get off by an employee of the defendant in charge of the operation of said train, and obedience to such direction would not lead her into any apparent danger, such as the ordinarily prudent person would not assume.*"

"(18) If the plaintiff undertook to board the train in question while it was in motion, and by reason thereof got injured, then she is guilty of contributory negligence, and cannot recover in this case, *unless she was directed by some employee of the defendant in charge of the train, and her obedience to such instruction would not lead her into apparent danger, such as an ordinarily prudent person would not assume.*"

It is contended that these modifications were erroneous, because incorrect statements of law, and for the further reason that there was no evidence to sustain them. There is no question in our mind that they announce correct abstract propositions of law. Indeed No. 18, without the modification, was more favorable to defendant than it was entitled to. *Galloway v. Railway*, 87 Iowa, 467, 54 N. W. 447, 58 Am. & Eng. R. Cas. 245. Moreover, the whole matter was covered in instruction No. 19, and defendant has no cause for complaint. No. 19 was as follows:

"(19) Even if defendant's train was not stopped a sufficient length of time to enable plaintiff to get aboard said train safely, and if plaintiff attempted to get aboard of said train while in motion, and was thrown from the train because of said attempt to get aboard the train while in motion, and was

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thereby injured, then she was guilty of contributory negligence, and cannot recover in this case."

There was evidence to the effect that the cars were in motion when plaintiff attempted to board them, and that she was directed to board them at the time she did. True, this evidence was introduced by plaintiff herself, but it was in the case, and the jury was properly instructed on this feature.

There is no claim that the instructions were contradictory, and we give that point no consideration, further than to state it.

Some of the answers to the special findings were modified by the trial court, but with the modification there is nothing in them inconsistent with the general verdict. Indeed, nearly if not quite all the interrogations were objectionable, and there would have been no error in refusing to submit them.

There is nothing in the answers to indicate that the jury was influenced by passion or prejudice in returning the verdict.

No prejudicial error appears, and the judgment is affirmed.

#### WALKER v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Rockingham, April 1, 1902.*)

[51 Atl. Rep. 918.]

#### Injury to Passenger—Damages—Mental and Physical Suffering—Instruction.\*

In an action by a passenger against a railroad for injuries, there was evidence that plaintiff, as a result of the injuries, was suffering with partial mental disability; and defendant requested the court to charge that in assessing damages they could not take into consideration any apprehension of insanity or prospect of insanity. The court instructed that they should only give damages for physical and mental pain which was the direct natural and physical cause of the injury, and not for any imaginary suffering: *held*, that the instruction given sufficiently covered the request.

#### Same—Apprehension of Insanity.

Inasmuch as apprehension of insanity caused by mental disability owing to her injuries would be an element of plaintiff's damages, the requested instruction was erroneous.

#### Exceptions from Rockingham county.

Action by Alice B. Walker against the Boston & Maine Railroad. Verdict for plaintiff, and case transferred from the superior court on defendants' exceptions. Exceptions overruled.

The plaintiff, a passenger, claimed that she was injured by the sudden starting of the train when she was leaving the car. The plaintiff's evidence tended to prove that she and her sister attempted to leave the car within a reasonable time after the train stopped. On cross-examination the sister

\*As to the right to recover for mental and physical suffering, see preceding case and foot-note.

testified that as she stepped from the car she heard some one say: "You started without orders. You'll hear from this." This remark was not responsive to any question, and there was no evidence connecting it with the defendants. The conductor, engineer, and brakeman were called by the defendants, and the conductor and brakeman were asked if they heard this remark. The train consisted of an engine, baggage car, and two passenger coaches. The plaintiff's counsel, in his closing argument, said: "The plaintiff's sister said she heard some one say: 'You started without orders. You'll hear from this.'". The defendants' counsel claimed an exception. The plaintiff's counsel said, "Except, if you want to," and proceeded as follows: "You will remember that the defendants asked their conductor and brakeman if they heard any one make this statement, and their denial, but that they did not ask this question of their engineer. If they had asked him, he would have said that he heard it. This shows that the brakeman was not where he said he was when the accident happened; for, if he had been, he, as well as the engineer, would have heard it." There was evidence that the plaintiff is suffering from partial mental disability, induced by the shock, and that this partial disability may become total. The plaintiff's counsel argued that she was liable to become insane, and asked the jury to consider her mental condition, on the question of damages. The defendants requested the following instructions, which were denied, subject to their exception: "In assessing damages the jury cannot take into consideration any apprehension of insanity; neither can they consider the prospect of insanity." On the question of damages the jury were instructed as follows: "If you come to that question, you will give her as damages so much money as will fully compensate her for all loss of time and money she has or may hereafter suffer, and for all the pain, both physical and mental, which she has or may hereafter endure, as the direct, natural, and probable result of the defendants' fault, as the evidence discloses it to you. If you find that she has nervous prostration, induced by dwelling upon her claim against the railroad, and on the probable result of her suit, you will not consider it in assessing her damages. In assessing her damages, you will only consider the physical injury she actually received, and the mental pain and suffering which resulted directly from the injury. You will not consider any fictitious pain and suffering due to a disordered imagination, for she can only recover for actual, and not imaginary, pain."

Dwight Hall and Emery & Simes, for plaintiff.

Frink & Marvin, for defendants.

PARSONS, J. The requested instruction was, so far as applicable to the evidence, covered by the instructions given. Upon the question of damages for future physical and mental pain, the jury were limited by the instructions given



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to such suffering as was shown to be the direct, natural, and probable result of the defendants' fault. When the legal principle governing a case is fully stated in general terms, it is not error of law for the court to refuse instructions upon its application to particular evidence. The substance of the requested charge having been given, it is no ground of exception that it was not repeated, or that a particular form of expression was not used. *Rublee v. Belmont*, 62 N. H. 365; *Chase v. Chase*, 66 N. H. 588, 592, 29 Atl. 553. There was evidence that the plaintiff was suffering from partial mental disability. If, as the result of mental disability induced by the defendants' fault the plaintiff suffered from apprehension of insanity, such suffering was an element of her damages. The instruction, if given in the form requested, would therefore have been erroneous. The argument in support of the exception is founded upon the meaning of the word "may" in the following statement in the case: "There was evidence that the plaintiff is suffering from partial mental disability induced by the shock, and that this partial disability may become total." Whether the word was used in the strict sense claimed, meaning that the evidence did not tend to prove a probability, but only a possibility, of total insanity, is at least open to serious doubt. Whether the meaning attached by the defendants is the one intended is not material, because their contention as to the proper rule upon their understanding of the word is fully covered by the general instruction limiting the consideration of the jury to such future suffering as the plaintiff may endure as the probable result of the injury. It could fairly be inferred that in stating the evidence the court used the word "may" with reference to the connection in which it was used in the charge. However this may be, this court is not obliged to resort to the study of derivations or definitions, or to employ the principles of judicial construction to ascertain the meaning of a case transferred. If there is doubt, an amendment of the case furnishes a convenient and certain solution of the difficulty.

As the defendants, instead of moving to reject the voluntary incompetent statement of the plaintiff's sister, called witnesses to dispute it, and thereby made an issue of her credibility, it was proper for counsel to discuss any competent evidence in the case bearing upon the question; but the assertion as a fact by the plaintiff's counsel, in his closing address to the jury, that the engineer, if he had been asked, would have said that he heard the statement of which the plaintiff's sister had testified, was incompetent testimony, which, introduced under exception, is fatal to the verdict. *Power Co. v. Clough*, 70 N. H. 627, 47 Atl. 704; *Bullard v. Railroad*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367. If, instead of stating to the jury as a fact what the engineer would have said if inquired of, counsel asked the jury to infer, from the fact that the defendants' counsel did not ask the engineer this

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question, that he did not ask it because he knew the answer would be as stated, the argument is within the limits of legitimate advocacy. *Mitchell v. Railroad*, 68 N. H. 96, 117, 34 Atl. 674. From the "case" it may be inferred that the exception covers everything said by counsel which is reported, and that the remark in question was not a request for an inference by the jury, but a statement of a fact. Whether the statement was made in one way or the other, and whether all that is reported was said subject to exception, are questions of fact for the trial court. *Edwards v. Tilton Mills*, 70 N. H. 574, 576, 50 Atl. 102. Legal fairness of trial requires that counsel apparently trespassing upon the rule prohibiting the introduction of unsworn testimony in argument should assume the burden of establishing his freedom from fault. An amendment of the case having been procured, which establishes that the suggestion of counsel to which objection was taken was understood to be a request to the jury to infer from the facts proved what the testimony of the engineer would have been, and not as a statement of that fact as within his knowledge, the argument is not objectionable. *Mitchell v. Railroad*, *supra*.

Exceptions overruled.

WALKER, J., did not sit. The others concurred.

## BEVERIDGE v. LEWIS.

(*Supreme Court of California, Feb. 25, 1902.*)

[67 Pac. Rep. 1040.]

**Eminent Domain—Damages—Right of Jurors to Exercise Individual Judgment.**

An instruction that the jury, in estimating damages to land taken, "are permitted to exercise, in weighing the evidence, their individual judgment as to values on subjects within their knowledge which they have acquired through experience and observation," was not erroneous.

**Same—Benefit to Land Not Taken.\***

In condemning land for a railroad the jury may consider benefits to the land not taken, though such benefits also accrued to other land in the vicinity.

**Same—Assessing Damages Irrespective of Benefits—Constitutional Law.**

Const. art. 1, § 14, providing that where a corporation, other than municipal, seeks to condemn land, the damages shall be assessed irrespective of benefits derived from improvements, is contrary to the fourteenth amendment of the federal constitution, forbidding a state to deny to any "person" the equal protection of the law.

Department 2. Appeal from superior court, Los Angeles county; W. F. Fitzgerald, Judge.

\*See 4 Rap. & Mack's Dig. 709 et seq.

Injury to land not taken, see *Union Term. R. Co. v. Peet Bros. Mfg. Co.*, 13 Am. & Eng. R. Cas., N. S., 851. See also, note at end of case.

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Proceedings by Philo J. Beveridge against Mary A. Lewis for the condemnation of a right of way. From the assessment of damages, the defendant appeals. Affirmed.

Lynn Helm, for appellant.

John D. Pope, for respondent.

McFARLAND, J. The plaintiff, a natural person, having obtained a franchise to construct and operate a certain railroad, commenced this action to condemn a right of way for a part of its line of railway through the land of defendant. In the trial court plaintiff had judgment, from which, and from an order denying her motion for a new trial, defendant appeals.

The main question in the case relates to the amount of compensation which the appellant was entitled to for the value of the land taken and damages for land not taken. The jury found the value of the land taken to be \$429; damages to the land not taken, \$2,000; and for costs of fences and cattle guards, \$233.84. It also found that the benefit from the construction of the railroad to the land not taken was \$500. Upon this basis the court fixed the amount to be paid appellant at \$1,929, which appellant contends was too small.

There are one or two minor matters to be disposed of. Appellant contends that the court erred in not sustaining her challenge to the juror Newell. On this point it is sufficient to say that, after considering all the testimony of the juror, we cannot say that the court erred in holding that he had not such an unqualified opinion about any question in the case as to make him an unfit juror.

It is contended that the court erred in instructing that in estimating damages "the jury are permitted to exercise, in weighing the evidence, their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation." Although this instruction seems, at first blush, to be somewhat questionable, yet it does not go as far as appellant claims. It is not an instruction that the jury may shut their eyes to the evidence before them, and decide the case according to their own notions. It, in effect, merely tells them that "in weighing the evidence" they may do, what jurors always do,—exercise their judgment in the light of their own general knowledge of the subject about which evidence has been introduced. This statement has been frequently sanctioned by courts. This court itself said in *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625,—almost in the very language of the instruction here assailed,—that "jurors are permitted to exercise their individual judgments as to values presumptively within their own knowledge, which they have acquired through experience or observation"; and it approved that ruling in *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922. In *Patterson v. City of Boston*, 20 Pick. 159, Chief Justice Shaw said: "Jurors

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would be very little fit for the high and responsible office to which they are called, especially to make an appraisal, which depends on knowledge and experience, if they might not avail themselves of these powers of the mind when they are most necessary to the performance of their duties." And Justice Field, in delivering the opinion of the United States supreme court in *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028, said that jurors "may, and to act intelligently must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." See, also, *City of Kansas City v. Butterfield*, 89 Mo. 646, 1 S. W. 831. Moreover, the evidence in the case at bar as to values was, substantially, all opinion evidence; and as to that kind of evidence the rule stated in the instruction is beyond all doubt correct. *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Haight v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465; *Rog. Exp. Test.* (2d Ed.) § 207, subd. 4, p. 487, and the numerous cases there cited. We are of the opinion that the instruction in question was not erroneous; and it may be further said that it could have done no harm, for it merely permitted the jury to do what they would necessarily and inevitably have done if the instruction had not been given.

It was not error for the court to tell the jury that they might consider benefits to the land not taken, although such benefits also accrued to other land in the vicinity. *Railroad Co. v. Armstrong*, 46 Cal. 85; *Railroad Co. v. Caldwell*, 31 Cal. 368.

Upon the main question in the case—that is, upon what basis should the estimation of compensation be made?—it is not necessary to notice in detail the various instructions given and those which were asked by appellant and refused. It is sufficient to say that the court presented the case to the jury, and rendered judgment, upon the theory that appellant was entitled to the full value of the land taken, and damages to the land not taken, less the benefits to such land by the improvement. It is not seriously contended that this is not the correct rule where the party seeking the condemnation is a natural person, or a company of natural persons not incorporated, but it is contended that, where such party is a corporation, not municipal, there, under section 14 of article 1 of our state constitution, no right of way shall be appropriated "until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation." And appellant sought to bring this case within that provision by offering evidence to the point that respondent had some understanding with a corporation called the Los Angeles Pacific Railroad Company, by which the latter was to receive the benefit of the condemnation, and was, therefore, the real party in interest. An objection by respondent to this offered evidence was sustained, and upon that ruling the

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main contention of appellant is based. Counsel for respondent contends that proof of the fact sought to be proven would not be admissible under any view, and, moreover, that the kind of evidence offered was not admissible to prove the fact; but we will not closely examine these contentions, because we are of opinion that his other contention, that said provision of section 14 of article 1 is invalid because repugnant to the fourteenth amendment of the constitution of the United States, must be maintained. The fourteenth amendment to the federal constitution is a limitation of the powers of a state. It provides that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law"; and it is definitely settled that a corporation is a "person" within the meaning of the amendment. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 396, 6 Sup. Ct. 1132, 30 L. Ed. 118. "It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States. The rights and securities guarantied to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to a corporation the equal protection of the law than it has to individual citizens." *Railroad Co. v. Ellis*, 165 U. S. 154, 17 Sup. Ct. 255, 41 L. Ed. 666, and cases there cited. Of course, a state cannot, by its own constitution, any more than it can by an act of its legislature, evade a provision of the federal constitution. This is too obvious for argument. To hold otherwise would be, as was said in *Railroad Co. v. Ellis*, supra, "to make the prohibitory clauses of the fourteenth amendment a mere rpe of sand in no manner restraining state action." See *In re Tuthill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574.

The provision that a state shall not "deny to any person within its jurisdiction the equal protection of the law" is violated by a discrimination between persons which is not based upon any natural, reasonable, or intrinsic distinction, and places on one person burdens from which other persons similarly situated are relieved. And the principle cannot be evaded by means of a mere arbitrary classification. Classification, to be valid, "must be for the purpose of meeting different conditions naturally requiring different legislation." *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500, and cases there cited. In *Railroad Co. v. Ellis*, supra, where it was held that a state law putting certain burdens of litigation on railroad corporations which were not imposed on other litigants was void under the fourteenth amendment, the whole subject is elaborately discussed and many authorities cited, the supreme court of the United States saying: "But arbitrary

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selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for the court, in *Yick Woe v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1071, 30 L. Ed. 220: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' " And in that case the court, after a full consideration of the subject, say: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the language of the clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection." The case of *Johnson v. Mining Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17, is, substantially, determinative of the question here involved against the contention of appellant. It was there held that an act of the legislature imposing upon corporations alone certain burdens as to contracts and liens—not arising out of natural conditions—was "discriminating and arbitrary legislation against corporations," and "denies to such corporations the equal protection of the laws, and is unconstitutional and void." In that case the court, after again stating the proposition that "the word 'person,' within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation," say that "the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation," and that "there is no reason why a different rule as to defenses that may be pleaded and proven and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants." Now, there is absolutely no natural or reasonable distinction between different persons seeking to exercise the right of condemnation with respect to the measure of compensation for the land taken and damages for land not taken. A law might, perhaps, rightfully discriminate between the business of operating a railroad and some other kinds of business, but as between parties intending to engage in that business the right of way is the same no matter what "person" appropriates it, and there is no reason why one person should pay more for it than another person, except a desire to unjustly discriminate.

It is argued that, even if the above propositions are, as a

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general rule, true, still they do not apply to the case of the exercise of the right of eminent domain. It is said that this right belongs to the state by virtue of its sovereignty, and that, therefore, the state may exercise the right with as much favoritism as it pleases. But the right to make laws upon the subject of eminent domain is no different from the right to make laws on any other subject. The right to make laws at all is a sovereign power. But that power must be exercised within constitutional limits. The state could, no doubt, refuse to grant to any person the right to exercise the power of eminent domain,—as it could refuse the right to a writ of attachment to any one; but when it does legislate upon either subject it must do so within the constitutional limitation against arbitrary discrimination. No one would contend that the power of condemnation could be legally given to persons having light hair and denied to persons having dark hair; and yet to say that this could not be done is to give up the whole contention. However, this contention has been definitely held untenable in *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604. That case dealt expressly with a law giving the right to exercise the power of eminent domain; and it was decided that a statute which imposed burdensome conditions to the exercise of the right upon certain municipal corporations which were not imposed on other municipal corporations was unconstitutional and void. In that case Chief Justice Beatty, in delivering the opinion of the court, having referred to the general law (Civ. Code, § 1001) giving to "any person" the right to use the power of eminent domain, and to the proposition that "a corporation, whether private or public, is a person," said: "But the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organization. They are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons." And in replying to the position—which is also taken in the case at bar—that the plaintiff in the condemnation proceeding is a mere "agent" of the state he says: "In reaching this conclusion we have not overlooked the argument of appellants that, since the plaintiff in such proceedings is always a mere agent of the state, and acting on its behalf, he cannot question the conditions upon which his principal authorizes him to act. We think this rather a fanciful argument, and that it is based upon a supposed analogy which has no real existence. It is, in a very modified sense, that the state is the principal and the plaintiff the agent in cases like this. Such may be the theoretical view, but practically it is the reverse of the truth. The party directly and beneficially interested is the person in charge of the use." And it might be added that he, and not the state, is

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the party who pays the compensation to the owner of the land taken and damaged.

We think that the foregoing views cover substantially all the questions raised in the case and in accordance with those views we are of the opinion that the judgment of the court below was right.

The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

## NOTES.

**EMINENT DOMAIN—DEDUCTION OF BENEFITS IN ESTIMATING COMPENSATION.****Scope of Subject.**

The discussion of the subject proceeds upon the hypothesis that there is no contention regarding the fulness or lawfulness of the authority to take, and pay a just compensation in compliance with constitutional provisions, regardless of the instrument or means by which such authority is evidenced. Without venturing into the realm of detail to discuss various elements which might influence a tribunal in arriving at the value of particular tracts under peculiar conditions, or to define and discuss the nature of general and special benefits, an attempt will be made to outline some of the broad fundamental principles which have been prescribed for the guidance of tribunals in arriving at a conclusion as to what is a just compensation so far as it is affected by benefits, such as will effectually conform to the constitutional requirement, when private property is taken for a public purpose. It is provided by the constitution in some states that compensation shall be made where private property is "damaged" as well as "taken." But the discussion of the influence of such provisions, and the discrimination between such provisions and those omitting the term "damage," or its equivalent, is not within the scope of this note.

**1. Compensation.****a. Meaning of Compensation.**

b. "Just," "Ample," "Adequate," "Reasonable," Compensation.

**2. Principles Regulating the Assessment of Benefits.****a. In General.**

b. Treatment of the Several Jurisdictions Separately with Reference to the Various Rules Enforced.

**c. Classification of Rules.**

(1) Benefits Not Regarded in Estimating Compensation.

(2) Assessment of Benefits Which Are Special and Peculiar as against Damages Resulting to the Remainder, but Not as against the Value of the Part Taken.

(3) Assessment of Both General and Special Benefits as against Damages to the Remainder, but Not as against the Value of the Part Taken.

(4) Allowance of Special Benefits as an Offset against Damages to the Remainder and Value of Part Taken.

(5) Assessment of Both General and Special Benefits as against Damages to Remainder and Value of Land Appropriated.

**1. Compensation.****a. Meaning of Compensation.**

The several rules relative to the allowance or nonallowance of benefits to the residue in reduction of the loss sustained by one who is actually deprived of property, or whose property is affected in value



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by a portion being taken, are so influenced by the meaning given by judicial interpretation to the word "compensation," that it is essential to briefly notice in this connection the scope and significance of the term as defined in the several jurisdictions.

Broadly speaking it means the giving of an equivalent, such as will be just in regard to the public, as well as in regard to the individual. That is, when under eminent domain proceedings, private property is taken for some public purpose or use, the owner thus sustaining loss, must be fully indemnified to the extent of his loss, by the public, or those through whom the right of user is immediately enforced,—this being but a fair and just consideration in return for benefits received by taking the property.

Although compensation is sometimes termed damages, yet it is in fact the consideration or price of a privilege purchased.

*California*.—San Francisco, etc., R. Co. v. Caldwell, 31 Cal. 368.

*Illinois*.—Alton, etc., R. Co. v. Carpenter, 14 Ill. 190.

*Iowa*.—Henry v. Dubuque, etc., R. Co., 2 Iowa 288.

*Maine*.—Bangor, etc., R. Co. v. McCombe, 60 Me. 290.

*New York*.—Livingston v. New York, 8 Wend. (N. Y.) 85.

*Ohio*.—Symonds v. Cincinnati, 14 Ohio 147, 45 Am. Dec. 529.

*Pennsylvania*.—Gilmore v. Pittsburg, etc., R. Co., 104 Pa. St. 275.

*United States*.—Chesapeake, etc., Canal Co. v. Key, 3 Cranch C. C. 599, Fed. Cas. No. 2,649; Laffin v. Chicago, etc., R. Co., 33 Fed. 415; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622.

Admitting, however, this general meaning of the term, disagreement arises when the principle involved is attempted to be applied. The decisions are unanimous so far as holding that the constitutional requirement is complied with when a money consideration is paid; and in those jurisdictions where it is held that only a money consideration shall be tendered, the rulings accord in limiting the meaning of "money" to the lawful medium of exchange, excluding every other form of consideration, except such as may be mutually agreed upon by the parties.

*California*.—Vilhac v. Stockton & I. R. Co., 53 Cal. 208; North Pac. R. Co. v. Reynolds, 50 Cal. 90.

*Kentucky*.—Covington S. R. Trans. R. Co. v. Piel, 87 Ky. 267, 8 S. W. 449.

*Maryland*.—Hamilton v. Indianapolis & E. R. R. Co., 1 Md. Ch. 107; Harness v. Chesapeake Canal, 1 Md. Ch. 248.

*Missouri*.—Ring v. Mississippi Bridge Co., 57 Mo. 496; Chicago S. F. & C. Ry. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931.

*New York*.—New York W. S. & V. R. Co. v. Bell, 21 Hun 426; Matter of New York L. & W. R. Co., 49 Hun 539.

But this narrow meaning that compensation for property taken shall be made only in money, is accepted in only a few jurisdictions. Some courts give it a more extensive meaning, viewing the property as a whole, and permitting benefits to the remainder to be set off both as against the value of the portion taken and damages to the residue, including in its estimate both special and general benefits. These views may be regarded as standing at the two extremes. Between them range doctrines which are more modified, some permitting special and general benefits to the remainder to be set off against damages to the remainder, others permitting special benefits only to be set off against damages to the remainder, while others allow special benefits only, but as against both the value of the property taken and damages to the residue. As illustrating these two extreme rules, it is held in Mississippi, and other states, on the one hand, in conformity to the theory that compensation must be made in money only, that a just compensation as secured by the bill of rights to the owner is the value of the injury done, excluding from consideration the enhancement of the value of his adjacent property.

*Kentucky*.—See Elizabethtown R. R. Co. v. Helm, 8 Bush 681. See also, post, subhead "Kentucky."

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*Mississippi*.—*Isom v. Miss. R. R. Co.*, 36 Miss. 300; *Brown v. Beatty*, 34 Miss. 227; *Natchez, J. & C. R. Co. v. Curry*, 62 Miss. 506. *Tennessee*.—See also, *Woodfolk v. Nashville R. R. Co.*, 2 Swan 42; *Paducah M. R. Co. v. Stovall*, 59 Tenn. (12 Heisk.) 1; *Mississippi R. Co. v. McDonnell*, 59 Tenn. (12 Heisk.) 64.

*Wisconsin*.—*Robbins v. Milwaukee R. R. Co.*, 6 Wis. 636.

On the other hand, adopting the theory which permits benefits, both general and special, to be set off as against the value of the part taken and damages to the residue, which rule is based upon natural equity, it is held in California and other states, that if part of a tract of land is taken for a railroad, and that part of the tract not taken is enhanced in value by the construction of a railroad, but receives no special benefits over other lands in the vicinity, and this enhancement in value is common to contiguous lands, it is a benefit which is to be deducted from the injury caused to that part of the tract not taken, as well as from the value of the part taken.

*California*.—*San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 368; *Cal. Pac. R. Co. v. Armstrong*, 46 Cal. 85.

*Ohio*.—*Kramer v. Cleveland & Pittsburg R. Co.*, 5 Ohio St. 140.

This view regards not only money as a compensation, but embraces any and all means which serve to recompense the owner for loss suffered by taking his property.

*Indiana*.—*Ross v. Davis*, 97 Ind. 79; *Rassier v. Grimmer*, 130 Ind. 219, 28 N. E. 866; *Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 129.

*Missouri*.—*Daugherty v. Brown*, 91 Mo. 26, 3 S. W. 210.

*Pennsylvania*.—*Root's Case*, 77 Pa. 276.

In New Jersey, and other jurisdictions, it is held that in estimating and deducting benefits there is no intent to estimate the compensation which is to be paid, but merely the taking, as it were, of an inventory of the condition of the property so as to form a basis upon which to reckon the money compensation.

*New Jersey*.—*Lowerre v. Newark*, 38 N. J. L. 151; *Butler v. Sewer Comm.*, 39 N. J. L. 665.

*Illinois*.—*Page v. Chicago, M. & S. P. R. Co.*, 70 Ill. 324.

Further treatment along this line would involve the discussion of the several rules observed in regulating the assessment of benefits, which is more properly reserved for another portion of this note. See post, 2, c.

b. "Just," "Ample," "Adequate," "Reasonable," Compensation.

As denoting the return to be made to the owner for property which is taken from him for public use, constitutions and statutes of the several states present an absence of uniformity in describing the compensation to be made in so far as the verbal form of the provisions are concerned. Thus, the requirement to pay for that which is taken is expressed by some, as a "just compensation," "ample compensation," "reasonable compensation," or merely "compensation." A question of construction arises as to the difference in force or meaning lent by the addition of one of these several adjectives. Some courts have apparently regarded "just" as giving some peculiar significance to the term compensation when prefixed to it.

*Colorado*.—*Dolores, etc., Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378.

*Iowa*.—*Sater v. Burlington & Mt. P. Plank R. Co.*, 1 Iowa 386.

*Maine*.—*Bangor & P. R. Co. v. McCombe*, 60 Me. 290.

*Michigan*.—*Chicago & G. T. R. Co. v. Hough*, 61 Mich. 307, 28 N. W. 532.

*New York*.—*Newman v. Metropolitan El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901.

*Wisconsin*.—*Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478.

It is true that the power of the state is inherent to burden those exercising the privilege to take property under eminent domain pro-

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ceedings with peculiar liability, which may result in the normal measure of compensation being increased.

*Massachusetts*.—*Woodborough v. Beverly*, 15 Mass. 355.

*Pennsylvania*.—*Monongahela Nav. Co. v. Coon*, 6 Pa. 379.

*United States*.—*Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 Sup. Ct. 598; *Grafton v. Baltimore & O. R. Co.*, 21 Fed. 309.

But while this is conceded, yet unless the intention is more clearly indicated than by a slight verbal addition in changing the provision, the courts, it being a judicial question, are hardly justified in discovering and declaring any new and peculiar significance to be attached to the word. See *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622.

As regarded by the great weight of authority, these prefixes to the word compensation, in the absence of other explanatory clauses, convey substantially the same idea; and are viewed not as adding to the measure or the character of the compensation to be paid, but merely as intensifying the requirement that a compensation shall be made which shall be a fair and substantial equivalent for the property taken.

Construing this term in *Hicks v. Rubicon Hydraulic Co.*, 27 Wis. 445, the court, in the course of its opinion, said: "In the case of *Bigelow v. Western Wisconsin R. Co.*, decided by this court at the present term, it was held that 'just compensation' consists in making the owner good, by an equivalent in money for the loss he sustained in the value of his property by being deprived of a portion of it."

In *Virginia & Truckee R. Co. v. Henry*, 8 Nev. 871, the court speaks thus: "It is difficult to imagine an unjust compensation; but the word 'just' is used evidently to intensify the meaning of the word 'compensation'; to convey the idea that the equivalent to be rendered for property shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution. So are the decided cases."

*Wisconsin*.—*Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636; *Snyder v. Wisconsin Union R. Co.*, 25 Wis. 60; *West v. Milwaukee & St. Paul R. Co.*, 26 Wis. 108.

*United States*.—See *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 632.

## 2. Principles Regulating the Assessment of Benefits.

### a. In General.

Considerable conflict exists in the decisions of the different courts of this country, including both the state and federal courts, upon the questions arising out of the assessment of benefits where land is taken for public use under eminent domain proceedings. In some states the allowance of benefits to the residue in reduction of damages is not left for the courts to regulate by rule, but is settled by constitutional or legislative provisions; in other states there is no definite or fixed rule prescribed by such instruments, other than the requirement that compensation shall be paid. Some of these constitutions prohibit generally the assessment of benefits to the remainder of the tract of which a part is taken. Others prohibit it as against corporations, in some instances private only, and in others both private and municipal. Thus a number of rules are in force in this country regulating the mode of determining the amount of compensation, and the character of the compensation, as a consequence of these conflicting decisions, which are the outcome of either affirmative measures prescribed by constitutional or legislative provisions, or by judicial construction of constitutional or legislative provisions which declare that compensation shall be made, but are silent concerning any positive rule by which it is to be determined. This has resulted in the operation at different periods within the same jurisdiction of rules which are clearly defined and totally at variance with each other. By reason of this it is well nigh impossible to lay down any rule as settled by uniform authority, or even by a decided weight of

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authority. In view of this lack of uniformity in the rulings of the courts of the several states, and the conflict which is seen to exist even in the same state, in many instances, it will, perhaps, prevent in a measure the tendency to confusion, to treat separately the decisions in the several jurisdictions where this question has arisen, and afterwards by way of summary endeavor to classify the rules which are observed.

b. Treatment of the Several Jurisdictions Separately with Reference to the Various Rules Enforced.

## ALABAMA.

A railroad charter (Acts 1853-54, p. 258, sec. 5) requiring the jury in condemning a right of way to take into consideration the possible advantages the owner of the lands condemned may derive from the construction of the road in increasing the value of the lands, is held not to authorize the jury to consider the possible damages that may arise from the possible necessity of an increase in the quantity of fencing on said land. *Alabama R. Co. v. Burkett* (1871), 42 Ala. 83.

## CALIFORNIA.

The thirteenth section of the railroad act of 1861, declared it to be the duty of the commissioners appointed to ascertain and assess the compensation for the land sought to be appropriated "to take into consideration and make allowance for any benefit or advantage that in their opinion will accrue to such persons owning the land by reason of the construction of the road."

It is held to be within the power of the legislature to pass such an act as this is, it not being unconstitutional. Construing this provision as to the compensation to be paid, the supreme court of California held, that the constitution guarantees to the owner of land taken for public purposes only a just compensation, and to give a just compensation, not only the benefit which may result to the remaining land of the parcel taken, but also the injury which this remaining parcel may sustain, should be taken into consideration; that is, when a portion of the tract is taken for a railroad it is the duty of the commissioners, in arriving at a just compensation to be paid to the owner to ascertain what is the value of the whole tract without the railroad, and also what will be the value of the part not taken after the road is constructed, and a difference in values is the true compensation to be awarded.

This includes, as it would seem, both general and special benefits, —but such benefits must be a proximate consequence of the taking of the land for public use, which is the taking and using it for such purpose; such use necessarily being followed by consequences advantageous to the remaining adjacent land of him whose property is taken. *San Francisco, Alameda & Stockton R. Co. v. Caldwell* (1866), 31 Cal. 368; *California P. R. Co. v. Armstrong* (1873), 46 Cal. 91.

But the above doctrine has been changed by constitutional provision (Const. Cal. art. 1, § 14), which declares that no right of way shall be appropriated to the use of any corporation not municipal, until compensation is made, irrespective of any benefits from the proposed improvements.

Construing this provision in *Pacific Coast Ry. Co. v. Porter* (1887), 74 Cal. 261, 15 Pac. 774, it was held that the benefits supposed to result to the rest of a piece of land by the taking of a part of it for the right of way for a railroad, cannot be considered in a suit to determine the compensation to be paid the owner. See *Muller v. Son. Pac. B. Ry. Co.* (1890), 83 Cal. 245, 23 Pac. 265; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522; *San Bernardino & E. Ry. Co. v. Haven*, 94 Cal. 489, 29 Pac. 875.

## COLORADO.

The Civil Code (1883) of Colorado provides: "In estimating dam-

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ages occasioned to other portions of claimant's property, or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom."

Passing upon this provision, in *Colorado Cent. R. Co. v. Humphreys* (Colo. 1891), Reed, C., said: "In states where there is no statute, the great weight of authority is in favor of the reception of testimony of benefits, such as the evidence here rejected (by the lower court), tended to show, as well as injury; and it is clear on principle, that the damage could only be the balance after deducting such benefits. Whether there were benefits, and of what value, were questions of fact for the jury." The ruling of the lower court that no benefits to the property could be considered, was held erroneous. The question was as to the allowance of benefits to the remainder as an offset against damages to such part not taken. The discrimination between general and special benefits seems not to have been made.

In *Burlington & C. R. Co. v. Schweikart*, 10 Colo. 178, 14 Pac. 329, one phase of the case turned upon the meaning of "compensation." The court held that the Constitution of Colorado (art. 2, § 15), and the eminent domain act (Code Civil Prac. 74) contemplate a compensation in money, to one whose lands are condemned for railroad purposes, and therefore, it being inadmissible to reduce his compensation, commissioners have no power to consider an agreement, in the absence of consent of the parties, by which the owner of a right of way which was taken, could use another way, which it was claimed would equally serve his purpose.

## CONNECTICUT.

The doctrine is laid down in Connecticut, *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636, that local and peculiar benefits accruing to the owner may be considered in estimating damages sustained by him by the taking of his property for public improvements, and if the benefit derived equals or exceeds the value of the land taken, the owner has sustained no damage within the meaning of the constitutional provision requiring compensation to be made for private property taken for public use, and nothing can be allowed him. See *Nicholson v. New York & N. H. R. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Trinity College v. City of Hartford*, 32 Conn. 452; *Wilcox v. City of Meriden*, 57 Conn. 120, 17 Atl. 366.

## GEORGIA.

In an early case, *Young v. Harrison*, 17 Ga. 30, it is argued that the term "compensation" comes from the civil law, which construes it to mean that all benefits, both general and special, may be set off against damages to the remainder, and the value of the part actually subjected for use.

This case seems to have been inadvertently overruled in *Jones v. Wills Valley R. Co.*, 30 Ga. 43, in which the court, without noticing the earlier case, lays down the doctrine that general or special benefits may be set off as against disadvantages or injuries accruing to the residue, but not in reduction of the value of the part taken. See *City of Atlanta v. Cent. Ry. & Bkg. Co.*, 53 Ga. 120; *Gilbert v. Savannah, G. & M. N. R. R. Co.*, 69 Ga. 396; *Wolff v. Georgia Sou. & F. R. Co.*, 94 Ga. 555, 20 S. E. 484; *Davis v. East Tenn., V. & G. Ry. Co.*, 87 Ga. 605, 13 S. E. 567.

## ILLINOIS.

Under the eminent domain law of 1845 damages were not allowable where an additional value was given to the land from the proposed improvement, equal to the injury occasioned; that is, both general and special benefits were allowed to be set off against the damages to the property by reason of the taking of a part thereof for the proposed improvement. *Alton & S. R. Co. v. Carpenter*, 14 Ill. 190; *Hays v. Ottawa, O. & F. R. Valley R. Co.*, 54 Ill. 373; *Peoria R. & J. R. Co. v. Laurie*, 63 Ill. 264.

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In 1852 an act was passed which provided for commissioners in condemnation proceedings, to fix the compensation under the statute. Compensation was required to be made for the full value of the land taken without regard to the benefits to the remaining land not taken. But in assessing damages to the residue of the land which was not taken, only special benefits to the part not taken, and not common to adjoining land through which the improvement passed, could be set off. *Emerson v. Western U. R. Co.*, 75 Ill. 176.

The constitution of 1848 provided only that land should not be taken for public use without just compensation. As held in construing this provision, it was a limitation upon the exercise of the sovereign power of eminent domain. Yet it was competent for the legislature to impose further limitations upon its exercise, which was sought to be done by the act of 1852.

In a later constitution, 1870, it was provided that land should not be taken or damaged for public use without just compensation. After this the legislature passed a statute repealing the act of 1852, and providing "that no benefits or advantages, which may accrue to land or property affected, shall be set off against or deducted from such compensation in any case." *Page v. Chicago, M. & St. P. R. Co.*, 70 Ill. 328.

Subsequent to the adoption of the constitution of 1870, but prior to the passage of the statute of 1872, above referred to, a case arose which was decided under the former constitution,—it being held, that the damage contemplated by the constitution must be an actual diminution of present value or price, caused by the construction of a railroad, for instance, or a physical injury to the property, that renders it less valuable in the market, if offered for sale. *Chicago & P. R. Co. v. France*, 70 Ill. 238.

Following this case *Page v. Chicago, M. & St. P. R. Co.*, 70 Ill. 328, was decided, arising as it did after the statute of 1872. This case, also, held that the test of whether damages had accrued to the land not taken was whether there had been a diminution in the market value of the land by reason of the proposed improvement, and that the effect upon the whole tract remaining after part is taken must be considered. The argument was interposed, and insisted upon, that benefits to the land not taken could not, under the statute, be set off against damages. It was decided, however, that the consideration of benefits by which land was increased instead of being diminished in value, was not deducting benefits or advantages from the damages, "but it is ascertaining whether there be damages or not. It is but the estimation of damages, and seems to be the only fair and just mode of estimating them." Accordingly, it was held, "If the market value of the tract will not be diminished by the construction and the operation of the road, the land cannot be said to be damaged thereby."

Following this decision in *Eberhardt v. Chicago, M. & St. P. R. Co.*, 70 Ill. 347, in which the issue was as to the damages resulting to lands not taken, an instruction given by the town court was approved, which directed that, "as to lots not taken, you will find, as damages, the depreciation in market value of the same by reason of the construction and maintenance of the said railroad." See *Chicago P. R. Co. v. Stein*, 75 Ill. 41; *St. Louis, V. & T. H. R. Co. v. Hallow*, 82 Ill. 208. See and compare *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Hyde Park v. Dunham*, 85 Ill. 569.

In the later case of *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42, it was decided that damages to property not taken for public use must be real and not speculative, and must appreciate the price or its use, and the depreciation is determined by comparing its value before and after the structure is made which produces the injury. Any benefits thus conferred should be considered, as well as injury inflicted by the structure in estimating the damages. Subsequently, the case of *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 347, arose, and an instruction was approved which directed the jury "that, in estimating the dam-

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ages to the balance of the farm through which the railroad ran, you should consider this railroad as running only through this farm and should not consider any general benefit which the road might be, in making a better market or convenience of travel." Remarking upon this decision in *Metropolitan West Side El. Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, the court said: "There was no discussion of the question, and it is evident that the view taken was that the instruction was proper, as excluding those general benefits which flow to the public generally, and not such as would appreciate the market value of the particular tract of land."

When *McReynolds v. Burlington & O. R. Co.*, 106 Ill. 152, arose, the jury were instructed that, if by the construction of the railway, the land would be specially benefited to the extent, or greater, than it would be damaged, then the jury should only find the verdict for the compensation for the strip of land taken. The argument was urged that this instruction was in conflict with the Eminent Domain Act, § 9; and directly opposed *Keithsburg & E. R. Co. v. Henry*, 70 Ill. 290.

Without citation of authority the court held that the instruction was proper. Commenting on this point in *Metropolitan West Side E. R. Co. v. Stickney*, 150 Ill. 362, the court said, that in approving this instruction, "the court was in entire harmony with all of its former rulings, since the adoption of the present constitution, except the *Henry Case* (*Keithsburg & E. R. Co. v. Henry*, 79 Ill. 296), and as will be seen in direct conflict with that case." See *Dupuis v. Chicago & N. W. R. Co.*, 115 Ill. 97, 3 N. E. 720; *Chicago & E. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co.*, 121 Ill. 199, 12 N. E. 536; *Chicago B. & N. R. Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Kiernan v. Chicago S. F. & C. R. Co.*, 123 Ill. 188, 14 N. E. 18. See and compare *Harwood v. Bloomington*, 124 Ill. 48, 16 N. E. 91.

The question was again decided in *Wabash, St. L. & P. R. Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207, in which the doctrine was declared that the measure of damages to the land not taken is the difference between the value of the land as a whole, before and after the construction of the road built according to the plan proposed. See *Chicago, P. & St. L. Ry. Co. v. Aldrich*, 134 Ill. 9, 24 N. E. 763.

The case of *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 294, is wholly out of line with the other decisions in Illinois. This case holds that under the statute (Acts of 1872), benefits cannot be considered and deducted either from the damages to the residue of the land, or as an offset against the value of the part actually taken. Commenting on this case the court, in *Metropolitan W. Side El. Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, said: "None of the cases previously decided, as before shown (nor indeed is any further authority referred to), sustain the doctrine of that case (*Keithsburg E. R. Co. v. Henry*, 79 Ill. 294). And we have been unable to find any subsequent case in which it has been cited, except *McReynolds v. Burlington & O. R. Co.*, 106 Ill. 15, where it is referred to by counsel as before shown. But it is not referred to in the opinion, and a holding contrary to it is made." Quoting further from this opinion the court says: "By a practically unbroken line of authority in this state, it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement upon the value of the land. Under the rule the land is said to be damaged only when there is a diminution in value occasioned by the construction and operation of the railroad or improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. *Wilson v. Sanitary District Trustees*, 133 Ill. 443, 27 N. E. 203; *Bohm v. Metropolitan El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; *Rigney v. Chicago*, 102 Ill. 64. As it has already been said, the fact that other property in the vicinity

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is likewise increased in value from the same cause—that is, also specially benefited by the improvement—furnishes no excuse for excluding the consideration of special benefits to the particular property, in determining whether it has been damaged or not, and, if it has, the extent of the depreciation in value. On the one hand damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages for benefits are excluded from consideration. Consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damage to the property, but is simply an ascertainment of whether the land has been in fact depreciated in price or worth,—that is, whether loss or damage has resulted to the owner; for, if his property is of the same value after as before the improvement, he has sustained no loss. If he has lost nothing—or his property has not been depreciated in price, worth or value,—it is not damaged, within the meaning of the constitution, and there can be no recovery. There can be no damage to property without pecuniary loss or injury which lessens its value."

## INDIANA.

In the early case of *McIntire v. State*, 5 Black 384, decided in 1840, the court in discussing the question of compensation in the light of statutory and constitutional provisions in force in Indiana, said: "From this review of the statutes bearing on the question before us, and embracing the very time of the adoption of the constitution, we cannot doubt that its authors, in providing that just compensation should be made for private property taken for public use, designed to convey the meaning which had been attached to that phrase for more than seventeen years, and which has since remained unquestioned for a longer period of time.

"That meaning is not that property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer in consequence of the exercise of the right of eminent domain over his property shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains.

"In ascertaining the extent of the injury, undoubtedly, an estimation of the value of the property taken at the time of taking is a necessary step; but, if the benefits really and substantially resulting to the claimant equal in pecuniary value the value of that of which the public has deprived him, we conceive they constitute a just and constitutional compensation for the deprivation to which he has been subjected."

But under statutory provisions it is now provided that when land is taken for railroad purposes no benefits are to be considered in estimating the compensation due the owner.

Thus, in *McMahon v. Cincinnati & C. S. & L. R. Co.* (1854), 5 Ind. 413, it is held, that in the assessment of damages against a railroad company for the appropriation of lands, no deduction can be made for any benefits which may be supposed to result to the owner of the land to be appropriated. See *Newcastle & R. R. Co. v. Brumback*, 5 Ind. 543; *Evansville, I. & C. Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120; *Evansville, I. & C. Straight Line R. Co. v. Cochran*, 10 Ind. 560; *Grand Rapids R. R. v. Horn*, 41 Ind. 479.

And in *White Water Val. R. Co. v. McClure*, 29 Ind. 536, decided in 1868, it is held that, in a proceeding under the general railroad law for an assessment of damages for taking land, evidence that the farm is worth as much, or more, with the road than without it, is inadmissible. No deduction is to be made for any benefit. But see and compare *Hagaman v. Moore*, 84 Ind. 496; *Rassier v. Grimmer*,



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130 Ind. 219, 29 N. E. 918; *Goodwine v. Evans*, 134 Ind. 262, 33 N. E. 1031.

## IOWA.

In Iowa the rule as to the deduction of advantages which may accrue to property by reason of a portion of it being subjected for public use under eminent domain proceedings is settled by the constitution of that state. The Constitution, sec. 18, art. 1, provides that the jury "shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." This is held to include all benefits and advantages; none being excluded.

The rule formulated by the courts in accordance with this provision is, that the compensation awarded should be for the difference in the value of the land immediately before and after the appropriation of the land for the public use, without considering the benefits that might accrue to the owner by the use or purpose for which the land taken is devoted; and, further, that prospective damages by reason of such user should be disregarded. *Sater v. Burlington & Mount P. P. R. Co.*, 1 Iowa 386; *Deaton v. County of Polk*, 9 Iowa 594; *Israel v. Jewett*, 29 Iowa 475; *Brooks v. Davenport & St. P. R. Co.*, 37 Iowa 99; *Koestenbader v. Peirce*, 41 Iowa 204; *Britton v. Des Moines, O. & S. R. Co.*, 59 Iowa 540, 13 N. W. 710.

## KANSAS.

The Constitution of Kansas, sec. 4, art. 12, provides that no right of way shall be appropriated to any corporation until full compensation therefor be first made in money, irrespective of any benefit from any improvement.

In *St. Josephs R. Co. v. Orr*, 8 Kan. 419, it was sought to offer evidence to show that benefits had accrued to the land by reason of building a railroad. But the court refused to permit any evidence on that point to go to the jury, in view of the constitutional provision above referred to. Later, in *Hunt v. Smith*, 9 Kan. 137, this rule was approved, Mr. Justice Valentine saying: "The commissioners must appraise the value of the land appropriated and assess the damages to that not appropriated (not actually taken), irrespective of any supposed benefits to that not appropriated (not actually taken)." Subsequently, in *Reisner v. Atchison, Union Depot & R. Co.*, 27 Kan. 382, it was said: "Under the provision of sec. 4, art. 12 of the Constitution of the state a railroad company must pay for the right of way irrespective of the proposed improvements of the company; and the compensation for such right of way appropriated to the use of the company includes, not only the value of the property taken, but also the loss the landowner sustains in the value of his property by being deprived of a portion of it." See *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217. See also, *Leroy & W. R. Co. v. Hawk*, 39 Kan. 638, 18 Pac. 943; *Atchison R. Co. v. Blackshire*, 10 Kan. 477; *Interstate Con. R. T. R. Co. v. Simpson*, 45 Kan. 714, 26 Pac. 393; *Florence E. D. & W. V. R. Co. v. Shepherd*, 50 Kan. 438, 31 Pac. 1002; *Chicago K. & W. R. Co. v. Emery*, 51 Kan. 16, 32 Pac. 631.

But in all other cases the rule is that in the appropriation of land for public improvements benefits to the land which is not taken may not only be deducted from the damages to such remainder, but also from the compensation which is to be made for the part actually taken. See *Pottowatomie Co. v. O'Sullivan*, 17 Kan. 58; *Trospen v. Saline County*, 27 Kan. 391.

## KENTUCKY.

In *Jacob v. City of Louisville*, 9 Dana 114, the city of Louisville procured a writ of *ad quod damnum*, which directed an inquisition as to the damage certain property, which it desired for the extension of a street, would sustain by the extension of such street, after deducting the estimated value of advantages which would accrue to

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him from the proposed extension. Upon the inquisition it was proven that so much of his ground as would be covered by the street when extended, was worth three thousand dollars. But when a verdict was rendered it appeared that the jury assessed damages at only twenty-eight dollars, after deducting the value of advantages, according to their estimate of them. Upon appeal the property owner sought to repeal the order of the city judge, for opening the street through his grounds, upon the payment to him of the twenty-eight dollars as assessed. Citing a leading case in that state, *Sutton v. City of Louisville*, 5 Dana 28, the court said: "In that case (*Sutton's Case*) it was decided that the constitutional guaranty of a just compensation to every person whose property shall be appropriated to public use without his consent, entitles the owner of the property so appropriated, to the money value thereof, at least, and we are not only not inclined to disturb the doctrine thus settled, but are still perfectly satisfied that it recognizes the true and only effectual exposition of the constitution. A just compensation for property applied to public use clearly implies, as we think, the value of the property in money. If the owner derive any incidental advantage or benefit from the manner in which it is applied to public use, others participate in some degree, and perhaps equally, in the same or similar advantages resulting to them also; and it would be unjust to exact from the one an equivalent for his incidental benefits, while the others enjoy theirs without the like exactions. \* \* \* In paying for the value of his land, he will be required to make his individual contribution as a citizen of Louisville, and the amount of that contribution may be augmented by the enhanced value of his ground arising from the extension of the street. This is the utmost that should be exacted from him for opening a street for the public use and benefit."

The principle declared may be formulated thus: "Where land is taken under a constitutional guaranty of a just compensation to every person whose property shall be appropriated to public use without his consent, it entitles the owner to the money value thereof at least, by way of compensation, estimated advantages accruing from the proposed improvement, being disallowed as offsets from such value. But the value of any advantages resulting to an owner may be set off as against any disadvantages resulting from the same public act. See *Rice v. The Nicholasville, Danville, and Lancaster Turnpike Co.*, 7 Dana 81; *Robinson v. Robinson*, 62 Ky. (1 Duv.) 162; *Henderson & N. R. Co. v. Dickerson*, 56 Ky. 173; *Louisville & N. R. Co. v. Glazebrook*, 64 Ky. (1 Bush) 325.

## LOUISIANA.

The rule prescribed in Louisiana is, that benefits may be set off against the damages to the part of the land not taken, but cannot be deducted from the value of the part actually taken. Thus, in *New Orleans Pac. Ry. Co. v. Gay*, 31 La. Ann. 430, it was held, that in determining the amount of damage, an owner of land suffers by an expropriation of a part of it in favor of a railroad company, the enhanced value of the balance of the land, caused by the building of the railroad, should be allowed as an offset to the damages. *New Orleans Pac. Ry. Co. v. Gay*, 31 La. Ann. 430; *New Orleans O. & G. W. R. Co. v. Lagarde*, 10 La. Ann. 150.

And in accordance with this principle it was held in *Vicksburg S. & T. R. Co. v. Calderwood*, 15 La. Ann. 481, a suit brought by a railroad company to expropriate land, that the defendant had no right, in addition to the price of the land expropriated, to claim payment for damage which may be done the rest of the property, when it is shown that such damage is more than compensated by advantages derived from the project.

## MAINE.

In Maine special, but not general benefits, which accrue to the remainder of a parcel of land may be set off as against both the value

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of the part actually taken and damages resulting to the remainder. Bangor, etc., R. Co. v. McCombe, 60 Me. 290.

## MARYLAND.

In Maryland special benefits are allowed to be set off in reduction of damages resulting to the remainder of a tract of land where a portion has been taken and used for public purposes; but they are not allowed in reduction of the value of the part subjected. See Penn. R. R. Co. v. Reichert, 58 Md. 261. See also, Hamilton v. Annapolis & E. R. R. Co., 1 Md. Ch. 107; Harness v. Chesapeake Canal, 1 Md. Ch. 248.

## MASSACHUSETTS.

Special or peculiar benefits which proximately enhance the value of the remaining portion of a tract, a part of which has been seized for some public purpose, may be set off as against the value of the part taken, and the damage to the residue.

Thus, in Upton v. South Reading Branch R. Co., 62 Mass. (8 Cush.) 600, it is held, that in estimating the damages occasioned by taking land for a railroad company direct and peculiar benefits or increase of value, occasioned to land of the same owner adjoining or connected with the land taken, are to be allowed by way of set-off; but not any general benefit or increase of value, received by such land in common with other lands in the neighborhood. Meacham v. Fitchburg R. Co., 58 Mass. (4 Cush.) 491.

And in Whitman v. Boston R. R. Co., 3 Allen 133, it was held, that, if by reason of the location of a railroad over a part of a lot of land, and the filling up of an adjacent canal, in which the owner of the lot had a privilege, the value of the land was so enhanced, that what afterwards remained of it was worth more than the entire lot was worth before, the owner has no claim for damages. See Old Colony R. Co. v. Miller, 125 Mass. 1, 28 Am. Rep. 194; Childs v. New Haven & N. Co., 133 Mass. 253; Whitney v. Boston & M. R. R. Co., 89 Mass. 313.

## MICHIGAN.

The rule as to the assessment of benefits in Michigan is apparently not well settled.

In City of Detroit v. Daly, 68 Mich. 503, 37 N. W. 11, it was held, that Local Acts 1885, No. 354, § 12, relating to opening streets and alleys in the city of Detroit, which provides that the jury, in determining the amount of damages to be assessed for taking private property for public use, may take into consideration the amount of benefits, if any, which the portion not taken will receive from the intended improvement, but that they need not state in their report the damages separately, violates § 11, art. 14 of the Constitution, which prescribes that the legislature shall prescribe a uniform method of taxation. See further, City of Detroit v. Beecher, 69 Mich. 15, 37 N. W. 17; City of Detroit v. Sauer, 69 Mich. 164, 37 N. W. 18; City of Detroit v. Stoeple, 69 Mich. 166, 37 N. W. 19; City of Detroit v. Heintz, 69 Mich. 167, 37 N. W. 19; Chicago & G. F. R. Co. v. Hough, 61 Mich. 307, 28 N. W. 532.

## MINNESOTA.

The rule adopted in Minnesota permits special, but not general benefits, to be set off as against damages resulting to the residue of land,—a portion of which is taken,—and, also, the value of the part not taken.

Declaring this doctrine in Winona, etc., R. R. Co. v. Waldron, 11 Minn. 515, 88 Am. Dec. 100, Millan, J., speaking for the court, said: "We are compelled, in establishing a rule for our own state, to adopt that which, in view of the important results to public improvements and to private rights, seems most in accordance with settled principles of law in analogous cases. The charter of the railroad

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company in this case provides the manner in which compensation for lands taken for the road shall be ascertained and determined: 'In estimating damages or compensation to be paid to any claimant to lands, or interest in lands so proposed to be taken, the said commissioners shall take into consideration the benefits to accrue to the claimant by the construction of said railroad, and allow such benefits by way of recoupment against the damages which such claimant may sustain thereby, and report only the balance of damages which shall remain after applying such benefits in recoupment thereof; but no balance shall be in any case reported in favor of the company.' This language does not aid us in determining what elements are to constitute the damages for which compensation is to be allowed, or the benefits which are to be recouped therefrom, but leaves these questions to be determined by other principles of law. The court charged the jury, 'that any general benefits arising from the construction or operation of the railroad, shared by the defendants in common with the whole country in this vicinity, and not peculiar to them or to other lands actually crossed by the road, you will exclude and not consider in ascertaining their damages; as, for instance, such benefits as defendants would receive if the railroad should be constructed through the country, but not crossing this farm.' The court also charged the jury that 'if the farm would sell for as much,—as it now is, with the road constructed through it, less the value of the land actually taken, as it would bring if the road ran through the country, but not crossing this farm, then defendants have sustained no damage whatever. If it will not, then that reduction in the market value of the lands not taken is the measure of defendants' damages.' To these instructions to the jury the appellant excepted. We think this charge was correct. The benefits which result to the country generally, or to particular communities, by reason of the construction and operation of railroads, and other internal improvements prosecuted by private enterprise, although for public use, are to be shared equally by the citizens affected by them. The railroad company, the appellant, is a private corporation, and possesses only the rights conferred by the statute. The state has granted to it important and valuable rights and franchises, among them a corporate existence, the right to take, in invitum, the land of the private citizen for the construction, and operation of a railroad, and the right to take fare, freight, and tolls for carrying passengers and merchandise. In the consideration of these and other privileges, the company contracts to build and operate the road in accordance with the terms of the act. The charter gives it no right to assess upon lands benefited by the road through which it does not pass any sum to aid in the construction, pay damages, or otherwise; and whatever may be the case, when a public improvement is prosecuted by the public, in this instance no such right exists. It would scarcely be claimed by the appellant here that it could maintain an action against a land holder through whose land the road does not pass, to recover any sum for general benefits accruing to him from the construction of the road. This principle being established, it follows that if benefits of this character are to be recouped from damages suffered by the owner of the land through which the road passes, the operation of the law must be very unequal and unjust.

"These allowances will fall upon but a small portion of those receiving benefits, and that portion, those whose lands have been taken and injured without their consent; thus requiring them to bear the whole public burden, and at the same time denying to them advantages conferred on others. Such construction of the charter would be unreasonable; the benefits to be deducted must be those resulting directly to the land a part of which is taken for the construction of the road,—not through the vicinity, but through the land \* \* \*.

"The court also charged the jury as follows: 'Against this market value of the land actually taken, you will offset nothing whatever;' to which the appellant excepted. There seems to be a distinction

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made here between the value of the land taken for the road and the injury done to the remaining land by taking it. It would seem to be implied by the charge, and conceded by the respondents, that special benefits to the remainder of the land may be recouped from the damages thereto incurred by the owner, as distinguished from the value of the land actually taken for the road; and such seems to be the position of the authorities, which hold that the value of the land taken must be paid in money: *Robbins v. Milwaukee & H. R. R. Co.*, 6 Wis. 610. I am unable to see a ground for any such distinction. It seems to me the right to compensation for both elements of damage is found in the same source,—the fundamental right of the citizen to just compensation when his private property is taken for public use. The compensation is for the taking and its proximate consequences; otherwise it leaves the right of the citizen to redress for those consequences at the option of the legislature, to which I do not assent. To take land of the citizen for public use by the state when necessary is an essential incident to sovereignty. The right of eminent domain is not conferred by the constitution, but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress. If, therefore, the limitation extends only to requiring compensation for the land taken, any other injury being done under the power of eminent domain, and in pursuance of statute, must be *damnum absque injuria*, and the citizen has no redress. This would take from the principle contained in the constitutional provision half its virtue, and in many, if not in most, cases render the citizen comparatively without remedy. For in this day we know that in many cases the value of the strip of land actually taken for a railroad is but a small portion of the actual damage to the owner by the construction of the road through his land. Nor can I discover that the nature of the injury is more aggravated, or the right infringed more sacred, in the one case than in the other. In one instance the possession of a small part of a tract of land may be taken, and in the other the whole tract or parcel may be rendered comparatively useless or valueless. The constitution should receive no such narrow and technical construction. It was intended to declare a fundamental principle of government, that when the public exigency requires the government to take for public use the property of the citizen, full compensation shall be made for the injury; not only the value of the portion of land taken but the damages caused by taking it. \* \* \* If this view is correct, then the damages are a unit, although composed of integral parts, and if benefits are to be deducted at all, they must be deducted from the aggregate sum; and it would seem but just and equitable that if the same act at the same time inflicts injury and confers benefits, the one should be set off against the other in determining the compensation due for the injury; then a just and full compensation is ascertained, and thus ascertained, must be paid in money. \* \* \* The decided weight of authority in our country, we think, sustains this conclusion, whatever may be the reasoning by which it is arrived at \* \* \* .”

See *St. Paul, M. & M. R. Co. v. City of Minneapolis*, 35 Minn. 141, 27 N. W. 500; *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769; *Arbrush v. Town of Oakdale*, 28 Minn. 61, 9 N. W. 30; *Schroeder v. First Div. St. P. & P. R. Co.*, 28 Minn. 299, 9 N. W. 857; *Minnesota Cent. R. Co. v. McNamara*, 13 Minn. 508; *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 260.

## MISSISSIPPI.

Upon the ground that compensation is money, it is held in *Mississippi*, that benefits shall not be regarded in estimating the compensation to be paid for land taken or damaged under eminent domain proceedings.

In *Brown v. Beatty*, 34 Miss. 227, the court says: “The party, at the time the assessment was made was entitled to ‘just compensation’ for the injury sustained in consequence of the appropriation of his

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property to the uses of the road. No diversity can exist as to the true construction of the language of the bill of rights. He was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid as to prescribe how much or how little he should receive. Manifestly, a party whose property has been taken and appropriated to public use in the construction of a railroad cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property. The cash value and the actual damage are the true standards by which to determine the compensation to which, in such cases, the party is entitled. We think, therefore, that the provision in the eighth section, by which the jury are directed, in assessing the damages when land is the subject, to take into the estimate, as an offset to the claim of compensation, 'the benefit' to the owner resulting from the location of the road upon his land, is invalid."

See *Sullivan v. Lafayette Co.*, 61 Miss. 271; *Natchez, J. & C. R. Co. v. Currie*, 62 Miss. 506; *Isom v. Miss. Ent. R. Co.*, 36 Miss. 300; *New Orleans J. & G. R. Co. v. Moye*, 39 Miss. 374.

## MISSOURI.

The rule declared by the supreme court of Missouri is, that special or peculiar benefits accruing to land, a portion of which is subjected under lawful condemnation proceedings for some public use, may be set off in reduction of the value of the part actually taken, as well as against the damages resulting from such use to the residue.

The rule was thus correctly stated in an instruction, as follows: "The court instructs the jury that, in estimating the damages growing out of the appropriation by defendant of a right of way for its railroad over plaintiff's lands, the jury should consider the quantity and value of the land taken, and the damages if any, to the tract of which it forms a part, by reason of the road running through it, and from the sum of these should deduct the benefits, if any, peculiar to such tract, arising from the running of the road through it; and by 'peculiar benefits' is meant such benefits derived from the location of the road as are peculiar to the tract itself, and not shared in common by it and other lands in the same neighborhood." *McReynolds v. Kansas City, C. & S. Ry. Co.*, 110 Mo. 484, 19 S. W. 824; *Railroad Co. v. Chrystal*, 25 Mo. 544; *Lee v. Railroad Co.*, 53 Mo. 178; *Quincy & R. M. Railroad Co. v. Ridge*, 57 Mo. 600; *Railroad Co. v. Waldo*, 70 Mo. 629; *Railroad Co. v. Calkins*, 90 Mo. 538, 3 S. W. 82; *Railroad Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock Yards Co.*, 120 Mo. 541, 25 S. W. 399; *St. Louis, K. & N. W. Ry. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 26 L. R. A. 751; *Chicago & C. F. R. Co. v. Vivian*, 33 Mo. App. 583; *Ragan v. Kansas City & S. E. R. Co.*, 111 Mo. 456, 20 S. W. 234; *Louisiana & F. P. R. Co. v. Pickett*, 25 Mo. 535; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466; *Hosher v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 303; *St. Louis & O. H. & C. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *Lee v. Teobo & N. R. Co.*, 53 Mo. 178; *Teobo & N. R. Co. v. Kingsberry*, 61 Mo. 51.

## NEBRASKA.

In Nebraska the rule may be stated thus: "Where land is condemned for railroad purposes the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken; and where a portion of the tract remains, if it can be said with reasonable certainty that the road properly constructed and carefully operated, will injure it, he is also entitled to recover for that. In other words, special benefits may go to reduce the damages to

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what remains of the land, but cannot be set off against the value of the part taken."

In the consideration of injuries, however, those which are merely speculative and contingent upon the construction or negligent operation of the road are too remote and uncertain to be considered. *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585, 10 N. W. 491; *Fremont, etc., R. Co. v. Lamb*, 11 Neb. 593, 10 N. W. 493; *Fremont, etc., R. Co. v. Ward*, 11 Neb. 597, 10 N. W. 524; *Omaha Sou. Ry. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289.

## NEW JERSEY.

The rule adopted in New Jersey permits special benefits to be considered in reduction of the value of the portion of land taken and the damages sustained by the residue.

Discussing this proposition in *State v. Hudson Co.*, 55 N. J. L. 88, 25 Atl. 322, *Dixon, J.*, said: "The claim of the prosecution is that the constitution does not permit, and this statute does not authorize, the deduction of benefits. Just compensation for taking part of one entire tract of land for public use, cannot, we think, be ascertained, without considering all the proximate effects of the taking. These are the withdrawal of the part taken from the dominion of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken to a certain public use. Just compensation is ascertained by combining the pecuniary value of all these facts; if any be excluded, what is given is more or less than is just. The value of the land taken is no more essential to just compensation than is satisfaction for the damages done to the residue, nor is it more exempt from diminution on account of benefits conferred. There is, however, a possibility of benefit to accrue from certain public uses for which land is taken, like the opening of highways, which should not be considered, for two reasons: First, because this benefit is to arise, if at all, in the indefinite future, while the compensation must be such as is just, at the time of the taking; second, because it is so uncertain in character as to be incapable of present estimation. Such benefit is that which may spring from the growth of population, if it should be attracted by the public improvement for which the land is taken, and from similar sources. It is usually styled 'general benefit,' because it affects the whole community or neighborhood. But any benefit which accompanies the act of taking the land for the contemplated use, and which admits of reasonable computation, may enter into the award." See *Swayze v. New Jersey Midland R. Co.*, 36 N. J. L. (7 Vroom) 295; *Packard v. Bergen Neck Ry. Co.*, 54 N. J. L. (25 Vroom) 229, 23 Atl. 722.

## NEW YORK.

Two rules seem to be prevalent in the state of New York. One applies where the state or a municipal corporation subjects the land for some public use. This rule is, that both general and special benefits may be set off against the value of the land taken, and in reduction, also, of the damages accruing to the part not taken. *Genet v. City of Brooklyn*, 99 N. Y. 296, 120 N. Y. 309, 1 N. E. 777.

The other rule, applying to the subjection of land by private corporations, is, that both general and special benefits may be set off in reduction of the injury claimed to be sustained by the residue of the land, by reason of the public user of the portion taken,—but cannot be set off against the value of the strip actually taken. This is governed by statute law. See *Albany Northern R. Co. v. Lansing*, 16 Barb. (N. Y.) 68; *Newman v. Met. El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901; *Bohm v. Met. El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802; *Washington Cemetery v. Prospect Park & C. D. R. Co.*, 68 N. Y. 591. See and compare *Heath v. Brown*, 50 N. Y. 302.

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## NORTH CAROLINA.

In North Carolina it is permitted to offset any damage to the remaining strip of land, after a portion has been subjected for public use, with the special benefits accruing to it from such user, and the value of the part taken may, also, be reduced by such benefits. *Raleigh & A. A. R. Co. v. Wicker*, 74 N. Car. 220; *Freedle v. North Car. R. Co.*, 49 N. Car. 89; *Haislip v. Wilmington & W. R. Co.*, 102 N. Car. 376, 8 S. E. 926.

## NORTH DAKOTA.

By the constitution of North Dakota, art. 1, § 14, the assessment of benefits is prohibited in favor of any other than municipal corporations.

## OHIO.

Prior to the adoption of the constitution of 1851, the rule prescribed in estimating the compensation to be made to the owner of land where a portion of it had been lawfully seized for public purposes was, that all benefits, including special as well as general, could be set off against the value of the land taken, and the damages to the remainder. This ruling was under the Constitution of 1802, art. 8, § 4, which provided, that "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation be made in money to the owner." Under this provision it was decided in the case of *Symonds v. The City of Cincinnati*, 14 Ohio 147, that where a portion of a lot had been subjected for a public purpose any increased benefit arising from the improvement made by the city to the balance of the lot could be set off against the value of the plaintiff's property.

This decision was based upon the ground that the constitution only requires compensation to be made, and that it is made when the party receives in money the difference between the value of his property before, and what remains after the work is constructed. *Kramer v. The Cleveland and Pittsburg Railroad Co.*, 5 Ohio St. 140; *Columbus, Piqua & I. R. Co. v. Simpson*, 5 Ohio St. 251; *Cleveland & Pittsburg R. Co. v. Ball*, 5 Ohio St. 568; *Browne v. City of Cincinnati*, 14 Ohio 541; *Platt v. Penn. Co.*, 43 Ohio 228, 1 N. E. 420.

But under the constitution of 1851, a wholly different rule is now enforced, as all benefits, both general and special, are prohibited in estimating the compensation to be paid for land taken, and the effect of such taking. See Constitution of Ohio (1851), art. 1, § 19; also, art. 13, § 5.

Construing this provision, in *Giesy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308, the court said: "The jury are not required to consider how much, nor permitted to make any use of the fact that it (the remaining portion of land) may have increased in value by the proposed construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct." See *The Little Miami R. Co. v. Collett*, 6 Ohio St. 182; *The Cincinnati & Springfield R. Co. v. Longworth*, 30 Ohio St. 108.

## OREGON.

In Oregon it is provided by statute that when a railroad takes land for a right of way no benefits can be deducted from the amount to be paid for the part taken. *Oregon Cent. R. Co. v. Wait*, 3 Ore. 91; *Willamet Falls Canal, etc., R. Co. v. Kelly*, 3 Ore. 99.

But in favor of others than railroad companies it seems that special benefits accruing to land, a part of which has been subjected under eminent domain proceedings for public purposes, may be set off against both the value of the portion taken, and the damage suffered by the residue by reason of the taking of a portion, and the use to which it is devoted. The rule is thus laid down and discussed in



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*Beekman v. Jackson County*, 18 Ore. 283, 22 Pac. 1074, by Thayer, C. J., who said:

"The main question in the case is whether the jury, in considering the question of damages to the appellant in consequence of opening the road, acted upon a proper basis. Their duty was to assess and determine how much less valuable, if any, the appellant's lands would be rendered by the opening of the road. In ascertaining such fact they should, of course, take into consideration any special benefits which the lands would thereby receive. They evidently determined that the lands would be benefited by the building of the road; but whether they had in view a peculiar benefit to the appellant's premises, or some general benefit which he would receive in common with others, does not appear. The appellant has brought here the substance of all the evidence in the case, including a plat of the premises, and the line of the proposed road, and I am unable to discover therefrom that the appellant's premises will be benefited by the opening of the road any more than any other premises in the vicinity will be. From the form of the verdict, and the nature and character of the evidence given, I should infer that the benefits considered by the jury in making up the verdict were such as result to the land-owners in a community by the construction of public thoroughfares. The jury in fact virtually said as much. They said that the benefits to the lands by the construction of the road would be equal to the damages. The opening of the road and the construction of the road might have quite a different effect upon the value of the appellant's premises. The latter, no doubt, would materially benefit them, but would involve the expenditure of a sum of money, a proportionate share of which the appellant would be compelled to contribute before realizing it, and then the benefit would not necessarily be special. The evidence in the case and the plat of the lands show that they are already accessible to a public road which answers their necessities in that particular; and the benefit to them by the opening of the road in question is evidently remote and speculative. Parties owning large bodies of land should not stand in the way of the laying out and establishing of public roads; nor should their lands be taken for such purpose without just compensation. The constitution of the government guarantees them that, and its provisions should be observed. The reasonable value of the land taken, the effect of the taking upon the remainder, the manner of the location of the road, the necessity it may occasion for the removal of buildings or fences, and any other material inconvenience or burden it may create, should be fairly considered, and the sum of the several items, should be allowed the owner, subject to any reduction on account of special benefits he may derive therefrom. But, before the jury are authorized to make any such reduction, the evidence must show that the remainder of the land will gain some peculiar advantage by the opening of the road, and they should be made to understand that they cannot arbitrarily set off benefits against damages unless the former pertain to the character here indicated."

## PENNSYLVANIA.

The true measure of compensation, as held in *Pennsylvania*, is, that it is the difference between what the property unaffected by the obstruction would have sold for at the time the injury was committed, and what it would have sold for as affected by the injury,—special or peculiar benefits only being considered.

In other words, special benefits are allowed in reduction of the value of the part taken, and also as an offset to damages resulting to the part not taken.

Discussing this question in *Setzler v. Penn. Schuylkill Val. R. Co.*, 112 Pa. St. 56, 4 Atl. 370, the court quotes the following from the opinion of Chief Justice Gibson in *Schuylkill Navigation Co. v. Thoburn*, 7 Serg. & R. 411.

"The adjustment of this difference involves, in all cases, a fair

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and just comparison of the advantages and disadvantages resulting from the opening and operation of the road and the construction of its works; but the advantages to be considered are such only as are special, and the disadvantages such as are actual. The general appreciation of property in the neighborhood consequent to the projected construction of the road cannot enter into the calculation. To this the landowner whose lands have been taken is as fairly entitled as is his neighbor whose possession and enjoyment have not been disturbed. The general increase of value, resulting from the growth of public improvements, railroads, canals, and highways, accrues to the public benefit, and in the computation of damages the landowner cannot be charged therewith. The question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood." *Lodge v. Frankfort & H. R. Co.*, 30 Leg. Int. 92; *Danville H. & W. Ry. Co. v. Gebhart*, Wkly. Notes Cas. 237; *Danville, etc., Ry. Co. v. McKelvey*, Wkly. Notes Cas. 338; *Pa. & N. Y. R. & C. Co. v. Burnell*, 81 Pa. St. (31 P. F. Smith) 414; *Pittsburgh & L. E. R. Co. v. Robinson*, 95 Pa. St. 426; *Rees v. Schuylkill River E. S. R. Co.*, 135 Pa. St. 629, 20 Atl. 149; *Harris v. Schuylkill River E. S. R. Co.*, 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278; *Shirk v. Pennsylvania R. Co.*, 9 Lanc. Bar. 198; *Gorgas v. Philadelphia H. & P. R. Co.*, 144 Pa. St. 1, 22 Atl. 715; *McElheny v. McKeesport & Du Quene Bridge Co.*, 153 Pa. St. 108, 25 Atl. 1021; *Plank-Road Co. v. Thomas*, 20 Pa. St. 91; *Plank-Road Co. v. Romage*, 20 Pa. St. 95; *Plank-Road Co. v. Rea*, 20 Pa. St. 97; *Homstein v. Atl. & G. W. R. Co.*, 51 Pa. St. 57; *Pittsburgh & L. E. R. Co. v. Robinson*, 38 Leg. Int. 22; *Pittsburgh Ry. Co. v. McCloskey*, 110 Pa. St. 436, 1 Atl. 555; *Short v. Rochester & P. R. Co. (Pa.)*, 8 Atl. 596; *Mahaffey v. Beech Creek R. Co.*, 163 Pa. St. 158, 29 Atl. 881; *Long v. Harrisburg & P. R. Co.*, 126 Pa. St. 143, 19 Atl. 39.

## RHODE ISLAND.

The rule in Rhode Island, as prescribed in *Howard v. City of Providence*, 6 R. I. 514, is, that in estimating damages for land taken for a street, under the act of January, 1854, entitled "An act in relation to the laying out, enlarging, straightening, or otherwise altering streets in the City of Providence," benefits resulting to the lands not taken, from the improvement, may be deducted from the value of the land taken and any substantial damage done to the remainder of the land.

## SOUTH CAROLINA.

It is provided by statute in South Carolina that benefits cannot be considered in estimating compensation for land taken for railroad purposes. *Bowen v. Atl., etc., R. Co.*, 17 S. Car. 574, 14 Am. & Eng. R. Cas. 332; *Charleston, C. & C. R. Co. v. Leech*, 39 S. Car. 446, 17 S. E. 994.

## TENNESSEE.

Tennessee adheres to the rule that special benefits may be set off as against damages to the remainder, but not in reduction of the value of the part taken. See *Woodfolk v. Nashville & C. R. Co.*, 32 Tenn. (2 Swan) 422; *Paducah & M. R. Co. v. Stovall*, 59 Tenn. (12 Heisk.) 1; *Mississippi R. Co. v. McDonnell*, 59 Tenn. (12 Heisk.) 64.

## TEXAS.

Upon the theory that compensation should be made in money for the part taken, but treating the claim for damage to the remainder as consequential and properly subject to the set-off of all advantages, it is held in Texas, that general or special benefits accruing to the residue of land, a portion of which has been subjected, may be allowed in reduction of damages to such portion, but not in reduction

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of the value of the part taken. See *Paris v. City of Mason*, 37 Tex. 447; *McDonald v. Texas P. R. R. Co.*, 1 Posey Unrep. Cas. 191; *Texas & P. Ry. Co. v. Hays*, 3 Wilson Civ. Cas. Ct., § 59. But see also, *Texas & St. L. R. Co. v. Matthews*, 60 Tex. 215.

## VERMONT.

The rule which seems to prevail in Vermont, permits special, but not general benefits to be set off both as against the value of the land taken, and the damage resulting to the residue. See *Adams v. The St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240.

## VIRGINIA.

As declared in Virginia, the rule relative to the deduction of benefits accruing to land where a portion is acquired under condemnation proceedings is, that the landowner is entitled to have the cash value of the part taken, irrespective of benefits, but as to the remaining portion of the land special benefits which have<sup>o</sup> accrued to it by reason of the public use of a part, may be deducted from the damages claimed to have been suffered by the residue. See *The James River & K. Co. v. Turner*, 9 Leigh 313; *Mitchell v. Thorne*, 21 Gratt. 165; *Richmond & Mecklenburg R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

## WASHINGTON.

The constitution of Washington prohibits the assessment of benefits in favor of all corporations other than municipal corporations. *Enoch v. Spokane Falls, etc., R. Co.*, 6 Wash. 393, 33 Pac. 966; *Northern Pac. & P. S. S. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514; *Kaufman v. Tacoma, O. & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137.

## WEST VIRGINIA.

By statute in West Virginia, the rule is fixed, allowing special benefits to the land not taken to be set off against damages which it may sustain; but as to the part taken compensation must be made according to its value, irrespective of benefits. Thus, it is provided by ch. 42, § 14, W. Va. Code 1899, that, "As to each tract, the commissioners, after viewing the same, and hearing any proper evidence which is offered, shall ascertain what will be a just compensation to the person entitled thereto for so much thereof as is proposed to be taken, and for damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, or the purpose to which the land to be taken is to be appropriated, and report to the following effect." *Railroad Co. v. Halstead*, 7 W. Va. 301; *Grafton & Greenbrier R. Co. v. Foreman*, 24 W. Va. 662.

## WISCONSIN.

In *Milwaukee & M. R. Co. v. Ebel* (1851), 4 Chand. 72, 3 Pin. 334, it is held, that from the value of the land taken, and the damages incident to the taking, should be deducted the benefits accruing to the owner from "the construction of the road." The phrase "the construction of the road," as used in the charter, does not mean the completion of the whole work, but the construction of that particular portion which runs through the party's land.

But in *Robbins v. Milwaukee & H. R. Co.* (1857), 6 Wis. 636, it is held that the owner of land, which is taken by a railroad company, is entitled to recover the value of such interest or title in the land as he is shown to have, as it stood at the time of taking without any diminution, of any benefits, advantages or offset whatever; such damages as result immediately and directly, as the destruction of wells, springs, out houses, etc., but not remote or speculative damages; the value of fences made necessary; injury to his whole tract from a less convenient communication, but against these special and

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peculiar damages may be set off any peculiar benefits resulting to his premises beyond those enjoyed by all the neighbors.

And in *Chapman v. Oshkosh & M. R. R. Co.* (1873), 33 Wis. 629, it was held proper, in an action against a railroad company for land taken, to direct the jury to "deduct" from the damages which they might allow for injuries to plaintiff's land contiguous to the land taken, the value of any "special benefits" which the remaining land received from the construction of the road.

And in *Neilson v. Chicago, M. & N. W. Ry. Co.* (1883), 58 Wis. 516, 17 N. W. 310, it was held, that in estimating the damages to property by the construction and operation of a railroad adjoining it, the rule is that the measure of such damages is the depreciation of the market value caused thereby, less any special benefits accruing to the owner of the property. See *Washburn v. Milwaukee & L. W. R. Co.* (1884), 59 Wis. 364, 18 N. W. 328.

## ENGLAND.

In *Eagle v. Charring Cross R. Co.*, L. R. 2 C. P. 638, an umpire to whom was referred a claim for compensation in respect to damages sustained by the plaintiff in consequence of his premises being injuriously affected by the erection of certain works by the defendants under their act of Parliament, found by their award that the company had by the erection of such works occasioned a diminution of light to the plaintiff's premises whereby they were rendered less convenient and suitable for the requirements of his trade carried on therein, and assessed the amount of compensation due in respect of such damage at £656; he further found that notwithstanding such diminution of light, the saleable value of the plaintiff's interest in the premises was not diminished (the value of the property in the neighborhood having become greatly enhanced by reason of the company's works); that, except the said damage in his trade or business, he had not sustained, and would not sustain, any damage in the premises; and that, except the compensation to which he was, or might be, by law entitled in respect of his said trade or business aforesaid, he was not entitled to any compensation in the premises. It was held, that the diminution of light was an injurious affecting of the plaintiff's interest in the premises, which entitled him to compensation under the statute; and that it was no answer, that, by reason of accidental circumstances, the saleable value of the premises was not diminished. See English Law Clauses, Consol. Act 1845.

## UNITED STATES.

The rule which seems to be approved by the supreme court of the United States is, that both general and special benefits may be set off against damages resulting to the remaining portion of the tract of land, a part of which is taken, and may be also, allowed in reduction of the value of the part taken. *Chesapeake & O. Canal Co. v. Key*, 3 Cranch, C. C. 599, Fed. Cas. No. 2,649. See also, *Lehigh Valley Coal Co. v. City of Chicago* (C. C.), 26 Fed. 415; *Lafin v. Chicago & W. & N. R. Co.* (C. C.), 33 Fed. 415; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622.

## c. Classification of Rules.

## (1) Benefits Not Regarded in Estimating Compensation.

In some states the rule is laid down that benefits to the remainder of land, a portion of which is taken, cannot be considered in determining the compensation to be rendered for the loss sustained by the owner of the property by reason of the public use for which his land is taken. This rule proceeds upon the theory that compensation means a payment in money, and no substitute will answer the constitutional requirement in the absence of consent of the parties to the transaction. By constitutional or statutory provision this rule is adopted in some states; in others it is declared by the courts. See *Alabama & F. R. Co. v. Burkett*, 42 Ala. 83.

*California.*—By constitutional provision the assessment of benefits

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is prohibited generally, except in favor of municipal corporations. See Constitution Cal., art. 1, § 14; *Pacific Coast Ry. Co. v. Porter* (1887), 74 Cal. 261, 15 Pac. 774.

Prior to this provision a different rule prevailed. See ante, 2, b, "California"; post (5), *San Francisco, etc., R. Co. v. Caldwell*, 31 Cal. 368.

*Indiana*.—See ante, 2, b, "Indiana." Also, see post (5).

*Iowa*.—See Const. Ohio, art. 1, § 18; *Sater v. Burlington & Mt. P. P. R. Co.*, 1 Iowa 386; *Brooks v. Davenport & St. P. R. Co.*, 37 Iowa 99.

*Kansas*.—See Const. Kansas, art. 12, § 4; *St. Joseph's R. Co. v. Orr*, 8 Kan. 419. See also, ante, 2, b, "Kansas."

*Mississippi*.—*Natchez, J. & C. R. Co. v. Currie*, 62 Miss. 506; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *New Orleans J. & G. N. R. Co. v. Moye*, 39 Miss. 374. See also, *Brown v. Beatty*, 34 Miss. 227; *Sullivan v. Lafayette County*, 61 Miss. 261.

*North Dakota*.—Prohibited except in favor of municipal corporations. See Const. North Dakota, art. 1, § 14.

*Ohio*.—Prior to constitution of 1851, under constitution of 1802, a different rule prevailed. See ante, 2, b, "Ohio," post, subhead (5). See also, *Kramer v. The Cleveland & Pittsburg R. Co.*, 5 Ohio St. 140. Since the adoption of the constitution of 1851, the rule now under discussion was adopted. See Const. Ohio (1851), art. 1, § 19; art. 13, § 5. See also, *Giesy v. Cincinnati, Wil. & Z. R. R. Co.*, 4 Ohio St. 308.

*South Carolina*.—By statute benefits are prohibited to be considered. See *Bowen v. Atl., etc., R. Co.*, 17 S. Car. 574, 14 Am. & Eng. R. Cas. 332; *Charleston C. & C. R. Co. v. Leech*, 39 S. Car. 446, 17 S. E. 994.

*Washington*.—Prohibited except in favor of municipal corporations. See *Enoch v. Spokane Falls, etc., R. Co.*, 6 Wash. 393, 33 Pac. 966; *Northern Pac. & B. S. S. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514; *Kaufman v. Tacoma, O. & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137. See ante, 2, b, "Washington."

(2) **Assessment of Benefits Which Are Special and Peculiar as against Damages Resulting to the Remainder, but Not against the Value of the Part Taken**

As held in Virginia and other states in assessing damages, or ascertaining the compensation which is to be paid for the land taken for public use the owner is entitled to have the value of the land taken for public purpose, without any deduction, and such further damage as the residue of such tract will sustain beyond the peculiar benefits which will be derived to such residue from the use to which the land appropriated is put.

This rule is based upon the theory that compensation in money is required for that portion of the land actually taken, while for disadvantages which may be termed consequential or incidental damage the legislature is empowered to prescribe the rule of compensation. This rule is open to criticism as being rather illogical.

*Illinois*.—See ante, 2, b, "Illinois." Also, see post (5).

*Maine*.—*Bangor, etc., R. Co. v. McCombe*, 60 Me. 290.

*Maryland*.—*Pennsylvania R. R. Co. v. Reichert*, 58 Md. 261. See *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107; *Harness v. Chesapeake Canal*, 1 Md. Ch. 248.

*Nebraska*.—*Chicago, K. & N. Ry. Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79; *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585, 10 N. W. 491; *Omaha Sou. Ry. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289.

*Tennessee*.—*Paducah & M. R. Co. v. Stovall*, 59 Tenn. (12 Heisk.) 12.

*Virginia*.—*James River & Kanawha Co. v. Turner*, 9 Leigh 313; *Mitchell v. Thorne*, 21 Gratt. 165; *Richmond & Mecklenberg R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901.

*West Virginia*.—*Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 200, 19

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S. E. 522; *Railroad Co. v. Halstead*, 7 W. Va. 301; *Grafton & Greenbrier R. Co. v. Foreman*, 24 W. Va. 662.

*Wisconsin*.—*Robbins v. Milwaukee & H. R. Co.* (1857), 6 Wis. 636; *Nelson v. Chic. M. & N. W. Ry. Co.* (1883), 58 Wis. 516, 17 N. W. 310; *Washburn v. Milwaukee & L. W. R. Co.* (1884), 59 Wis. 364, 18 N. W. 328; *Chapman v. Oshkosh & M. R. Co.* (1873), 33 Wis. 629. But see also, *Milwaukee & M. R. Co. v. Eble* (1851), 4 Chand. 52, 3 Pin. 334; ante, 2, b, "*Wisconsin*," post (4).

(3) **Assessment of Both General and Special Benefits as against Damages to the Remainder, but Not as against the Value of the Part Taken.**

Varying slightly from the last-named qualification it is held in some jurisdictions that not only may special and peculiar benefits derived by taking and using a portion of a tract of land be deducted from damages accruing to the residue, but general benefits can likewise be set off as against the damages accruing to the part not taken. The reason upon which the decision is based, is very similar to the above-mentioned class, it being that compensation must be made in money for the part taken, but as to the damage to the remainder it is regarded and treated as consequential, and is properly subject to the set-off of all advantages.

*Colorado*.—See Civil Code of Colorado 1883; *Colorado Cent. R. Co. v. Humphreys* (Colo. 1891), 16 Colo. 34, 26 Pac. 165. See also, ante, 2, h, "*Colorado*."

*Georgia*.—*Jones v. Wills Val. R. Co.*, 30 Ga. 43; *City of Atlanta v. Central R. & Banking Co.*, 53 Ga. 120; *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 Ga. 396; *Wolff v. Georgia So. & F. R. Co.*, 94 Ga. 555, 20 S. E. 484. But see *Young v. Harrison*, 17 Ga. 30, in which a different doctrine was applied, which was passed without mention in *Jones v. Wills Val. R. Co.*, 30 Ga. 43, which laid down the rule now under treatment. See also, post (5).

*Kentucky*.—*Sutton v. City of Louisville*, 5 Dana 28; *Henderson & N. R. Co. v. Dickerson*, 56 Ky. 173; *Louisville & N. R. Co. v. Glazebrook*, 64 Ky. (1 Bush) 325.

*Louisiana*.—*Vicksburg S. & P. R. Co. v. Caldwell*, 15 La. Ann. 481; *New Orleans O. & G. W. R. Co. v. Lagarde*, 10 La. Ann. 150; *New Orleans Pac. Ry. Co. v. Gay*, 21 La. Ann. 430.

*New York*.—By statute the rule now under discussion seems to apply where property is subjected by private corporations. *Newman v. Metropolitan El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 29 N. E. 802.

When land is condemned by the state or a municipal corporation a different rule is enforced. See ante, 2, b, "*New York*." Also, see post (5).

*Texas*.—*Paris v. City of Mason*, 37 Tex. 447; *McDonald v. Texas P. R. Co.*, 1 Posey Unrep. Cas. 191; *Texas & P. Ry. Co. v. Hays*, 3 Wilson Civ. Cas. Ct. App., § 59. But see also, *Texas & St. L. R. Co. v. Matthews*, 60 Tex. 715.

(4) **Allowance of Special Benefits as an Offset against Damages to the Remainder and Value of a Part Taken.**

Upon the theory that just compensation is construed to mean recompense for the net resulting injury, and excludes a share of the general advantage, because to allow it would be to distribute it unequally, charging those whose lands are taken for that which the rest of the community may enjoy without cost, it is declared that special benefits may be allowed in reduction of the value of the part taken and of the damages to the remainder, but general benefits will not be considered. Thus, it is held in *New Jersey, State v. Hudson R. Co.*, 55 N. J. L. 88, 25 Atl. 322, that just compensation for taking part of an entire tract of land for public use cannot be ascertained without considering all the proximate causes of the taking, namely, the withdrawal of the part taken from the dominion of the former owner; damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part

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taken to a certain public use. But what are called "general benefits" should not be considered, because—first, they are to arise if at all, in the indefinite future, while the compensation must be such as is just at the time of the taking; and secondly, they are so uncertain in character as to be incapable of present estimation.

*Connecticut*.—*Nicholson v. New York & N. H. R. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Nichols v. City of Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636. See ante, 2, b, "Connecticut."

*Maine*.—*Bangor, etc., R. Co. v. McCombe*, 60 Me. 290.

*Massachusetts*.—*Upton v. South Reading Branch R. Co.*, 62 Mass. (8 Cush.) 600; *Macham v. Fitchburg R. Co.*, 58 Mass. (4 Cush.) 491; *Whitman v. Boston R. R. Co.*, 3 Allen 133; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194; *Childs v. New Haven & N. Co.*, 133 Mass. 253; *Whitney v. Boston & M. R. R. Co.*, 89 Mass. 313.

*Minnesota*.—*Winona, etc., R. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 100. See ante, 2, b, "Minnesota."

*Missouri*.—*Quincy & P. M. R. Co. v. Ridge*, 57 Mo. 599; *Chicago S. F. & C. Ry. Co. v. Vivian*, 32 Mo. App. 583; *McReynolds v. Kansas City C. & S. R. Co.*, 34 Mo. App. 581; *Ragan v. Kansas City & S. E. Ry. Co.*, 111 Mo. 456, 20 S. W. 234; *St. Louis K. & N. W. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. 194, 26 L. R. A. 751; *St. L., K. & N. W. R. Co. v. St. L. Stock Yards Co.*, 120 Mo. 541, 25 S. W. 399.

*New Jersey*.—*State v. Hudson County*, 55 N. J. 88, 25 Atl. 322; *Swayze v. New Jersey Mid. R. Co.*, 36 N. J. L. (7 Vroom) 295; *Packard v. Bergen Neck Ry. Co.*, 54 N. J. L. (25 Vroom) 229, 23 Atl. 722.

*North Carolina*.—*Raleigh & A. A. R. Co. v. Wicker*, 74 N. Car. 220; *Freedle v. North Car. R. Co.*, 49 N. Car. 89; *Haislip v. Wilmington & W. R. Co.*, 102 N. Car. 376, 8 S. E. 926.

*Oregon*.—In Oregon this rule, as fixed by statute applies only when land is subjected by a railroad company for public use. *Oregon Cent. R. Co. v. Wait*, 3 Ore. 428; *Williams Falls Canal, etc., R. Co. v. Kelly*, 3 Ore. 99. But see, and compare, *Beekman v. Jackson County*, 18 Ore. 283, 22 Pac. 1074. See also, ante, 2, b, "Oregon."

*Pennsylvania*.—*Shirk v. Pennsylvania R. Co.*, 9 Lanc. Bar 198; *Gorgas v. Philadelphia H. & P. R. Co.*, 144 Pa. St. 1, 22 Atl. 715; *Lodge v. Franklin & H. R. Co.*, 30 Leg. Int. 92; *Danville, H. & W. R. Co. v. Gearhart*, 1 Wkly. Notes Cas. 237; *Danville H. & W. Ry. Co. v. McKelvey*, 11 Wkly. Notes Cas. 138; *Pennsylvania, N. Y. R. & Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh, L. E. R. Co. v. Robinson*, 95 Pa. St. 426; *Rees v. Schuylkill River E. S. R. Co.*, 135 Pa. St. 629, 20 Atl. 149.

*Vermont*.—*Adams v. The St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240.

*Wisconsin*.—*Milwaukee & M. R. Co. v. Eble*, 4 Chand. 72. But see ante, 2, b.

*England*.—See *Eagle v. Charring Cross R. Co.*, L. R., 2 C. P. 638. See also, ante, 2, b, "England."

(5) Assessment of Both General and Special Benefits as against Damages to Remainder and Value of Land Appropriated.

The doctrine which seems to be sanctioned by the supreme court of the United States, and many of the state courts, where changes have not been wrought by constitutional or statutory provisions, which may be construed as being positive in their nature in forbidding such rule, is, that general or special advantages which may accrue to the remaining portion of a tract of land a part of which has been subjected under eminent domain proceedings for public use, are allowed as a set-off both in reduction of damages to such residue and the value of that part which is taken. This rule is founded on natural equity, and is perhaps the most logical one, if benefits are to be considered at all.

*California*.—*San Francisco, etc., R. Co. v. Caldwell*, 31 Cal. 368; *California Pac. R. Co. v. Armstrong*, 46 Cal. 85. The rule adopted in these cases was afterwards changed by constitutional provision.

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See Constitution Cal. art. 1, § 14; *Pacific Coast Ry. Co. v. Porter* (1887), 74 Cal. 261, 15 Pac. 774. See also, ante, 2, b, "California," ante (1).

*Georgia.*—In an early case in Georgia the rule was laid down which brought the doctrine in that state under the classification now being treated, and which was based on the theory that compensation does not mean money but includes any means of recompense. It being held in this early case, *Young v. Harrison*, 17 Ga. 30, that the word "compensation" comes from the civil law which construes it to mean natural equity. This case apparently was inadvertently overruled in later Georgia decisions which seems to have omitted any notice of it and the doctrine declared in it. These later decisions in Georgia reversed this rule and adopted the rule stated in classification C. See *Jackson v. Wills Valley R. Co.*, 30 Ga. 43. See also, ante, 2, b, "Georgia"; and see, ante (3).

*Illinois.*—Prior to the constitution of 1870, general and special benefits were allowed to be set off as against damages to the remainder and the value of the part taken. *Alton & S. R. Co. v. Carpenter*, 14 Ill. 190. But since the adoption of the constitution of that year, and the enactment of a statute subsequent to that time benefits have been prohibited as against the value of the land taken; and it is further held that general benefits cannot be set off against either value or damages. See ante, 2, b, "Ohio," where a full discussion of the cases is given.

*Indiana.*—Prior to recent statutory changes, the rule now under treatment was observed. See *McIntire v. State*, 5 Black 384, decided in 1840. Subsequent to this decision a statute changed the rule so far as it applies to railroad companies. See ante, 2, b, "Indiana"; also, ante (1).

*New York.*—This rule applies to cases where land is taken by the state or municipal corporations. *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *Eldridge v. City of Binghamton*, 120 N. Y. 309, 24 N. E. 462; *Long Island Co. v. Bennett*, 10 Hun 91.

But in case of private corporations the rule prescribed in classification (3), that general or special benefits may be set off against damages to the remainder, but not against the value of the part taken, seems to apply. *Newman v. Metropolitan El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 29 N. E. 802. See ante, 2, b, "New York"; also, ante (3).

*Ohio.*—This rule prevailed in Ohio under the constitution of 1802, until the change wrought by the constitution of 1851, which brought the rule within that prescribed under classification a. *Kramer v. The Cleveland & Pittsburg R. Co.*, 5 Ohio St. 140. But see and compare Const. Ohio (1851), art. 1, § 19; art. 13, § 5; *Giesy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308. See also, ante, 2, b, "Ohio," and ante sub-head (1).

*United States.*—Discussing this question in *Chesapeake & O. Canal Co. v. Key*, 3 Cranch, C. C. 599, Fed. Cas. No. 2,649, the court said: "It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just compensation. If the jury had not been required by the charter to consider the benefit as well as the damage, they would still have been at liberty to do so, for the constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation, to give him the full value. If the jury would have a right to consider the benefit as well as the damage, without the provision of the charter which requires them to do so the same objection would still exist, namely, that under the provisions of the charter, it might happen that no compensation at all, or, that



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at most a nominal compensation, would be made. The insertion, therefore, of that provision in a charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public as well as just towards the individual, they ought to do, cannot be considered as repugnant to the constitution. *Lafiton v. Chicago, W. & N. R. Co.*, 33 Fed. 415; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622."

ARTHUR C. JONES.

*MABBOTT v. ILLINOIS CENT. R. CO.*

(*Supreme Court of Iowa, April 12, 1902.*)

[89 N. W. Rep. 1076.]

**Injury to Mail Carrier—Sufficiency of Evidence.**

Plaintiff, who was a mail carrier, and used a push cart in his work, was accustomed to deliver his mail at the postal car when defendant's train stopped at the depot platform; but the approach to this point being difficult, though not impossible, in wet weather, he began to deliver the mail when the train stopped at a water tank. On the night of the accident, as soon as the train stopped at the tank he pushed his car close under the mail car, when the train moved, overturning the cart and injuring plaintiff: *held*, that in the absence of anything to show that any one in charge of the train had any knowledge of plaintiff's new custom of delivering the mail at the tank, or of his being where he was when the accident occurred, defendant was not liable.

**Same—Contributory Negligence.**

It appearing that plaintiff knew that the train stopped at the tank only long enough to take water, and that it often had to move again after stopping before water could be taken, he was guilty of contributory negligence in placing his cart so near the train.

**Same—Same.**

Where the facts relied on in a damage suit as showing contributory negligence are such that only one conclusion can be drawn from them, the question is for the court.

Appeal from district court, Hamilton county; S. M. Weaver, Judge.

Action to recover for personal injuries. At the close of plaintiff's case the trial court directed a verdict for defendant, and from a judgment on such verdict plaintiff appeals. Affirmed.

J. H. Richard and G. D. Thompson, for appellant.

J. F. Duncombe and Hyatt & Hyatt, for appellee.

**WATERMAN, J.** Plaintiff was a mail carrier engaged in transferring mails from one railway to another in the city of Webster City, within whose limits the accident complained of occurred. He used a push cart in his work. He was injured by an eastbound train on defendant's road near midnight of the 7th day of July, 1899. He had a heavy load of mail upon his cart, which he pushed so near the train that when it moved unexpectedly the cart was struck and turned over upon plaintiff, and quite serious hurts inflicted. It had been customary to deliver and receive mail at the postal car

after the train stopped at the depot platform. But the position of the car of an eastbound train was such that an approach to it at this place was difficult, especially in wet weather; and about three weeks prior to his accident plaintiff began putting mail on and off the car when the engine stopped to take water at a tank a short distance west of the depot. It was at this last-mentioned place he was hurt. The engine had pulled up to the tank and stopped. Plaintiff wheeled his cart in close to the train. For some reason (doubtless because the engine was not in position to take water where it was first halted) it was moved forward a few feet, and it was this last movement of the train which caused the accident. The change in the place of delivering and receiving the mail was made at plaintiff's own instance, and for his convenience. The only reason he gives for making it is the difficulty of approach to the car at its usual place. He could get to it there, but not so easily or so readily as at the new place he selected. It does not appear that any one in charge of the train, or who had control of its movement, knew that plaintiff was availing himself of the stop at the water tank to deliver and receive mail. While plaintiff was not technically a trespasser, yet his rights, and the duty of defendant which arises from such rights, are not materially different from those which such a relation would confer or impose. *McAllister v. Railway Co.*, 64 Iowa, 395, 20 N. W. 488. In all the cases where damages have been awarded for injuries caused by moving railway trains to persons in proximity to the track, the theory of liability has been predicated upon the knowledge of the situation by those who had control of the train. 2 *Thomp. Neg.* §§ 1841-1843. It may be that the engineer and conductor of the train might have learned the use plaintiff was making of this stop, but that is not enough to impose liability on the company.

2. But aside from the matter of defendant's negligence, there is another ground of the motion to direct a verdict which we think is good, and that is that plaintiff's contributory negligence is conclusively shown. The engine had not got into position to take water when plaintiff was hurt. Plaintiff admits that he knew the engine was likely to stop sometimes in a place which would have to be changed before water could be taken. He knew, also, that the train did not stop longer than to enable the engine to get water. So he stood on this occasion with his cart near the track, ready to push in close to the train when it halted, and thus secure all the time possible for his work. As soon as the train stopped, he pushed his cart in so close that it went under the mail car. What he knew might sometimes happen occurred on this night. The engine had to be moved a few feet forward to use the tank. It was this move, as we have already said, that caused the accident. That plaintiff was negligent in placing his cart, as he did, under the edge of the car, is too

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plain to invite discussion. And the proposition is equally plain that those in charge of the train were not called upon to anticipate any such situation. Even if they knew he was in the habit of delivering and receiving mail while the train stopped for water, they would have had no reason to think he would begin his operations before it had got into position. Appellant's counsel argue that the question of contributory negligence was for the jury, but that is not so unless the facts are such as would authorize different conclusions to be drawn from them. *Vreeland v. Railway Co.*, 92 Iowa, 279, 60 N. W. 542; *Sala v. Railway Co.*, 85 Iowa, 68, 52 N. W. 664.

The trial court was justified in directing a verdict, and the judgment is affirmed.

WEAVER, J., takes no part.

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SMITH v. INDIANAPOLIS ST. RY. CO.

(*Supreme Court of Indiana, April 30, 1902.*)

[63 N. E. Rep. 849.]

**Ejection of Passenger—Nonpayment of Street Railway Fare—Presumption That Requirement of Conductor Was Legal.**

Where the complaint in an action against a street railroad company, in a city of over 100,000 population, for the ejection of a passenger for the nonpayment of fare, does not allege that the company was not acting under a contract with the city, made in pursuance of 2 Burns' Rev. St. 1901, § 5458c et seq., authorizing and relating to such contracts, which would authorize the charge of an increased fare, it will be presumed that the requirement of the conductor as to the payment of the increased fare was lawful.

**Fixing Street Railway Fares—Franchises—Constitutional Law—Special Privileges.**

Acts 1899, p. 260 (2 Burns' Rev. St. 1901, § 5458c et seq.), authorizes cities of over 100,000 to contract with an existing or future street railroad corporation, and to grant such corporation a franchise not exceeding 34 years; one of the conditions of such contract being the company's surrender of all franchises or rights to use the streets. Section 8 provides that, if no extension of the franchise of existing street railroad corporations is granted between the enactment of the statute and nine months of the expiration of the franchise, the company may remove its tracks, but that the board of public works shall open to free competition the right to so occupy the streets not less than nine months before the expiration of such franchise, and authorizes the successful bidder, if not the former occupant of the streets, to condemn the property. Section 9 provides that the contractual powers of the board of public works with reference to the use of streets are not taken away by the statute, except by contracts under it. Section 10 requires companies operating under the statute to charge certain fixed rates, which are higher than those fixed by former statutes. 2 Burns' Rev. St. 1901, § 3830, gives the Indianapolis board of public works power to grant franchises to street railroads for such terms and on such conditions as it sees fit: *held*, that the act of 1899 is not a grant of a right to an existing Indianapolis street railway company, denied to others, by which it may charge a higher fare than other companies, in violation of Const. art. 1, § 23, prohibiting the granting of special privileges or immunities, as the benefits of the act are not confined to existing corporations.

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**Corporations—Statute.**

The statute is not in violation of Const. art. 11, § 13, requiring corporations other than banking corporations to be formed under general laws, as it does not relate to the creation of corporations, but to the granting of franchises.

**Same—Presumptions.**

It will be presumed, in an action against a street railroad corporation, that it was incorporated under Rev. St. 1881, § 4143 et seq., constituting a general law for the incorporation of such companies.

**Street Railways—Franchises—Special Law.**

Acts 1899, p. 260 (2 Burns' Rev. St. 1901, § 5458c et seq.), relating to the granting of franchises to street railroad companies in cities of over 100,000, is not a local or special law, where a general law may be made applicable, in violation of Const. art. 4, § 22, requiring general laws in all cases where they are applicable, as the determination of the legislature that a general law is not applicable cannot be reviewed.

Appeal from superior court, Marion county; James M. Leathers, Judge.

Action by Charles F. Smith against the Indianapolis Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Burk & Warrum and Albert Schoonover, for appellant.

F. Winter and S. A. Pickens, for appellee.

GILLETT, J. The appellant filed a complaint in the court below, charging, in substance, that on the 5th day of May, 1899, the appellee was a street railroad corporation, organized under the laws of this state, and was then engaged in operating an electric street railroad upon the streets of the city of Indianapolis; that on said day appellant entered one of appellee's street cars so operated, for the purpose of being conveyed therein as a passenger; that appellee tendered 3 cents, as his fare, to the conductor of said car, but that the latter refused to receive the same, and demanded that appellant should pay a fare of 5 cents, or surrender a ticket that the company sold at the rate of 6 tickets for 25 cents, or 25 tickets for \$1; that appellant refused so to do, and was ejected by the conductor from said car, to appellant's damage, etc. Appellee demurred to this complaint. Its demurrer was sustained. Appellant excepted to the ruling, and assigns error thereon in this court.

Appellant's counsel state in their brief: "The real question—the entire question before the court—may be said to be the constitutionality of the act of 1899, under which appellee claims the right to charge more than 3 cents for a fare. If this act is constitutional, we do not and cannot claim any right of recovery against appellee." As the complaint in this case does not allege that the appellee was not acting under a contract made with such city pursuant to Acts 1899, p. 260 (section 5458c et seq. 2 Burns' Rev. St. 1901), it must be presumed that the requirement of appellee's conductor was lawful, unless said act is unconstitutional, as claimed by appel-

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lant's counsel. The section of the state constitution that they especially claim the act violates is the twenty-third section of article 1. That section is as follows: "The general assembly shall not grant to any citizen, or class of citizens, privileges and immunities which, upon the same terms, shall not equally belong to all citizens."

Before further discussing the law applicable to this particular case, we announce certain propositions, upon which the authorities do not divide: (1) Every ultimate, reasonable doubt as to the validity of a statute is to be solved in its favor. "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. Ed. 162. (2) If a statute is within the legislative power, the court cannot set up its judgment as to whether the power has been wisely or unwisely exercised. It is its duty in such cases not to obstruct, but to enforce, the legislative will. (3) If an act admits of two interpretations, one of which will bring it within, and the other presses it beyond, the constitutional authority of the general assembly, that interpretation will be adopted which will make it possible to uphold the act, because a presumption will not be indulged that the lawmaking power intended to violate the fundamental law, unless that conclusion is forced upon the court by unambiguous language. As said by Harris, J., speaking for the court, in *People v. Supervisors of Orange Co.*, 17 N. Y. 235, 241, "Before proceeding to annul by judicial sentence what has been enacted by the lawmaking power, it should clearly appear that the act cannot be supported by any reasonable intentment or allowable presumption."

Counsel for appellant say: "We do not deny the power of the legislature to authorize a grant that must of necessity be monopolistic in its nature; otherwise railway franchises could not be granted at all." It is, of course, competent for the general assembly to make provision by law whereby, in the grant of a street railroad franchise, there may pass with the grant the exclusive right of the grantee to operate cars over the particular space occupied by its tracks during the existence of the franchise; otherwise the grant might be of little or no value. But the conclusion of counsel for appellant that the law in question is of a monopolistic character is based on the assumption that it was so framed that only the appellee company could obtain the franchise that the act purported to authorize the city to grant. Appellant's counsel state that the appellee was incorporated subsequent to the year 1890, and that, at the time of the enactment of the act of 1899, appellee was operating under a franchise that it had been held by the supreme court of the United States would

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expire on January 18, 1901. Of course, we are not judicially advised of this; but as the act in question, in its earlier sections, seems to assume the existence of a street car franchise, held under said city, that was soon to expire, we are content, for the purposes of this opinion, to assume the existence of the facts so stated.

The act is a very long one, and it would greatly prolong this opinion to state all of the provisions in detail. In substance, the act provides that it "may be lawful" for any city having a population in excess of 100,000 persons by the last federal census preceding the incorporation of "any street railroad company, now or hereafter organized," to enter into a contract with said company for the granting to said company of a franchise for a term not exceeding 34 years, subject to many conditions, relative to compensation, fares, paving, the use of its lines by suburban and interurban railroad companies, the right of control of the city, etc. One condition that should be mentioned is as follows: "As a part of any contract entered into pursuant to the provisions of this act, and as a part of the consideration therefor, the company entering into said contract shall first make an absolute surrender to such city of all franchises and rights to the use and occupancy of the streets, alleys and public places of such city owned, held or claimed by such company within the corporate limits of such city at the time of the making of such contract pursuant to the provisions of this act, or theretofore owned, held or claimed by such company." Section 8 of the act provides that where the use or occupancy of any streets shall be had by any street railroad company under any ordinance or contract fixing or limiting, or attempting to fix or limit, the time of such occupancy, then, if no extension has been granted between the date of the enactment of the statute and a date nine months before the date of the termination of said right, and if no other company has acquired the franchise and property by contract with said company and the city, the right of said company to occupy the streets shall, at the expiration of the time so fixed or attempted to be fixed, absolutely expire, and the company is then authorized to remove its tracks, etc. It is further provided by said section that, not later than nine months before said time expires, such city, through its board of public works, shall "open to free competition the further occupancy for a period not exceeding thirty years of the streets of such city," subject to the conditions and limitations of section 2 of the act, and that "in such competition no company now or hereafter organized for such purpose shall be excluded." If the occupying company is not the successful bidder, and elects not to remove its tracks, etc., then provision is made that the company that is successful in the competition may institute proceedings to condemn such property. Section 9 is especially important, and therefore we quote it in full: "Nothing contained in this act shall be so construed

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as to take away from the board of public works and common council of any such city the exclusive powers now exercised over the streets, highways, alleys and bridges within such city, or the rights and powers now possessed by such board of public works and common council to enter into contract with reference to the use of the streets, alleys and public places in such city for street railroad purposes, except in so far as such powers and rights shall be affected by contracts entered into pursuant to the provisions of this act, and except as such powers are reserved to such city by the provisions of this act." Section 10 of the act is as follows: "It shall be unlawful for any railroad company operating under a contract secured under the provisions of this act or an employee of the same, to charge or receive any greater amount for fares than that provided for in this act, and it shall be unlawful to fail or refuse to keep on sale tickets as provided in this act, and any one violating any of the provisions of this section shall be fined in any sum not to exceed one hundred dollars." Section 59 of the Indianapolis charter (2 Burns' Rev. St. 1901, § 3830) provides, among other things, that the board of public works of said city is granted the right, subject to the approval of the common council, "to authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use, to fix by contract the prices to be charged to patrons."

Section 9 (Act 1899), that we have quoted above, when subjected to proper interpretation and construction, is broad enough to authorize the statement that it gave to the city an absolutely free hand in the granting of a street railroad franchise, to take effect in *presenti*, except as to the act provided, with reference to reservations in the contract. We base this conclusion primarily on the language of said section. It puts upon the power of the city to grant street railroad franchises the limitations as to the form of contract provided for in the other portions of the act, thus fusing it with the rest of the act, and recognizing in the very prescribing of such limitations the fact that it was intended to grant to the city all power not so expressly withheld. Section 10, making it unlawful to exact any fare in excess of the provisions of the act, also indicates that it was not intended to limit the city, under section 9, to an authority that was circumscribed, except by the act of which said section is a part. We think that section 9 is to be construed in connection with sections 1 and 2 of the act. Any number of corporations might have been organized under the general law for the incorporation of street railroad companies after the act of 1899 was passed, and while the federal census of 1890 was the last census, and thereby been in a position, under sections 1 and 2 of the stat-

ute, to bid for a franchise that would have enabled the company obtaining it to occupy other streets, or to parallel the lines of the occupying company where the width of the street permitted. Indeed, it would be competent at any time hereafter for the city to grant franchises, under section 9 of the act, to companies hereafter organized, provided that the rates of fare fixed did not exceed the maximum rates fixed by section 2, and provided that the contract was in other respects in accord with such other provisions of the act as are applicable. It was not necessary that a company competing for the franchise with the occupying company should have been in possession of the unexpired franchise, but, if it had such a franchise, it was required to surrender it, as a part of the consideration of the new contract. The occupying company had no advantage whatever over a company organized to compete with it, except that it had possession for a limited time of the space in the streets that its tracks occupied; and, if that circumstance gave it such advantage over other corporations that might bid for the franchise that it was enabled to make a bid that the city saw fit to accept as against other bids, that was an advantage that would naturally belong to it.

Does such a statute amount to a grant by the general assembly of a privilege or immunity in violation of section 23 of article 1 of the state constitution? Waiving any matter of technical construction with reference to this provision, we hold that it does not. The city was merely empowered, in its discretion, to extend appellee's franchise, or it might, at a particular period before the expiration of the time that such franchise would expire, let a contract of franchise upon public competition, or it might during any of said time have exercised the authority that the general assembly expressly reserved to it, to grant a franchise, if it could take effect in present, for the use of its streets, by virtue of section 9. There is nothing in the claim that no other company but appellee could make a contract by which it could charge in excess of three cents as fare. The act was intended as a readjustment of the whole street car situation in Indianapolis, at least as applied to any company entering into a contract with the city by virtue of said act. A careful study of the act has convinced us that its sole effect, in so far as it relates to the relations of the city to street railroad companies, was to make it possible, under specified limitations, to make a contract for a street railroad franchise that was not hampered by the provisions of the so-called three-cent fare law of 1897 (2 Burns' Rev. St. 1901, § 5458a). In this view, it is quite plain that the act was not a grant to the appellee, but was merely a restoration to the city of its former power to enter into contracts for the grant of street railroad franchises. Because a law merely authorizes a municipality to make a particular contract, leaving it authority, under other sections of the



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law, to make other contracts, does not create a monopoly, even if there is a contract let without advertising or competition. If it was the desire of said city, as such desire found expression through its authorized representatives, to extinguish the remaining portion of appellee's rights under its former franchise, by entering into a new contract with it that would supersede the one that before existed, there would be no occasion to advertise and offer competition for that purpose, because no one but appellee could offer that which the city desired to acquire. It would doubtless have been a wiser law, and more in keeping with the modern view that effort should be made to obtain the best price for the right to use the public streets, if the act had provided that before contracting the city should be required to invite competition; but even without that limitation the city had full authority so to do, and if it is now perceived that it made an unwise contract with appellee,—a matter concerning which we are, of course, not judicially advised,—the blame properly rests upon the representatives of the city who made the contract.

Even if we were to grant that sections 1, 2, and 9 of the act have been construed by us too broadly, still appellant must fail in this particular ground of attack; for, beyond question, the city was authorized to refuse to negotiate with appellee alone, and could wait until the period fixed in section 8, nine months before the expiration of appellee's franchise, and then let a contract upon public competition. As a mere business proposition, the city, if it could not obtain satisfactory terms from appellee at the outset, could have much better afforded to bide its time than appellee, for ultimately the latter would have been compelled to sue for terms. The act represents the legislative judgment that appellee's then existing franchise should be merged in a new franchise, if it could be acquired on sufficiently advantageous terms. The general assembly therefore merely gave the city permission to treat with appellee, for something that no one but appellee possessed, on any terms upon which the contracting parties might agree, provided that they were not more burdensome than those fixed as a maximum of terms by the act. As we have stated, the act is not a grant to a private corporation, but it is a mere delegation of business powers to a governmental corporation. If the act, *ex proprio vigore*, had granted the appellee a franchise, or if it had directed the city so to do, a different question would have been presented; but the attack of appellant, in so far as it is based on the claim that the act is a grant of a privilege or immunity, must fail, since it must be admitted that the act is only permissive. The powers conferred might be abused by the agent, but in honest and capable hands there was no reason, so far as the provisions of the act were concerned, why there should have been such abuse, if any there was.

It is next claimed that the act in question violates the fol-

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lowing section of the state constitution: "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Section 13, art. 11. If the appellee is a corporation organized under the laws of Indiana, as the complaint alleges, it must be presumed that it was organized under the general act for the incorporation of street railroads, that became a law September 7, 1861. Section 4143 et seq., Rev. St. 1881. Section 2 of that act provides that the organization "shall be a body politic and corporate in perpetuity." Under that act, appellee's corporate continuity is only dependent upon section 11 of the act mentioned, that provides that the "act may be amended or repealed at the discretion of the legislature." A street railroad corporation is none the less a corporation because it does not possess a franchise. It is its right to be a corporation that gives it the capacity to acquire a franchise. In this case the general assembly, as such, did not grant appellee anything. Whatever was granted was power to the city. Under the act of 1899, it was within the authority of the city to have granted this corporation, or any other street railroad corporation, a new franchise. The grant applied to the city not only in its relation to appellee, but in its relations to all corporations that might contract with it. The act amounted to no more than a regulating of the right, and a granting of a more ample and definite power. Our cases of *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344, and *In re Bank of Commerce*, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489, conclusively settle the question under consideration against appellant. In the *Navin* Case it was said: "When the present constitution of 1851 went into effect, on November 1, 1851, there was a great number of corporations in this state which had been created by special acts. The legislature, commencing with its first session of 1852, after the constitution took effect, again and again, by special acts, enlarged the powers and privileges of such corporations, but in no instance created a corporation by special act; thus recognizing the difference between the creation of a corporation, and the regulation of a corporation already in existence. There sat as members of the legislature passing such acts many persons who had been members of the constitutional convention, and who were familiar with the provisions of the constitution, and its intended reforms and changes. No one questioned the right of the legislature to pass such special acts, and for over forty-five years the power assumed by the legislature has never been challenged, but has been acquiesced in by the state and people. This practical construction is influential. *French v. State*, 141 Ind. 618, 628, 41 N. E. 2, 29 L. R. A. 113; *Hovey v. State*, 119 Ind. 386, 21 N. E. 890; *City of Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, and cases cited. It is one thing to create a cor-

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poration,—bring it into existence,—and quite another, as an existing corporation, to regulate its conduct and relations as to other corporations and persons. It has been decided in many cases that, when a corporation has been created, a special act regulating it, without changing the organization of the corporate body, is not within the prohibition. *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120; *Attorney General v. Insurance Co.*, 82 N. Y. 172; *In re New York El. R. Co.*, 70 N. Y. 327, 337, 338; *In re Church*, 92 N. Y. 1, 4; *Bank v. Davis*, 16 Barb. 188; *Railroad Co. v. Orton (C. C.)* 32 Fed. 457; *Green v. Boom Corp.*, 35 Minn. 155, 27 N. W. 924; *Insurance Co. v. Allis*, 24 Minn. 75; *Cotton v. Boom Co.*, 22 Minn. 372; *Railroad Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *State v. Railroad Co.*, 48 Mo. 468; *Attorney General v. Joy*, 55 Mich. 94, 106, 107, 20 N. W. 806; *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895; *Mor. Corp. § 12*; *Clark, Corp. pp. 43-45.*" In the *Bank of Commerce Case* it was held that an act providing for the extension of the corporate life of a corporation created by special act before the adoption of the present constitution amounted to an effort to create a corporation, and was therefore in violation of that instrument, but the *Navin Case* and the *Bank of Commerce Case* are written upon the same lines. If the act itself conferred a new franchise upon the company, a different question might be presented, as the constitution cannot be evaded by the creation of a corporation by general act, and the subsequent grant to it of extraordinary powers by special act. We have not been unmindful that the act of 1897 relative to fares was an amendment of the charter of all street railroad companies operating in cities having a population of more than 100,000 persons. But if it be objected that the act of 1899 impliedly gave the appellee a right to contract relative to fares that it did not possess after the act of 1897 became a law, the answer to that is that if it was competent for the general assembly to lay that burden on appellee after it was organized, under the reserved right of amendment, then it was also competent to repeal the act that created the burden. In other words, if the *Navin Case*, upholding the law of 1897, correctly decided that that law did not amount to the creation of a corporation by special law, then by the same token it must be held that the law of 1899, taking away the disability, is not obnoxious to that constitutional provision.

The act in question is not invalid because it is not a general law. The power of the general assembly to pass local and special laws finds its restraint in section 22 of article 4 of the state constitution. The general assembly is by that section denied power to enact local and special laws upon 17 subjects. The next section ordains that "in all the cases enumerated in the preceding section, and in all other cases

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where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." As the subject-matter of the legislation in question does not fall within said section 22, it must be held, as it has been held by this court since the decision of *Gentile v. State*, 29 Ind. 409, that the determination of the general assembly that a law not relating to any of the subjects mentioned in said section 22 cannot be made general is not subject to review by the courts. *Clem v. State*, 33 Ind. 418; *State v. Tucker*, 46 Ind. 355; *Vickery v. Chase*, 50 Ind. 461; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Kelly v. State*, 92 Ind. 236; *Warren v. City of Evansville*, 106 Ind. 104, 5 N. E. 876; *Johnson v. Board*, 107 Ind. 15, 8 N. E. 1; *Wiley v. Corporation of Bluffton*, 111 Ind. 152, 12 N. E. 165; *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Young v. Board*, 137 Ind. 323, 36 N. E. 1118; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Woods v. McCay*, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97; *City of Indianapolis v. Navin*, *supra*. The fact that the general assembly enacts a special or local law not comprehended within said section 22 is per se a legislative declaration that a general law cannot be made applicable. *State v. Kolsem*, *supra*; *Mode v. Beasley*, *supra*; *Woods v. McCay*, *supra*; *City of Indianapolis v. Navin*, *supra*.

Objection is made by appellant to some of the sections of the act that we have not mentioned, such as the grant of the right to purchase other street railroad lines in said city, etc. As it might be conceded that all of these sections were unconstitutional, yet, as enough would remain to authorize the making of a contract as to the rates of fare, we deem it unnecessary to decide any of such further questions. The court below did not err in sustaining the demurrer to appellant's complaint.

Judgment affirmed.

## CHICAGO CITY RY. CO. v. COONEY.

(*Supreme Court of Illinois*, April 16, 1902.)

[63 N. E. Rep. 1029.]

## Injury to Passenger—Collision on Street Car Track—Pleading—New Cause of Action.

Where, in an action against a street railroad and another for injuries, the complaint alleged that the servants of the railroad so carelessly managed the car in which plaintiff was seated and the other so carelessly managed a truck he was driving that the car and truck collided, and injured plaintiff, a contention that an amendment, after the time limited for bringing an action for the injuries, to the effect that plaintiff was in the exercise of ordinary care for her safety, was a statement of a new cause of action, so that the bar of limitations might be interposed, was without merit.

## Same—Pleading—Special Damages.

Where, in an action for injuries, the complaint alleged that plain-

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tiff sustained serious physical injuries, causing great pain and suffering and impairment of bodily health, strength, and ability to labor, evidence of a miscarriage seven months after the accident was admissible.

**Same—Injured Health—Remarks of Counsel.**

In an action for injuries, counsel for defendant had been inquiring about plaintiff's testimony as to her health before the accident. His questions had been fully answered, and plaintiff had stated she had not had a doctor, but had sometimes taken a little medicine in the spring. The court then said, in effect, that he should have to interpose an objection if counsel were going to consume time with immaterial matter; that she might as well be asked if she did not get up in the morning during the several years; that thousands of people took medicine in the spring, and it did not prove her health bad; *held*, that the remarks were improper.

**Same—Elements of Damage—Unskillful Medical Treatment.**

In an action for injuries, an instruction that, if plaintiff exercised ordinary care in seeking medical aid, she might recover for all physical impairments, though they resulted "in whole" from mistakes of medical attendants, was improper.

**Same—Same—Same.**

The error was harmless, it appearing from the evidence that her impairments were not wholly due to mistakes in treatment.

**Same—Same—Same.**

Where mistakes are made in the treatment of one injured, who has used ordinary care in the selection of medical attendants, injuries from such mistakes are a part of the damages resulting from the original injury.

**Appeal from appellate court, First district.**

Action by Ellen Cooney against the Chicago City Railway Company. From a judgment of the appellate court (95 Ill. App. 471) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit brought by appellee against appellant to recover for injuries sustained by her in a collision between a wagon and one of appellant's street cars on which she was a passenger. A large wagon, loaded with heavy iron pipes, some of which projected as much as eight feet from the rear end of the wagon, was backed out of a building on the west side of Clark street across the tracks of appellant's road, and the ends of the pipes came into collision with appellant's train, consisting of a motor car and a trailer. Appellee was sitting in the forward car, and, when she saw that a collision was imminent, attempted to get off the car, and in so doing fell and was injured. The suit was originally begun against the appellant company and Downey, the driver, and Burke, the owner, of the wagon. After Downey had testified as a witness for appellee, the suit was dismissed as to him. Burke was adjudged not guilty, but a verdict was found and judgment rendered against appellant for \$2,500. From the judgment of affirmance rendered by the appellate court for the First district this appeal was taken.

Appellee's declaration contained but one count originally, on which appellant joined issue. This count contained no allegation of due care on the part of plaintiff. After the trial

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began, and certain witnesses had been heard, appellee, by leave of court, filed an amended declaration, which was substantially the same as the original, with the additional allegation that she was in the exercise of ordinary care for her own safety. It was in the main as follows: "That said servants of said company so improperly and carelessly drove, pushed, and managed said electric car in which plaintiff was seated, and Downey so improperly and carelessly drove, pushed, and managed said truck, that through the negligence and improper conduct of said servants, respectively, the said truck and electric car collided with great force and violence, by reason of which premises plaintiff was violently thrown to the ground there, and sustained serious and permanent physical injuries, internally and externally, was caused great pain, suffering, and impairment of bodily health, strength, and ability to labor, and will, the rest of her life, sustain such pain, suffering, and impairment; and that at, throughout, and prior to said occurrence she herself was in the exercise of ordinary care for her own safety." In addition to the general issue, the defendant pleaded the statute of limitations to the amended count, to which plea a demurrer was sustained, and the defendant elected to stand by its plea. Motions for a new trial and in arrest of judgment were overruled.

One of the instructions given for appellee was the following: "(8) While it was the duty of plaintiff to employ such medical attention as ordinary prudence in her situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession, yet, if she exercised such judgment and care, then, and in case (as provided in the other instructions) you find her entitled to recover, you may take into consideration all injuries and impairments, if any, which directly resulted from the occurrence in question, even though they resulted, in whole or in part, through mistakes of some one or of any of her medical attendants. This liability that a medical attendant (provided ordinary care was used in his selection) may make mistakes or errors is by you (but as limited by above provisions) to be considered as part of the immediate and direct damages resulting from the occurrence in question."

William J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

Rosenthal, Kurz & Hirschl, for appellee.

CARTER, J. (after stating the facts). Appellant's first assignment of error is that the trial court erred in sustaining the plaintiff's demurrer to its plea of the statute of limitations. It is contended that the original declaration was defective, because it lacked the allegation that the plaintiff was exercising due care for her own safety, and for that reason stated no cause of action; and that the cause of action stated

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in the amended declaration was barred by the statute, it having been filed more than two years after the cause of action accrued. That the original declaration stated a cause of action, though defectively, clearly appears, for the reason that it would have been sufficient, after verdict, on motion in arrest of judgment or on error. *Railroad Co. v. Simmons*, 38 Ill. 242; *Cox v. Brackett*, 41 Ill. 222; *Gerke v. Fancher*, 158 Ill. 375, 41 N. E. 982. See, also, *Coal Co. v. Scheiber*, 167 Ill. 539, 47 N. E. 1052. The cause of action stated in the amended declaration was identical with the one stated in the original declaration, and the amendment amounted only to a restatement of the cause of action, and not to a statement of a new cause of action. The demurrer to the plea of the statute was therefore properly sustained.

Appellee insists that it was too late to raise the question by the plea of the statute of limitations, but says it should have been raised by an exception to the order of the court allowing the amendment to be filed. In support of this view she contends that by the language of the statute such order is conclusive that the new count is the same as the old. The latter part of section 23 of the practice act is as follows: "The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action." *Hurd's Rev. St. 1899*, p. 1287. The statute of limitations must be pleaded to be availed of, for it is the privilege of the pleader to avail himself of it or to waive it. A count containing a new cause of action, filed after two years, would be a good count, and a recovery could be had under the same if the statute was not interposed. The statute of limitations cannot be raised by an exception. We are of the opinion that said section 23 was not intended to apply to a question of this kind.

As seems to have become the practice in all such cases, counsel for the defendant moved the court, at the close of the evidence, to instruct the jury to find the defendant not guilty. Under the assignment of error that the court erred in refusing such instruction, counsel have at great length discussed the controverted questions of fact, the weight and preponderance of the evidence and the credibility of the witnesses. Such discussions are not only unnecessary, and wholly useless for any purpose here, but are often a hindrance to the proper examination of the legal questions raised which this court has power to determine, but which are obscured in the argument by the mass of facts with which they are interblended. Upon the point made it is sufficient to say that the evidence tended to prove the cause of action, and that it would have been error to give such an instruction.

The admission of testimony in regard to a miscarriage that appellee suffered seven months after the accident is assigned for error. It is claimed that such injury should have been declared on as matter for special damages, and that it was not

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covered by the allegations calling for general damages only. We are of the opinion that the evidence was properly admitted under the allegations of the declaration. *Railway Co. v. Slanker*, 180 Ill. 357, 54 N. E. 309; *Railroad Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *Railroad Co. v. Levy*, 182 Ill. 525, 55 N. E. 554, and cases cited therein. Whether such miscarriage was caused by the injury was a question of fact for the jury, but that such an injury might be the proximate cause of a miscarriage is too well known to admit of any controversy.

It is assigned as error that the court made improper remarks in the presence and hearing of the jury. The only remarks we consider it necessary to notice are the following: "The Court: I am afraid I shall have to interpose an objection myself if you are going to take up the time of the court with immaterial matter. You might as well ask her if she did not get up in the morning during the several different years. \* \* \* The Court: She said she generally took a little medicine in the spring. That does not prove her health was not good. Counsel for appellant: Yes, it does, your honor. The Court: I don't see how it can. Thousands of people do that." We regard these remarks of the court as improper, but not of sufficient importance to work a reversal of the judgment. It appears from the record that counsel was inquiring about her former testimony as to her health prior to the accident, and that his questions had been fully answered; that she said she had not had a doctor, but had sometimes taken a little medicine in the springtime. It does not appear that the cross-examination was improperly abridged, and, while the remarks complained of should have been omitted, we are satisfied they could not have affected the result before a jury of ordinary intelligence.

The eighth instruction given for the plaintiff, set out in the preceding statement of the case, is claimed to be erroneous because of the inclusion in it of the words "in whole." While it is true that, if her "injuries and impairments" were wholly due to mistakes in her medical treatment, she could not recover from appellant for such injuries and impairments, still the instruction could not have prejudiced the defendant in the case. It was established by the evidence, and is not controverted, that she suffered injuries in the accident for which she was sent to the hospital, where she remained for some time under treatment, and that her "impairments" were not wholly due to mistakes in treatment. The liability to mistakes in treatment is incident to the injury, and where such mistakes occur—the injured party using ordinary care in the selection of her medical attendants—the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the original injury. *Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601. As applied to the evidence then before the jury, the inaccuracy in the in-



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struction complained of could not have worked any injury to the defense.

Other questions of minor importance have been raised by counsel and considered by the court, but we are unable to find that any substantial error was committed in the trial of the case. The judgment will therefore be affirmed.

Judgment affirmed.

## COMERFORD v. NEW YORK, N. H. &amp; H. R. CO.

(*Supreme Judicial Court of Massachusetts, Norfolk, May 23, 1902.*)

[63 N. E. Rep. 936.]

## Injury to Passenger—Sudden Starting of Train—Alighting from Moving Car.\*

When defendant's train arrived at the station at which plaintiff desired to alight the car gate at the front of the car leading to the station platform was closed, and the passengers began alighting from the other gate. Thinking that all had alighted, the conductor started the train, and immediately afterwards, seeing that some still desired to alight, stopped it. Plaintiff's evidence tended to show that he was on the car platform when the car stopped, and was thrown off and injured by the sudden stop; while there was evidence tending to show that he stepped off the car while in motion, supposing it motionless: *held*, that the question of plaintiff's exercise of due care was properly submitted to the jury.

## Same—Evidence—Harmless Error.

Where a written statement, made shortly after the accident, by a witness in a personal injury action, was excluded, but the witness was allowed to testify that the statement was made shortly after the accident, was correct, and that the signature was his, and the attorney was allowed to bring out the entire contents of the statement by questions, and there was no contention that the witness did not make the statement contained in the paper, its exclusion was without prejudice.

## Same—Absence of Statutory Number of Brakemen—Instructions.

In an action for injuries alleged to have been caused by the negligent starting or stopping of a train, an instruction that, if the lack

\*Liability for death of passenger caused by jerking of train, see *Sansom v. Southern Ry. Co.*, 111 Fed. Rep. 887, 24 Am. & Eng. R. Cas., N. S., 88. See also, *Wait v. Omaha, K. C. & E. R. Co. (Mo.)*, 24 Am. & Eng. R. Cas., N. S., 98; *Doolittle v. Southern Ry. Co. (S. Car.)*, 24 Am. & Eng. R. Cas., N. S., 105; *Farnon v. Boston & A. R. Co. (Mass.)*, 24 Am. & Eng. R. Cas., N. S., 95; *Southern Ry. Co. v. Vandergriff (Tenn.)*, 24 Am. & Eng. R. Cas., N. S., 104.

On general subject of carrier's liability where passenger jumps from moving train, see abstracts, 2 Am. & Eng. R. Cas., N. S., 257 et seq. See also, *Chicago, B. & O. R. Co. v. Hyatt (Neb.)*, 4 Am. & Eng. R. Cas., N. S., 44; *Schiffler v. Chicago & N. W. R. Co. (Wis.)*, 8 Am. & Eng. R. Cas., N. S., 122; *Louisville & N. R. Co. v. Depp (Ky.)*, 3 Am. & Eng. R. Cas., N. S., 440; *Hodges v. Southern Ry. Co. (N. Car.)*, 8 Am. & Eng. R. Cas., N. S., 46; *Atchison, Topeka & S. F. R. Co. v. Hughes (Kan.)*, 2 Am. & Eng. R. Cas., N. S., 248; *Lewis v. President, etc., Canal Co. (N. Y.)*, 2 Am. & Eng. R. Cas., N. S., 192; *McPeak v. Missouri Pac. R. Co. (Mo.)*, 2 Am. & Eng. R. Cas., N. S., 226. See notes, 12 Am. & Eng. R. Cas., N. S., 164; 12 Am. & Eng. R. Cas., N. S., 222.

Liability for injury to employee caused by sudden checking of train, see *Louisville & N. R. Co. v. Smith (Ala.)*, 23 Am. & Eng. R. Cas., N. S., 218.

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of the statutory number of brakemen helped on the accident, the jury might consider that fact in determining whether defendant railroad was negligent, was not erroneous as allowing the jury to predicate liability on the separate substantive ground of nonobservance of the statutory requirement as to brakemen, but merely authorized consideration of that fact as an element going to make up negligence in the starting or stopping of the train.

Exceptions from superior court, Norfolk county; Charles U. Bell, Judge.

Action by Thomas J. Comerford against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Geo. Fred Williams and James A. Halloran, for plaintiff.

Chas. F. Choate, Jr., for defendant.

HAMMOND, J. Upon the evidence in this case the jury would be warranted in finding that, while the train was stopping at a regular station for the discharge of passengers, some of them, seated in the only ordinary general passenger car of the train, desiring to alight, passed out upon the front platform of the car, and, seeing that the right-hand gate—which was the one leading to the station platform—was closed, and that the left-hand gate was open, proceeded to pass out by the latter, and in that way alighted from the car; that while this was going on, and while the plaintiff and others who desired to alight were yet upon the platform and steps, the conductor of the train, seemingly unaware of this action on the part of the passengers, and supposing that all who desired had left the train, caused it to be started; that immediately afterwards he saw that several had not left the train who apparently intended to do so, and caused the train to be stopped; and that (although upon this a finding the other way might reasonably have been expected) the plaintiff, being then upon the steps of the car, was thrown to the ground by the jar in stopping. They further might properly have found that the conductor should have known what was going on, and that, in consideration of the high degree of care required of common carriers towards their passengers, the sudden stopping of the car without any warning was, under the circumstances, a negligent act, and that it contributed to the injury. It is true there is much to be said in support of the theory that the plaintiff was not thrown from the car at all; that he supposed the car was at a stop, and hence voluntarily stepped from it; and this view of the evidence may seem to be the more reasonable,—but we cannot say that the jury were bound to take that view of the occurrence. Upon the question of due care of the plaintiff the case was properly left to the jury. It follows that the first request was properly refused. We understand that the exceptions to the refusal to give the other requests in the form presented are waived. We do not see how the defendant was harmed by the exclusion of the written statement made by the witness Bryant. The

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language in the statement which the defendant desired to have introduced to the jury was as follows: "The train had gone about two car lengths, and was going as fast as a man could run, when Mr. Comerford attempted to get off. I would not want to swing off when the car was going as fast as it was when Mr. Comerford attempted to do so." After the witness had looked at the paper, and said that the signature to it was his, and that the statement was made shortly after the accident, and was correct, he was further examined as to its contents as follows: "Q. You said the train had gone about two car lengths, and was going as fast as a man could run, when Mr. Comerford attempted to get off, didn't you? A. Yes. Q. Didn't you then say, Mr. Bryant, this: 'I would not want to swing off when the car was going as fast as it was when Mr. Comerford attempted to do so?' A. I said so at that time, yes." With the paper in his hands, the counsel thus was allowed to show its precise language by the answer of the witness, and no one contended that the witness did not use the language in the paper. The jury had, therefore, the fact that the paper contained those statements made in writing by the witness, and they knew the exact language. The exclusion of the paper under these circumstances could work no injury. As to the absence of brakemen, the jury were instructed that, if the absence of the statutory number of brakemen "had nothing to do with the accident, that is all out of the case," but, "if the lack of those brakemen in any way helped on this accident, then that is one of the things you may consider in determining whether this railroad was negligent in what took place there." The defendant contends that the effect of this was to give the jury the right to find for the plaintiff upon a new substantive ground of liability on the part of the defendant, namely, the nonobservance of a statutory requirement. We do not so understand it. The jury were distinctly told that the plaintiff must prove his case as set out in his declaration; or, in other words, that he was thrown from the car by a negligent starting or negligent checking of the train. The number of persons at work on the train, whether brakemen or not, might properly be considered by the jury upon the question whether proper care was exercised to ascertain the condition of things at the time the order to stop was given, and we do not see that the court went further than that.

Exceptions overruled. \_\_\_\_\_

LOKER v. SOUTHWESTERN MISSOURI ELECTRIC RY. CO.

(Court of Appeals of Kansas City, Mo., May 5, 1902.)

[68 S. W. Rep. 373.]

Personal Injuries—Excessive Verdict.\*

Where, in an action against a street railway for personal injuries,

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\*See generally, 3 Rap. & Mack's Dig. 654 et seq.

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plaintiff's evidence tended to show that her right arm was broken, her spine and nose injured, her ankle sprained, and her injuries permanent, and it appeared that a former jury had awarded her \$2,500, the court will not interfere with a second verdict for substantially the same amount.

**Same—Extent of Injuries—Evidence.**

Where, in an action for personal injuries, defendant introduced a witness who testified that he had dressed plaintiff's arm the night of the accident, and had waited on her from four to six weeks afterwards, refusal to allow him to testify as to the nature of the injury was not reversible error, in the absence of any statement of the object of the testimony, so as to enable the court to determine its materiality.

Appeal from circuit court, Jasper county; Joseph D. Perkins, Judge.

Action by Gussie M. Loker against the Southwestern Missouri Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McReynolds & Halliburton, for appellant.

Thomas & Hackney, for respondent.

BROADDUS, J. The plaintiff sued to recover for personal injuries received while a passenger on one of defendant's cars. The defendant operates an electric railway in the city of Carthage, Mo. The car on which she was a passenger was wrecked, it is admitted, by the negligence of defendant's motorman who was operating the car at the time of the accident. And it is further admitted that the plaintiff was injured by reason of said accident; but it is claimed that such injuries were slight, and that the verdict of the jury is excessive, and the result of bias and prejudice on the part of the jury. There is only one other objection made, and that is, the court erred in refusing competent testimony offered upon the part of the defendant.

The plaintiff's evidence tended to show that her right arm was broken, and that her spine was injured; that her neck was bruised and painful for several weeks after the injury; that she was injured in the loins; and that her nose was injured and ankle sprained. She stated at the trial that her arm was crooked, and that she did not have much use of it; that her hand was stiff, and her wrist would not bend; that she could not lift things with any weight; and that she could not grasp things. She further testified that her nerves had been seriously affected, and that she had not been able to sleep well since the wreck. She exhibited her arm to the jury, and stated that: "The bones on the third finger on my right hand lie a great deal lower than those of my left, on account of the bones in my wrist being pushed underneath the others, causing them to draw down." The plaintiff was evidently a fluent talker, and stated many other important facts; but we omit them, as the object is not to incorporate her entire evidence in this opinion. Witnesses Mrs. B. F. Thomas and S. M. Weddell tended in many particulars to corroborate the

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evidence of the plaintiff. Dr. L. E. Whitney, who was her physician part of the time, and who had examined her recently, testified as to a tenderness in her spine, and, as a consequence, to a disturbance of her nerves. He also stated that her arm will never be like it was before the injury. On the other hand, the defendant introduced evidence strongly tending to show that the plaintiff was magnifying her injuries and feigning suffering; that she was seen to use her broken arm in getting on and off cars, and in handling goods in her husband's store. In reply she denied all this. The jury evidently believed her and her witnesses as to the extent of her injury and suffering. We are not prepared to say that, in view of all the evidence, the jury were influenced by prejudice against defendant or bias in favor of the plaintiff. It appears there was a former trial of the case, and verdict for \$2,500, which the court set aside on the ground that it was excessive.

In the recent opinion in this court, in the case of *Baker v. City of Independence* (not yet officially reported), the plaintiff was injured by a fall occasioned by the defective condition of the defendant's streets. The jury returned a verdict for \$1,933. The injury received was in her right hand and arm, and it was a question for the jury whether she would ever recover the full use of that limb. She was not injured in any other part of her body. There had been a previous trial, in which she had recovered the sum of \$1,800, which was set aside because, in the opinion of the court, it was excessive. A similar motion was made as to the second verdict, but it was overruled, and this court sustained the action of the trial court in that respect, and in doing so followed the precedent furnished in *Porter v. Railroad Co.*, 71 Mo. 66, 36 Am. Rep. 454. In that case there had been three verdicts, viz., the first for \$10,000; the second for \$12,000; the third for \$10,000. In view of the fact that three juries had passed upon the case and rendered large verdicts, the court held that, under such circumstances, they could not with propriety say that the damages were excessive, and affirmed the finding. The evidence in this case, if credible,—and that was for the jury to determine,—showed that the plaintiff's injuries were serious, and most probably permanent; and in view of the fact that a former jury has rendered substantially the same verdict, we do not feel called upon to interfere with their estimate of the plaintiff's loss and suffering. The verdict of two juries, practically the same, ought to be conclusive of the case.

The defendant introduced as a witness Dr. J. R. Freed, who testified that he had dressed plaintiff's arm the night of the accident, and had waited on her from four to six weeks afterwards. The defendant asked him the following question: "Q. Now, sir, I will ask this question, and you needn't answer it until the gentlemen on the other side have time to object. Can you explain to the jury the nature of the break

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and the kind of break?" The plaintiff objected to the witness answering the question, on the ground that he had been her physician, etc. The court sustained the objection. This was not reversible error. The defendant "should have gone further and stated what he proposed to prove, so that the court could determine whether it was material." Jackson v. Hardin, 83 Mo. 175; Bank v. Aull's Adm'r, 80 Mo. 199. And this is the law notwithstanding the reason given against allowing the question answered is not sound; for it is the result of the action of the court that we are to pass upon, and, if that is proper, the aim of the law is accomplished.

We have examined the instructions given upon both sides, and find them to be in harmony with the law of the case. The two refused instructions offered by the defendant were properly refused,—the first because it referred to facts in existence prior to the accident and in no way connected with the issue before the jury. The second was a commentary on the evidence.

Finding no error in the trial, the cause is affirmed. All concur.

SPAVIN v. LAKE SHORE & M. S. RY. CO. *et al.*

(*Supreme Court of Michigan, May 19, 1902.*)

[90 N. W. Rep. 325.]

Railroads—Personal Injury—Walking on Track\*—Contributory Negligence\*—Evidence—Directing Verdict.

Plaintiff, who for two years had been in charge of the semaphores and joint switch at a railroad junction, was accustomed to take a train which passed after he was relieved. The train stopped at the junction, with the rear car opposite the building used as a waiting room for passengers. As the train approached, plaintiff always walked along the track to take the second-class car, which was next to the engine. On the day of the accident, seeing a semaphore go down when his train was due, he looked down the track, and saw a headlight, which he thought was his train, and walked along a track parallel with the one on which the train would run, from which the snow had been cleared. A switch engine running on this track, without blowing its whistle or ringing the bell, ran him down. He knew that engines were liable to run over the track at any time, and did not look back after stepping on the track: *held*, that plaintiff was guilty of contributory negligence, and, no gross negligence on the part of defendants being shown, the court did not err in directing a verdict for defendants.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by John Spavin against the Lake Shore & Michigan Southern Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

At the time of the accident upon which this suit is based, and for years prior thereto, the defendant companies operated

\*See note, appended to Cottrell v. Sou. Ry. Co. (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

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jointly a double-track railroad extending from the Brush street depot, in the city of Detroit, to Dequindre street, north on Dequindre street to a point about 200 feet north of Ferry avenue, where the trains of the Lake Shore diverge from the double tracks in a westerly direction onto the Lake Shore main line, the double track of the D. & M. continuing northward. The easterly main track was used by all trains going north, and the westerly main track by all trains going south. About 500 feet south of Ferry avenue there was a semaphore which controlled out-going trains, and about 200 feet north of Ferry avenue there was a semaphore which controlled incoming trains. Between Ferry avenue and the semaphore on the south side there is a joint switch, used to switch trains over from the outbound track to the inbound track, and thence onto the Lake Shore main track. Just south of Ferry avenue a cross-over track connects these two tracks. About 250 feet south of Ferry avenue, on the easterly main track, is a switch which opens into the cross-over track. At the northerly end of the cross-over, where it connects with the inbound main track, there is another switch. An outbound Lake Shore train would come up the easterly D., G. H. & M. main track to the switch first above named, would pass over it into the cross-over, out of the cross-over by the second switch upon the inbound track, along it a short distance, and then over the joint switch upon the Lake Shore track. After running a train length, plus the distance from that switch to Ferry avenue and the width of Ferry avenue, it would stop, with its rear car opposite the car checker's shanty. To get it from the outbound D., G. H. & M. main track to its stopping place, the three switches had all to be opened and set for its passage. They were all fitted with switch lamps, which showed, to one looking down from Ferry avenue, white when the switches were set for the main lines, and red when they were set for the Lake Shore outbound train to make the station. About 250 feet south of Ferry avenue, and just south of the joint switch, and westerly of the inbound track, there was a telegraph station, which was used by the telegraph operator and the person in charge of the joint switch and the semaphores, which were operated from this station by levers. West of the inbound track there was a long siding, commencing just south of the telegraph office, and extending south to Gratiot avenue and beyond. This siding was parallel with the main tracks, was connected with the inbound track at different points, and a number of spurs ran over in a westerly direction into different coal yards and other manufacturing establishments along the line, and were used for the purpose of switching cars upon the premises of the several establishments. On the northwest corner of Ferry avenue and the railroad track, and about 25 feet westerly from the inbound track, there was a small house used as a car checker's office and a waiting room for passengers. This

point was known as the Lake Shore junction, and was used as a passenger station for many years, for the purpose of taking on and letting off passengers. All Lake Shore trains stopped at this point, and many of the trains of the D. & M. The outgoing trains would stop at this point, so that the rear car would just pass the north side of Ferry avenue. It was the custom of passengers to enter and leave the outgoing Lake Shore train on the easterly side, from which all signals were given by the conductor to the party in charge of the engine. The plaintiff in this case had been in the employ of the defendant Detroit, Grand Haven & Milwaukee Railroad for a number of years, in different capacities, and for two years prior to the accident had been in charge of the two semaphores and the joint switch at Ferry avenue, working from 6 o'clock a. m. until 6 o'clock p. m., standard time. He was well acquainted with the rules of the company, and knew the custom and manner in which trains were operated by both companies at this point. He lived in the western part of the city, and after quitting work it was his custom to take the 6:30 Lake Shore train to the west side of the city. He testified that he done this every evening for a period of two years, and during all that time it had been his custom, upon the approach of the Lake Shore train, to walk up the inbound track almost to a point opposite the north semaphore, and there take the first passenger car behind the engine, being the second-class coach. This train stopped at this station only long enough to take on and let off passengers, the stop being momentary, and in order to be sure of getting onto the train it was necessary to be at the proper point on the train's arrival. On the 26th day of December, 1896, plaintiff quit work at 6 o'clock, went over to the car checker's office, and waited there until he saw the south semaphore go down. He looked at his watch. It was then 6:30 o'clock, and the Lake Shore train which he wished to take was then due. He went out of the car checker's office, walked about 20 feet towards the inbound track, looked southward down the tracks, and saw a headlight on the outgoing main line, but said he did not see any engine or train south on the incoming main line. He then walked over onto the westerly or inbound track, and started towards the north semaphore, the point where he usually entered the Lake Shore train. While he was walking along this track, and had proceeded a distance of about 100 feet up the track, a switch engine came up north-erly on the inbound track, and without blowing any whistle or ringing any bell ran over the plaintiff, severing both legs. There were about three or four inches of snow on the ground, the atmosphere was practically clear, there was an electric light at the intersection of Ferry avenue and the railroad crossing, and the headlight of the engine which struck him was lighted. The engine which ran over the plaintiff was engine No. 106, owned and operated by the Detroit, Grand Haven & Milwau-



kee Railroad Company. This engine had been at work on the siding to the west of the inbound track, and south of the telegraph station, for 10 or 12 hours during that day. At some point south of the telegraph office this engine ran in upon the inbound track and started northward towards the D. & M. junction, which is beyond the Lake Shore junction. This engine came out the inbound track at a speed, according to one of the witnesses, of about 12 miles an hour, and according to others at a speed of about 6 miles. The headlight which the plaintiff saw in looking down the track was the headlight, not of the Lake Shore train, but of a wild engine, which was coming out the outbound track, and it was for this engine that the semaphore was dropped, giving this engine the right to proceed on the outbound track. Plaintiff testified that he walked out the inbound track, relying upon the rules of the company and his knowledge of their custom in the operation of trains at that point. Rule 84a reads as follows: "When double track is used, all trains will take the right-hand track, except as provided in special rules or orders, or when necessary to cross over to do work at stations when protected as provided in rule 100." Rule 18a reads as follows: "Train or switch engines must use the right-hand track between the Lake Shore junction and double-track switch at Jefferson avenue bridge, according to the direction in which they are running, and must keep careful lookout for switch engines and approach cross-over switches under perfect control." Rule 14 reads as follows: "The track between Lake Shore junction and Milwaukee junction will be considered yard limits for irregular trains and yard engines, and between Lake Shore junction and Leland street yard limits for yard engines only; but they must keep entirely clear of all time-card trains, and run very cautiously between those points, expecting to find main line occupied." This rule controlled all switching crews. Rule 2 provides: "Enginemen approaching Lake Shore junction from Detroit will come to a full stop not less than 100 yards short of the double-track switch, and approaching Lake Shore junction going towards Detroit will come to a full stop not less than 100 yards short of the joint switch, and remain until semaphore has been lowered and switch properly set and signaled by switch tender to proceed, and will not pass the switches at a rate of speed exceeding four miles per hour. It will not be necessary to lower the semaphores on both sides of the switches,—only the one nearest to the train given the right to cross it. The other semaphore must be kept up to stop trains coming in opposite direction. Rule 114b reads as follows: "When within the limits of the various yards, all trains must be run with great care, and under the control of the engineman, so that he may at all times be able to stop within the range of his division. \* \* \* " The court directed a verdict for the defendants, holding, first, that the plaintiff was guilty of con-

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tributory negligence in being upon the track, and, secondly, that there was no gross negligence shown on the part of the defendant companies.

Flowers & Moloney, for appellant.

Wells, Angell, Boynton & McMillan, for appellee Lake Shore & M. S. Ry. Co.

Geer & Williams (E. W. Meddaugh, of counsel), for appellee Detroit, G. H. & M. Ry. Co.

GRANT, J. (after stating the facts). There is no evidence to show any liability on the part of the defendant the Lake Shore & Michigan Southern Railway Company. It had provided a station room and platform for those who had occasion to depart from and to enter its trains at Ferry avenue. In doing this it had done its full duty. *Sturgis v. Railway Co.*, 72 Mich. 619, 40 N. W. 914; *Railroad Co. v. Coleman*, 28 Mich. 452. The rear car stopped just opposite this platform. It extended no invitation to plaintiff or any one else to walk along the other track, or to use it as a platform for plaintiff or other passengers who desired to take its train. If it were necessary to walk to the front of the train instead of taking the rear car (there is no evidence to show such necessity), there was ample space between the two tracks, level and smooth, which the plaintiff might have taken. At the point where he was struck, the distance between the two tracks was 20 feet. Neither is there any evidence to show such a well-known custom on the part of passengers to walk down the other track so as to enter the smoking car,—the forward car of the train,—a distance of about 200 feet, as would bind the defendants. Switch engines were liable to come in and go out over these tracks at any time. They were not limited to one track coming in and to the other going out. All they were required to do by rule 14 was to keep entirely clear of all time-card trains, and run cautiously between the points mentioned in the rule, as they might expect to find the main line occupied. Plaintiff is chargeable with notice that in this busy place these engines were liable to occupy the tracks at any time. He entered upon this track supposing, as a matter of course, that the headlight he saw was the headlight of the engine of the train which would take the Lake Shore track. Evidently, had he looked when upon the track on which he was injured, or within 10 feet of it, he would have observed that the engine was upon the track. Furthermore, the switch lights were not turned for the train to go upon the Lake Shore. Upon this point he testified: "I did not observe whether the switches, which were within a few feet of me, were set so the train could go on the Lake Shore. I was off duty. I did not bother my head about it. That was left for the night man to look after. Two engines were, in fact, coming on defendant's tracks." He did not look at any time after he had reached a distance of 20 feet from the inbound

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track. He testified that when within 20 feet he could look about a half mile down the track. He further testified: "I was about twenty feet from the office when I looked to the south and saw the headlight. I had gone about twenty feet towards the tracks when I looked to the south and saw the headlight. I saw them coming that way, and I turned myself and went up the track. At no point after that did I look to the south to see if any train were coming." That he knew of the extent of the switching appears from his own testimony as follows: "On account of all this switching and moving of trains, engines may be passing there any moment. They were liable to be switching up there at any time. In the winter time, especially, it is a busy place." He further testified: "I walked up the incoming main line because there was snow shoveled away on the side of the track more than anything else, and to keep out of the snow." Plaintiff relied solely upon the fact that the semaphore was dropped, and shut his eyes to all other evidences of the facts surrounding him, and of which he might readily have availed himself, showing that no train was coming upon the Lake Shore track, but that a train was coming on the track over which he was walking. What right had he to assume that the engineer and fireman would look out for him any more than he would look out for himself? Evidently the engineer and fireman were not at the moment looking. If this was negligence on the part of the engineer and fireman, was it not equally negligence for him to pay no attention to his surroundings? What right had he to rely upon the performance of duty by his fellow servants, if he was at that time in the employ of the company, while he himself was neglecting to perform his own duty? Had they been looking, they would have had a right to suppose that he would step off the track in time to avoid injury. He does not testify that he did not hear the trains. On the contrary, it is quite evident that he did hear them, and knew that one at least was coming behind him. It is difficult to conceive of a case of greater contributory negligence. Plaintiff went deliberately from a place of safety into a place of danger. *Railroad Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181; *Railroad Co. v. Skiles* (Ohio) 60 N. E. 576; *Trudell v. Railroad Co.*, 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271; *Railroad Co. v. Campan*, 35 Mich. 468; *Bresnahan v. Railroad Co.*, 49 Mich. 410, 13 N. W. 797; 3 Elliott, R. R. § 1250.

The judgment is affirmed.

LONG, J., did not sit. The other justices concurred.

CHICAGO & E. I. R. Co. *et al.* v. HUSTON.

(Supreme Court of Illinois, April 16, 1902.)

[63 N. E. Rep. 1028.]

**Person Killed While Crossing Track to Board Car.\***

Where deceased was killed while crossing one of defendant's railroad tracks, and it was alleged that he was not a trespasser, but was crossing over to board defendant's passenger train on another track, evidence that about a half hour before the accident, as deceased was leaving his home, his father gave him a nickel for car fare, and that a nickel was all the money afterwards found on his person, was admissible.

**Same—Evidence—Look and Listen—Instructions.**

Where deceased was killed while crossing defendant's railroad track, it was not error to refuse an instruction that, had he looked and listened "he could not have failed to see the engine, as it was approaching, and that he must have neglected to look."

**Death of Son—Presumption of Loss.**

Where a minor who is killed leaves a father entitled to his services, loss is presumed, and the fact that the minor worked for his father and received pay for his services does not show that he was "an expense, and not a benefit."

**Appeal from appellate court, First district.**

Action by George Huston, administrator of Frank N. Huston, deceased, against the Chicago & Eastern Illinois Railroad Company and others. From a judgment of the appellate court (95 Ill. App. 350) affirming a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Lyford and K. M. Landis (Sol Rosenblatt, of counsel), for appellants.

Thornton & Chancellor, for appellee.

CARTER, J. This was an action on the case brought by appellee, as administrator, to recover damages for the death of Frank B. Huston, his son, a young man of about 17 years of age. The son was struck and killed by a locomotive of the Chicago & Eastern Illinois Railroad Company on the evening of May 11, 1895, at or near the Seventy-Second street suburban station of the appellants' road, in Chicago. The locomotive was going north rapidly, without any cars attached, the engine driver evidently intending to run past this station without stopping. At the station were two parallel tracks running north and south, used for passenger trains exclusively, the eastern most one for north-bound passengers and the other for those bound south. There was a passenger platform along the east side of the tracks and another one between the two tracks. The principal dispute was whether the deceased was walking on the track, and thus a trespasser, when he was struck by the locomotive, or whether he was in

\*See note, 12 Am. & Eng. R. Cas., N. S., 444. See also, Vincent v. Morgan's L. & T. R. & S. Co. (La. Ann.), 5 Am. & Eng. R. Cas., N. S., 463; Pyle v. Clark et al. (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 431.

the act of crossing the track to take passage on the south-bound train from the platform between the tracks. The evidence on his point was very conflicting. A south-bound passenger train was due at this station about the time of the accident.

At the close of appellee's evidence, and again at the close of all the evidence, appellants moved the court to instruct the jury to find for appellants, which instruction the court refused. There was no error in refusing the instruction, inasmuch as the question whether deceased was in the exercise of due care for his own safety was one especially for the jury to determine under the conflicting evidence in the case. The jury returned a verdict for \$3,600 damages, and the judgment on this verdict was affirmed by the appellate court.

The appellee was allowed to testify, over the objections of appellants, that he gave his son a nickel a half or three-quarters of an hour before the accident, when he left home, and that a nickel was all the money found in his possession after the accident. It is claimed that this testimony was irrelevant, and not part of the *res gestæ*, but too remote in time to be properly considered by the jury, and that it was error to admit it. The object of the testimony was to show that the deceased has secured the means of paying his fare to his home before leaving his father, and, in connection with other circumstances in evidence, that he was at or near the railroad platform, with the intention and for the purpose of taking passage on the train approaching from the north, and was then crossing the track to the proper platform for that purpose when he was struck by the locomotive running north. A number of cases are cited by appellant to sustain their contention that the testimony was inadmissible, but all of them refer to statements or declarations made by the party injured some time either before or after the accident. No declaration or conversation was here admitted in evidence, but the mere fact that the deceased came to his father just as he was leaving home, and that his father gave him a nickel. His father did not see him again till after the accident. The act of getting and receiving the nickel, and the finding of it in his pocket at the station, were competent, as circumstances tending to show, in connection with other circumstances, the purpose of the deceased in being at the railroad station. If he had attempted to cross the easternmost track, upon which the locomotive was running, to reach the platform where passengers entered cars running south on the next track, with no means with which to pay his fare, that would have been a circumstance tending to prove that he did not intend to become a passenger on the then approaching train. The converse of this proposition would not necessarily be true; still it was not error to admit it as a circumstance in the proof.

The refusal of appellants' seventh instruction is urged as error. It is not proper to tell the jury what acts or omissions

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will constitute negligence, or that it was the duty of the deceased to have looked and listened, and "that he could not have failed to see the engine as it was approaching, and that he must have neglected to look," as would have been done had this instruction been given. *Railroad Co. v. Gunder-son*, 154 Ill. 495, 51 N. E. 708. The question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury was one of fact. *Railway Co. v. Hansen*, 166 Ill. 923, 46 N. E. 1071.

It is claimed by the appellants that no damages were proved, and that the verdict is therefore unsupported by the evidence. The deceased was the son of and worked for appellee, and had been paid by him as high as \$12 a week for his services. It is contended that the evidence showed that he was an expense to his father, and that appellee received no pecuniary benefit from him. His father was not obliged to pay him anything for his services. Where the deceased is a minor and leaves a father entitled to his services, the law presumes there has been a pecuniary loss from his death, for which compensation, under the statute, may be given. *City of Chicago v. Scholten*, 75 Ill. 468; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171. Finding no error, the judgment will be affirmed.

Judgment affirmed.

# BROWN v. NEW YORK, N. H. & H. R. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1902.*)

[63 N. E. Rep. 941.]

## Injury to Passenger—Alighting from Moving Train.\*

In an action for injuries received on alighting at a station from a train after it had started, it was shown that plaintiff had alighted there every day for 35 years, and that it was daylight at the time of the accident. Plaintiff testified that it was a dark and drizzling evening, that he did not look to see if the train was moving, that his sight was good, and that there was nothing to distract his attention. There were a truck and a lamp on the platform within the range of his vision, which would have shown him that the train was in motion, if he had looked: *held*, that plaintiff could not recover, because of a lack of due care.

## Same—Same—Burden of Proof.

In an action against a railroad for injuries received while alighting at a station from a train after it has started, the burden is on plaintiff to show that he was carefully trying to alight safely.

Exception from superior court, Suffolk county; John Hopkins, Judge.

\*See note, 12 Am. & Eng. R. Cas., N. S., 249. See also, *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606, 18 N. W. 380, 16 Am. & Eng. R. Cas. 321, 50 Am. Rep. 274; *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; *Falk v. New York, etc., R. Co.*, 56 N. J. L. 380, 58 Am. & Eng. R. Cas. 191; *McDonald v. Illinois, etc., R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263; *Hartwig v. Chicago, etc., R. Co.*, 49 Wis. 358, 5 N. W. 865, 1 Am. & Eng. R. Cas. 65.

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Action by Brown against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Foster Rogers, for plaintiff.

Charles F. Choate, Jr., for defendant.

KNOWLTON, J. The plaintiff on August 10, 1899, took the defendant's train from Boston to North Abington, where he arrived at 45 minutes after 5 o'clock in the afternoon. He started to alight from the train, and, on reaching the door of the car, discovered that he had left his umbrella in his seat, and went back for it. He found that it had been taken out by his friend at the other end of the car, and, returning to the door from which he had gone back, he stepped out upon the platform of the car, and got off after the train had started. He fell, and was injured, and now seeks to recover compensation for his injury.

We do not consider the question whether there was negligence on the part of the brakeman or conductor in allowing the train to start before the plaintiff had alighted, for we are of opinion that there was no evidence that he was in the exercise of due care in getting off as he did. It is a general rule that a passenger who attempts to get on or off a railroad train while it is in motion is not in the exercise of due care. *Merritt v. Railroad Co.*, 162 Mass. 326, 38 N. E. 447, and cases there cited. The question in a case like the present is whether there is evidence that takes it out of the general rule. The plaintiff was very familiar with the place. For nearly 35 years he had traveled back and forth by train nearly every day between North Abington and Boston. When he alighted there was no person in his way, and nothing to obscure his vision. Although he says it was a dark, drizzling evening, daylight had not gone, for a quarter before 6 o'clock on August 10th is a long time before sunset. There was a kerosene light 10 or 12 feet from where he stepped off, under the roof which covered the platform, and he testified that he could have seen it if he looked around. There was also a truck on the platform nearly opposite the place where he stepped off, which he saw while he was on the platform of the car. He testified that his sight was good, and there was nothing to distract his attention as he was getting off. He also testified that he did not look to see if the train was moving; that he did not look at all, but got off the train without looking. If the plaintiff knew that the train was moving when he stepped down from it, he was not in the exercise of due care, and he cannot recover. If he did not know it, there is no evidence that he was in the exercise of due care in getting off without knowing it. The evidence tends to show that, if he had paid any attention to the familiar surroundings, he could not have failed to notice that the train had started. To say nothing of the platform and other objects,

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the truck which he saw while he was on the platform of the car would have shown him that the train was in motion, if he had looked. So would the kerosene light. But he chose to get off without looking or paying attention to the train or his surroundings. The circumstances disclosed by the evidence have no tendency to show that he would have failed to discover the movement of the train if he had been in the exercise of ordinary care. Indeed, they indicate that the accident happened because he used no care. While the burden was on him to prove that he was carefully trying to alight safely, he fails to show that he was giving any attention to his surroundings. The case is not like *Brooks v. Railroad Co.*, 135 Mass. 21. It differs materially in its facts from *Merritt v. Railroad Co.*, 162 Mass. 326, 38 N. E. 447. In principle, it is more like *England v. Railroad Co.*, 153 Mass. 490, 27 N. E. 1. Exceptions overruled.

ILLINOIS CENT. R. CO. v. HENON.

*(Court of Appeals of Kentucky, May 27, 1902.)*

[68 S. W. Rep. 456.]

**Employment of Minor—Liability to Father for Personal Injuries.\***

One who employs a minor to perform dangerous or hazardous work without the knowledge or consent of the father, when he knows, or might by the exercise of ordinary care know, that the person employed is a minor, is liable to the father for the loss of the son's services during his minority, resulting from an injury received by him while so engaged, and for trouble and expense of taking care of him.

**Manumission.**

There being no plea that the father manumitted the son, an instruction on that point was properly refused.

**Damages—Harmless Error.**

Though the petition alleged only the expenditure of \$5 for medicine, an instruction that the jury might find for "medicine not to exceed \$25" was not prejudicial, there being no proof that the medicine cost over \$5, and the error being plainly a clerical one.

**Res Gestæ.**

The circumstances under which the injury was committed were properly admitted in evidence as a part of the *res gestæ*.

**Evidence.**

Error in admitting the testimony of plaintiff's wife was harmless, as she stated nothing more than plaintiff had already testified to, and his statements as to those matters were not contradicted.

**Damages—Evidence.**

Testimony as to the extent of the boy's injury was admissible to show the extent to which his services had been lost and the trouble and care required in nursing him.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

\*See *Taylor v. Ches. & O. Ry. Co.* (W. Va.), 4 Am. & Eng. R. Cas., N. S., 115; *Railway Co. v. Redeker*, 75 Tex. 310; *Railroad Co. v. Byrle*, 110 Ind. 100, 28 Am. & Eng. R. Cas. 306; *Vaughan v. Rhodes*, 2 McCord 227, 13 Am. Dec. 713, and notes; *Lawyer v. Sauer*, 10 Kan. 519.



## Illinois Cent. R. Co. v. Henon

Action by W. L. Henon against the Illinois Central Railroad Company to recover for the loss of services of plaintiff's infant son and compensation for expenses and care in nursing him. Judgment for plaintiff, and defendant appeals. Affirmed.

Quigley & Quigley and Pirtle & Trabue, for appellant.  
B. F. Proctor and C. H. Wilson, for appellee.

HOBSON, J. Appellee, W. L. Henon, instituted this action against appellant to recover for the loss of the services of his infant son Luther Henon and compensation for expenses and care in nursing his son in consequence of injuries received by him while in the service of appellant, alleging that he had been employed by it without his knowledge or consent in a dangerous and hazardous service, with notice of his infancy. He also alleged that the injury of his son was caused by the gross negligence of the defendant in the operation and management of its cars. The answer traversed the allegations of the petition and pleaded affirmatively contributory negligence on the part of the son Luther Henon. On the trial of the case before a jury a verdict was returned in favor of the plaintiff for \$600, on which judgment was entered, and the defendant appeals.

Luther Henon was 19 years of age. He was employed by the defendant to work in his gravel pit about February 10, 1900, and worked there until the 7th of March, when he was hurt. On that morning they loaded 8 or 10 cars with gravel. The boss or foreman then said, "Boys, get on that train and go over to Gilbertsville and help unload gravel." Luther Henon thereupon left the place where he was working, and walked around in front of the engine to the end of the tender, and climbed up the ladder to the rear end of the tender for the purpose of riding on it to Gilbertsville. After he started up the ladder the engine started off. The brakes had been loose on all the cars. After the engine started it was found that the cars were not fastened to the engine, and the engineer, at the order of the conductor, stopped it. The cars, however, had been set in motion and ran down against the engine, giving it quite a hard bump just as the boy got to the top of the ladder. This knocked him off and he fell down and the car ran over his arm and so injured it that it had to be cut off. The gravel crew had made a number of trips of this kind. The boy had seen some of the hands ride on the tender. Others rode on top of the gravel on the cars. Some who were sitting on the gravel on this occasion were knocked over by the concussion. The defendant knew he was only 19 years of age, and his father had not been consulted as to the employment.

In *Railroad Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, the railroad company was held liable to the father of a boy who was acting as brakeman, although receiving no wages,

and was injured. The court said: "The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable, at least, for any injury that was likely to result from such illegal conduct. If one engages the servant of another in an obviously dangerous business he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person by so illegally interfering assumes all the risk incident to the service." See, also, to same effect, *Railway Co. v. Carroll* (Ky.) 31 S. W. 132. The circuit court followed the rule laid down in these cases. He instructed the jury that if the son was employed without the knowledge or consent of the father, and was under 21 years of age, and this fact was known to the defendant's agents in charge of him prior to his injury, and he was required to perform dangerous or hazardous work, and while thus engaged was thus injured, they should find for the father a fair compensation for the loss of the services of his son during his minority, and for trouble and expense in taking care of him; but that if the employment was made with the knowledge or consent of the father, or if defendant's agents who employed the son did not know, or by exercise of ordinary care could not have known, that he was under 21 years of age, they should find for the defendant.

These instructions properly presented the law of the case, and the verdict cannot be disturbed as against the evidence. There was no plea that the father had manumitted the son, and the instruction on this point was therefore properly refused. The question of consent by the father to the employment of the son was fairly submitted to the jury by the instructions, and under the evidence was clearly a question for the jury.

The amount of the verdict is not excessive. The instruction that the jury might find for "medicine not to exceed \$25" could not have prejudiced appellant on the trial, and was plainly a clerical error. The medicine was alleged in the petition to have cost \$5, and there was no proof that it cost over \$5. The jury therefore could not have been misled by the instruction on this minor item. The plaintiff claimed damages in the sum of \$1,800, or three times as much as was allowed.

There was no substantial error in the admission of evidence. The circumstances under which the injury occurred were properly admitted in evidence. They were part of the *res gesta*. The testimony of the mother of the boy could not have been prejudicial to the appellant, as she stated nothing

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more than appellant had already testified to, and his statements on these subjects were not contradicted. Testimony going to the extent of the boy's injury was properly admitted, for this went to show the extent to which his services had been lost and the trouble and care required in nursing him.

On the whole record we see no error, and the judgment complained of is therefore affirmed.

## CENTRAL OF GEORGIA RY. CO. v. AUSTIN.

*(Supreme Court of Georgia, March, 11, 1902.)*

[41 S. E. Rep. 40.]

**Death of Employee\*—Negligence of Master—Evidence.**

This being a suit for damages for a tortious homicide, and the evidence showing without contradiction that the defendant was not negligent in any of the particulars alleged, a verdict for the plaintiff was contrary to law.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by E. V. Austin against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error.

Westmoreland Bros. and W. E. Cousins, for defendant in error.

SIMMONS, C. J. Mrs. Austin brought suit against the Central of Georgia Railway Company for damages for the homicide of her son, who had been, up to the time of his death, an employee of the defendant company. On the trial the jury returned a verdict in her favor. The company moved for a new trial. The judge overruled the motion, and the movant excepted. Under the view we take of the case, it is unnecessary to notice any of the many allegations of error made in the motion for new trial, except that the verdict is contrary to law and the evidence. After a careful reading and study of the brief of evidence, we have come to the conclusion that, even if the deceased was without fault, the defendant was not shown to have been negligent. The evidence for the plaintiff fails to sustain any of the allegations of negligence on the part of the defendant, and the evidence for the defendant demonstrates that it was not guilty of any negligence whatever causing the death of the deceased, or contributing thereto. This being true, the verdict was without evidence to support it, and was contrary to law.

Judgment reversed. All the justices concurring, except LITTLE, J., absent.

\*Columbus, etc., R. Co. v. Christian (Ga.), 5 Am. & Eng. R. Cas., N. S., 584.

ST. LOUIS, I. M. & S. RY. CO. *v.* THURMOND.*(Supreme Court of Arkansas, May 10, 1902.)*

[68 S. W. Rep. 488.]

**Master and Servant—Negligence—Fellow Servant.\***

Plaintiff's husband, while employed by defendant railway company as a "fire knocker," was killed by the standing engine under which he was working being run against by another engine in charge of a "hostler." Deceased and the "hostler" were both under the supervision of the engine dispatcher. The "hostler" had men under him, while deceased had no supervision over any others. Sand. & H. Dig. § 6248, provides that all persons engaged in the service of any railway company who are intrusted with the authority of superintendence of any other employee are vice principals, and not fellow servants with such employee; and section 6249 provides that employees shall be deemed fellow servants only when of the same grade: *held*, that such "hostler" and deceased were not fellow servants.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Action by Lizzie Thurmond, as administratrix of the estate of James Thurmond, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dodge & Johnson, for appellant.

P. C. Dooley, E. W. Kimball, and R. E. Wiley, for appellee.

BUNN, C. J. Lizzie Thurmond, as the administratrix of the estate of her deceased husband, James Thurmond, brought this suit, for herself, as the widow, and James C. and Sue Ada Thurmond, the minor children of herself and deceased husband, against the St. Louis, Iron Mountain & Southern Railway Company, for damages in the negligent killing of her said husband, in the Second division of the Pulaski circuit court, laying the damages as follows, to wit: For herself in the sum of \$6,000, for the children in the sum of \$7,000, and for the estate in the sum of \$3,000, aggregating the sum of \$16,000, for which she prayed judgment. The defendant answered, denying all material allegations, and trial was had before a jury. Verdict and judgment for \$1,050 for widow and children and \$50 for the estate. From this judgment defendant in due form and in due time appealed to this court, assigning 11 separate and several grounds of error in the proceedings and rulings of the trial court.

The plaintiff testified that she was the widow of the deceased, James Thurmond, and that they had two minor children living,—the children named in the complaint; that her husband had been working for the railway company for five years as a "fire knocker," receiving \$1.62½ per day wages; that he was a steady colored man, and supported his family;

\*See article, "Fellow Servants," 12 Am. & Eng. Enc. Law 893. Also, see notes, 20 Am. & Eng. R. Cas., N. S., 296; 9 Am. & Eng. R. Cas., N. S., 9.

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being put in use again. It is doubtful what the legislature really meant, but such is the force of the language of the act, and as construed in *Railway Co. v. Becker*, 63 Ark. 477, 39 S. W. 358, and *Id.*, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. Rep. 78. The verdict is extremely moderate as to amount of damages.

Affirmed.

WOOD and RIDDICK, JJ., not participating.

HERBERT v. ST. PAUL CITY RY. CO.

(*Supreme Court of Minnesota, Jan. 31, 1902.*)

[88 N. W. Rep. 996.]

**Street Railways—Care Required in Keeping Car Steps and Platforms Free of Ice and Snow.\***

A street car company is required to exercise the highest degree of care to keep its platforms and steps in safe condition for use in the season when operated, so far as it practically can do so, in consideration of the climate, temperature, and condition of the air with respect to snow, moisture, and frost.

**Sufficiency of Evidence.**

Evidence considered, and *held* to sufficiently support a verdict for plaintiff upon the claim that she was a passenger on a street car, and, when alighting therefrom, slipped and fell from the same by reason of ice and snow negligently permitted by the carrier to be and remain upon its steps and platforms.

**Excessive Verdict.**

*Held* that, under the evidence in this case, the verdict of the jury cannot be held to be excessive.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Olin B. Lewis, Judge.

Action by Eva Herbert against the St. Paul City Railway Company. Verdict for plaintiff for \$1,000. From an order denying a new trial, defendant appeals. Affirmed.

Munn & Thygeson, for appellant.

Edwin Gribble, for respondent.

LOVELY, J. Plaintiff was a passenger on one of defendant's street cars, and, in attempting to alight therefrom at her destination,—upon her claim,—slipped upon ice and snow negligently allowed by defendant to remain upon the rear steps of the car. She sustained injuries, for which a recovery was had. After denial of a motion for new trial, defendant appealed from such order.

The material questions presented here for review are the sufficiency of the evidence to sustain the verdict, the contributory negligence of the plaintiff, and the amount of the damages.

There was evidence for the plaintiff tending to show that

\*See notes at end of case.

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she and her daughter took passage on February 19, 1901, on a car of defendant's street railway in St. Paul; that the car was stopped for her to alight at her destination, at the corner of Rice and Rondo streets; that it was a cold, blustery morning; that two days before the accident 2.8 inches of snow had fallen; that the ground was at the time covered with snow; that, in attempting to leave the car, the conductor, who remained inside, opened the door for her, when she went to the platform, put out her hand to take hold of the hand rail to aid herself, and stepped out, when she suddenly slipped upon the ice and snow which had formed on the steps of the platform, and fell therefrom to the ground; that she was jarred, and injured to such an extent that she had to be taken to her home, where she was confined by reason of her injuries to her bed for the period of two weeks. Plaintiff's description of her injuries indicates that, while her health had been previously good, up to the time of the trial, May 17, 1901, she has suffered to a greater or less extent and was still unable to work without pain, which condition might be permanent. Her physician testified that, while there was no substantial discoloration or bruises, yet she had received internal injuries, with a severe nervous shock, which would considerably impair her health. While there is no dispute as to the fact of plaintiff's fall at the place stated, there was a decided contradiction to her claim (supported by the testimony of several witnesses for defendant) that there was ice and snow on the car steps, and also testimony to show that her injuries, if any, were very slight. We find nothing in the evidence, however, that makes it physically impossible or highly improbable that the account of plaintiff and witnesses called by her might not have been truthful. The doubts arising rest solely upon the weight of the evidence, which was for the jury. In an exceedingly fair and impartial charge to the jury, applied to the facts, the learned trial court substantially stated the duty defendant owed to its passengers was the exercise of the highest degree of care to keep its platforms and steps in safe condition for their use, consistent with its undertaking to transport them in the season when such duties occurred, in this climate, as far as practicable, considering the climate, the temperature, and the condition of the air and ground with respect to snow, moisture, and frost. This obligation of duty, as stated by the trial court, was sufficiently favorable to the defendant, and stated the correct rule of law applicable to the case in that respect. The question of plaintiff's care was clearly for the jury, and needs no notice. The most that can be said upon the able argument of counsel for defendant is that the witnesses who contradicted the material statements of plaintiff exceeded in number those produced by her. The same argument on that question might have been presented to the jury, who were authorized to determine the weight of evidence. We are therefore bound to accept

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the verdict as decisive, particularly in view of the fact that the learned trial court approved it.

While the amount of damages awarded to the injured lady are questioned, yet, upon her own account of her sufferings, in connection with the opinion of her attending physician as to their character and durability, which were for the jury, we do not feel warranted in holding that their verdict was excessive or influenced by passion or prejudice.

The order of the trial court is affirmed.

## NOTES.

**CARRIERS OF PASSENGERS—DUTIES AS TO VEHICLES.**

BY THEODOR MERGAARDEN.

- I. General Rule.
- II. Railroads and Street Railways.
  - A. In General.
  - B. Cars, Engines, Couplings, Bell-Ropes, etc.
  - C. Brakes.
  - D. Interior of Railroad Coaches.
  - E. Heating Railroad Coaches.
  - F. Window Guards.
  - G. Platform Guards.
  - H. Ice, Snow, etc., on Platforms and Steps of Cars.
  - I. Projecting Bolts, etc., Catching Clothes of Passengers.
  - J. Projection of Wheel Guard from Floor of Street Car.
  - K. Construction of Steps of Street Cars.
  - L. Wheel Guards.
  - M. Motive Power of Street and Cable Cars.
  - N. Formation of Train.
  - O. Attaching Improperly Loaded Car, or Car of Wrong Gauge, to Train.
  - P. Precautions against Fires and Explosions.
  - Q. Mixed Trains.
  - R. Vestibule Trains.
  - S. Palace or Sleeping Cars Forming Part of Train.
- III. Stage and Hackney Coaches.
- IV. Carriers by Water.
- V. Elevators.

**I. GENERAL RULE.**

While, as has been shown in a previous note (see note to *Whippel v. Michigan, etc., R. Co.*, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774), a distinction necessarily exists between different kinds of carriers with respect to the duty to exercise care that the road over which passengers are carried is safe and suitable for the purpose, all carriers are under practically the same obligation with respect to the vehicle in which passengers are transported; every public carrier of passengers, whether by railroad, stage coach, water craft, or otherwise, is bound to exercise care to see that the vehicle or vessel in which passengers are carried is safe and secure.

**II. RAILROADS AND STREET RAILWAYS.****A. In General.**

Since a very large proportion of modern passenger transportation is in the hands of railroad and street railway companies, there are, very naturally, many recent cases in which the duty of these carriers with respect to their vehicles is stated. But most of these cases will be used later in this note in connection with a discussion of the

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specific applications of the duty, and only a few cases which state the obligation in general terms are here cited.

*Michigan*.—*Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

*Minnesota*.—*Bishop v. St. Paul, etc., R. Co.*, 48 Minn. 26, 50 N. W. 927.

*New York*.—*Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. (N. Y.) 353.

*Pennsylvania*.—*Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581.

*Texas*.—*Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182; *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475.

*Washington*.—*Washington v. Spokane, etc., R. Co.*, 13 Wash. 9, 42 Pac. 628.

#### B. Cars, Engines, Couplings, Bell-Ropes, etc.

In the case of a railroad train, the whole train must be regarded as the vehicle, and care must be exercised that the engine and all the cars are free from defects and roadworthy, that the couplings are adequate, and that the appliances necessary to the safe management of the train are supplied.

It may be a question for the jury as to whether it is negligence to use a baggage car for the transportation of passengers. *Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 2 Am. & Eng. R. Cas. N. S., 187, 31 L. R. A. 313. The fact that passengers are carried on a hand car cannot, of course, relieve the railroad of the obligation to exercise care properly to equip the car for the purpose. *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 44 Am. & Eng. R. Cas. 294, 19 Am. St. Rep. 795; *International, etc., R. Co. v. Cock* (Tex.), 14 S. W. 242. If, during the course of a trip, a street car is discovered to be out of repair, it should ordinarily be withdrawn from the service. *Washington v. Spokane, etc., R. Co.*, 13 Wash. 9, 42 Pac. 628. A car is, of course constructed with a view to its proper management, and it cannot be said that the mode of construction is defective, or not reasonably safe, when the unsafety is dependent upon conditions which are the result of negligent conduct either of passengers or company. *Werbowlaky v. Ft. Wayne, etc., R. Co.*, 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120.

The engine should be of the proper kind and in good condition. *Peyton v. Texas, etc., R. Co.*, 41 La. Ann. 861, 6 So. 690, 41 Am. & Eng. R. Cas. 550, 17 Am. St. Rep. 430; *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App. 1896), 34 S. W. 165. It may, in some cases, be necessary to equip the engines with spark arresters to protect passengers from injury by escaping sparks. *Higgins v. Cherokee R. Co.*, 73 Ga. 149, 27 Am. & Eng. R. Cas. 218. A railroad company has been held liable to a passenger rightly standing on a station platform who was injured by sparks flying from a passing engine, the evidence tending to show that the emission of sparks was due to a defectively constructed ash pan. *Philadelphia, etc., R. Co. v. Young*, 62 U. S. App. 428, 33 C. C. A. 251, 90 Fed. 709. See *Texas, etc., R. Co. v. Jumper* (Tex. Civ. App. 1901), 60 S. W. 797.

Care should be exercised that the couplings are of the proper kind and in repair. *Cotchett v. Savannah, etc., R. Co.*, 84 Ga. 687, 11 S. E. 553; *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 30 N. Y. S. R. 817, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.) 486, 11 N. Y. S. R. 872. A cattleman while descending a ladder of one of the cars in the train on which he was riding in charge of cattle, was injured in consequence of being caught between that and the adjoining car and crushed. It was alleged in the declaration that the two cars were defective owing to the bumpers being out of repair, so that, when the train was backed or pushed forwards, the two cars came within six inches of each other. A judgment for plaintiff was sustained. *New York,*



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etc., *R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, 4 Am. & Eng. R. Cas., N. S., 174.

In a few states it is provided by statute that passenger trains shall be equipped with bell-ropes. *Tenn. Code* 1884, sec. 1306; *Vt. Stat.* 1894, sec. 3909. And see *Hay v. Great Western R. Co.*, 37 U. C. Q. B. 456. But while it might be negligence to fail to equip a train with bell-ropes when that is necessary for the protection of passengers and it is practicable to do so, there is no rule of the common law which requires that to be done in all cases and on every kind of train. In an action by a passenger on a "mixed" train operated as a "way freight" and "passenger accommodation" combined, it appearing in evidence that it was impracticable and not usual to have bell-ropes on such trains, and it not being shown that the use of a bell-rope would have tended to prevent the accident complained of, it was held that the trial court erred in refusing to instruct the jury "that on the evidence they could not find the defendant ought to have a bell-rope on the train." *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, 45 N. W. 436.

**C. Brakes.**

Care must be exercised to equip a train or street car with proper and sufficient brakes, and to maintain them in sound working condition. *Lyon v. Union, etc., R. Co.*, 35 Fed. 111; *Wormsdorf v. Detroit, etc., R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453; *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721, reversing 14 N. Y. Supp. 172; *People's etc., R. Co. v. Weiller* (Pa. 1886), 2 Atl. 510; *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182; *Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

This duty has been made the subject of legislative enactment in several states, and it has been provided that passenger trains shall be equipped with automatic air brakes. *Ky. Gen. Stat.* 1894, sec. 778; 1 *How. Ann. Mich. Stat.*, sec. 3363; *N. Y. Laws* 1884, c. 439, sec. 6; *R. I. Pub. Stat.* 1882, c. 158, sec. 12; *Vt. Stat.* 1894, sec. 3910. When a train is equipped with the usual air-brakes required by law, which are in good condition when the train is started, but the brakes refuse to work in consequence of the unexplained turning of an air-cock, the failure of the brakes to work is not, it has been held, of itself evidence of negligence. *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511.

A judgment for plaintiff in an action by a passenger who was injured by the sudden flying back of an iron brake lever, the declaration alleging and the evidence tending to prove that the brakes and grip and appurtenances were in bad order and condition, has been sustained. *West Chicago, etc., R. Co. v. Johnson*, 180 Ill. 285, 54 N. E. 334, affirming 77 Ill. App. 142.

**D. Interior of Railroad Coaches.**

The duty of a railroad company to exercise care to provide safe vehicles necessarily extends to the interior fixtures of its coaches. Thus railroad companies have been held liable to passengers for injuries inflicted by the falling of a lampshade (*White v. Boston, etc., R. Co.*, 144 Mass. 404, 11 N. E. 552, 30 Am. & Eng. R. Cas. 615), by the falling of a seat (*International, etc., R. Co. v. Anthony* [Tex. Civ. App. 1900], 57 S. W. 897), by the falling of a berth (*Northern, etc., R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866, 48 Am. & Eng. R. Cas. 91. See, post, this note, II, S., and IV) and by a bell cord which a brakeman, in making a connection, pulled through a car in a violent manner. *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107, 17 So. 503. A railroad company will be liable for injuries to passengers resulting from the use of doors of unusual construction and which are more than ordinarily dangerous. *Sturdivant v. Ft. Worth, etc., R. Co.* (Tex. Civ. App. 1894), 27 S. W. 170. But in an action to recover damages for mortification sustained by a woman passenger on account of being imprisoned in a water closet owing to a defective

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lock, it appearing that the lock was of the best manufacture, and it not being shown that defendant was guilty of negligence in failing to keep the lock in good repair, a judgment for plaintiff was reversed. *Gulf, etc., R. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

## E. Heating Railroad Coaches.

It is the duty of a railroad company to provide for the comfort and welfare of passengers to the extent of properly and comfortably warming its coaches. *Hastings v. Northern, etc., R. Co.*, 53 Fed. 224; *Taylor v. Wabash R. Co.* (Mo. 1896), 38 S. W. 304, 42 L. R. A. 110; *Duck v. St. Louis, etc., R. Co.* (Tex. Civ. App. 1901), 63 S. W. 891; *International, etc., R. Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. 540; *Dillingham v. Hodges* (Tex. Civ. App. 1894), 26 S. W. 86. And, therefore, in an action to recover for the death of a passenger caused by the alleged negligence of defendant in failing, though requested, to warm its coaches in cold weather, it is not necessary for plaintiff to allege and prove a universal custom on the part of railway companies to warm their coaches. *Ft. Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 34 S. W. 677, 3 Am. & Eng. R. Cas., N. S., 397.

For the cases dealing with the duty of railroad companies to heat the waiting rooms at their stations, see II, D. 3 of the note to *Muhlhaue v. Monongahela St. R. Co.*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

## F. Window Guards.

No obligation rests upon a railroad to provide the car windows with guards so as to protect passengers from injury by exposing their arms at the windows, or to protect them against missiles thrown from the outside by persons over whom the company has no control. *Indianapolis, etc., R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Pittsburg, etc., R. Co. v. McClung*, 56 Pa. St. 294, overruling *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203; *Missimer v. Philadelphia, etc., R. Co.*, 17 Phila. (Pa.) 172. And so in the case of street railways, undoubtedly there is no invariable rule of law requiring them to provide the windows of their cars with guards to prevent injury to passengers who expose their hands and arms at the windows. Still under some circumstances, as where the cars run unusually close to structures alongside the track, it may be a question for the jury whether due diligence does not require that barricades or guards be provided for the car windows. *New Orleans, etc., R. Co. v. Schneider*, 13 U. S. App. 655, 8 C. C. A. 571, 60 Fed. 210.

## G. Platform Guards.

It has sometimes been provided by statute that the platforms of passenger coaches shall be guarded with flexible or movable bridges or aprons (Conn. Gen. Stat. 1888, sec. 3540; Ohio Rev. Stat. 1890, sec. 3347), and that the front platform of street cars shall be equipped with gates. See *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. 315, 28 Am. & Eng. R. Cas. 157. But in the absence of statutes to this effect it cannot be said as a matter of law that it is negligence on the part of railroad or street railway companies not to equip their cars with gates or similar guards; the question of the carrier's negligence must be determined in each case in view of all the facts. Thus it has been held that there is no absolute duty resting on a street railway company operating cars on parallel tracks to equip the car platforms with gates to prevent passengers from getting off the cars on the side next to the parallel track; whether it is negligence to fail to equip cars with gates is a question for the jury to be determined upon the facts of each particular case. *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 58 Am. & Eng. R. Cas. 269. And it has been held that it is a question of fact which ought to be submitted to a jury to determine whether or not the position of riding upon the front platform of a street car is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent them from being thrown from the car. *Archer v. Ft. Wayne, etc., R. Co.*, 87 Mich. 101, 49 N. W. 488, 48

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Am. & Eng. R. Cas. 50; West Philadelphia, etc., R. Co. v. Gallagher, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 201. But in an action against a street railway operating its cars upon a single track, it was held that the use of cars which had no gates upon the platforms was not negligence. *Byron v. Lynn, etc., R. Co.*, 177 Mass. 303, 58 N. E. 1015.

The question of whether a company which has equipped its cars with gates is chargeable with negligence in failing to have them closed must, it has been said, be determined by the jury in each case. *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406, 58 Am. & Eng. R. Cas. 369.

In an action to recover for the death of a passenger from injuries received in consequence of falling off the rear platform of a street car, the evidence tended to prove the following facts: The rear platform extended the whole width of the car body,—about 6 feet,—and was about three and one-half feet wide. It had a dasher across the end, and a shifting gate on the side next the other track, for the purpose of keeping passengers from going out on that side. The other side of the platform was left open for the ingress and egress of passengers. The dasher had a rail along the top, and on the rear end of the car body was a hand rail on each side of the door. The rail on the dasher was about two and one-half feet high, and the gate on the side was "a little bit lower." The dashers and gates on the cars on some of defendant's other lines were from 6 to 8 inches higher. The track on that line was quite rough, had "high and low joints," so that a car "would go uneven when it passes over them." The cars would rock a good deal. It was the practice and custom of the defendant to carry passengers on the platforms, and at certain hours they would be crowded. On appeal, the reviewing court, in holding that the question of defendant's negligence was one for the jury, said: "Permitting and inviting, as it did, passengers to ride on the platform, it was its duty to use all reasonable precautions to insure their safety. Under the circumstances disclosed by the evidence it was to be anticipated that passengers might, by reason of the jolting or rocking of the cars, or of some other cause, lose their balance, especially when the platform was crowded; and it was a fair question for the jury to say whether, in the exercise of that high degree of care required of carriers of passengers, the defendant ought not to have guarded the platform with rails or gates of sufficient height to have prevented just such accidents as occurred in this instance." *Matz v. St. Paul, etc., R. Co.*, 52 Minn. 159, 53 N. W. 1071.

**H. Ice, Snow, etc., on Platforms and Steps of Cars.**

Unquestionably, railroad and street railway companies must exercise care to keep the platforms and steps of their cars free from snow, ice, and other substances which threaten the safety of passengers in getting on and off, and will be liable for negligence in the discharge of the duty. *Louisville R. Co. v. Park*, 96 Ky. 580, 29 S. W. 455; *Herbert v. St. Paul, etc., R. Co.* (Minn. 1902), 88 N. W. 996. In a case in which there was evidence that there was snow and ice on the step of a car before the train started, and that the step was in such a condition that passengers would slip upon it in getting on or off the car, it was held that the jury was warranted in finding that defendant was negligent. *Gilman v. Boston, etc., R. Co.*, 168 Mass. 454, 47 N. E. 193, 8 Am. & Eng. R. Cas., N. S., 478. But it is at times unwarrantable to expect or require a railroad or street railway company to keep the platforms and steps of its cars clear of snow, ice and sleet. Thus a railroad company can hardly be expected to keep an exposed car platform clear of snow while in transitu during a storm. The question of the carrier's negligence in this particular must depend upon whether it has had a reasonable opportunity to remove the nuisance (*Pittsburg, etc., R. Co. v. Aldridge* [Ind. App. 1901], 61 N. E. 741), and is, in nearly every case, to be determined by the jury. *Louisville, etc., R. Co. v. Cockerel*, 17 Ky. L. Rep. 1037,

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33 S. W. 407; *Neslie v. Second, etc., R. Co.*, 113 Pa. St. 300, 6 Atl. 72, 27 Am. & Eng. R. Cas. 180. In an action to recover for injuries received while alighting from defendant's train by slipping on snow and ice alleged to have been allowed to accumulate on the platform of the car through the negligence of the defendant, it appeared that the accident had happened about five o'clock in the morning at the end of a twelve hours' journey. It had stormed at various times during the night and morning, and the weather was cold and freezing. It was quite certain that the quantity of either ice or snow on the platform was inconsiderable, and perceptible only after some inspection. In reversing a judgment for plaintiff on the ground that the case presented no facts as to the negligence of defendant which the jury were justified in regarding as proof of negligence, the reviewing court, in discussing the duty of a railroad company to remove snow and ice on cars attached to a running train traveling at night during a continuous storm, said: "The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain, or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so. We are not referred to any case laying down the precise degree of care and diligence required of such corporations, under such circumstances; but we think it must be somewhat analogous to that imposed upon municipal corporations in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred, but they are not to be deemed negligent if they do not remove all traces of such obstructions when they do not constitute something more than the presence of a danger arising alone from their inherent quality of being slippery." *Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, 19 N. Y. S. R. 493, 18 N. E. 859, 37 Am. & Eng. R. Cas. 150, 2 L. R. A. 252, reversing 42 Hun (N. Y.) 656, 4 N. Y. S. R. 888.

A railroad company cannot be expected to keep up a continuous inspection or to know at each moment the condition of every part of a train. In an action by a passenger to recover for injuries received, while alighting from defendant's train, by slipping on filth which covered the car step, the evidence showed the following facts: The train had been inspected before the train started, the cars being found to be in good condition and free from the particular nuisance. The distance from the station where the inspection was made and where plaintiff boarded the train to the point where she alighted was two or three miles. The regular running time between the two points was eleven minutes. It was night, and there was no evidence to show that, in the brief interval which had elapsed since the inspection was made, either the conductor or any one of the brakemen had been so situated, in the discharge of his duties, that observation would have disclosed to him the condition of the step. The trial court refused to direct a verdict for defendant and plaintiff had judgment. On error, the judgment was reversed on the ground that the verdict for plaintiff was not supported by the evidence. *Proud v. Philadelphia, etc., R. Co.*, 64 N. J. L. 702, 46 Atl. 710, 18 Am. & Eng. R. Cas., N. S., 633, 50 L. R. A. 468.

1. Projecting Bolts, etc., Catching Clothing of Passengers.

Care should be exercised that bolts, hooks, etc., are not allowed to

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project from the floor or other parts of the vehicle in such a manner that they may catch in the clothing of, and cause injury to, passengers. *Bowdle v. Detroit, etc.*, R. Co., 103 Mich. 272, 61 N. W. 529, 2 Am. & Eng. R. Cas., N. S., 223, 50 Am. St. Rep. 366; *Tunnicliffe v. Bay Cities, etc.*, R. Co., 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142. A woman who was a passenger on defendant's suburban train, in attempting to alight, was injured by being thrown to the ground in consequence of the skirt of her dress becoming caught on the head of a coupling pin which projected from the platform of the car. It was held that the facts that similar platforms were recognized by railroad men as suitable and safe, and were in general use by railroad companies, did not conclusively establish the absence of negligence on the part of the defendant, but that the projecting pin being plainly visible so that the company had notice of the possible danger to passengers, the question of defendant's negligence was properly left to the jury, and a judgment for plaintiff was affirmed. *Illinois, etc.*, R. Co. *v. O'Connell*, 160 Ill. 636, 43 N. E. 704, 4 Am. & Eng. R. Cas., N. S., 260, affirming 59 Ill. App. 463. Plaintiff was injured, while alighting from defendant's street car, by being thrown to the ground in consequence of her dress becoming caught in a curtain hook. The hook was of the kind known as a snap hook, consisting of a hook with a spring, forming a ring or loop when the spring was in place. But the spring of the particular hook which caused the accident was broken. The only proof of negligence given by the plaintiff was that the spring of the hook was broken, and that the point of the hook was thus exposed. There was no proof showing how or when the spring was broken, nor how long it had been broken; nor was there any proof that, by any degree of diligence or care incumbent upon the defendant, it could have known of its defective condition. The hooks broke in no other way than by use, and, for aught that appeared, the particular hook might have been broken by some person after the car started upon the trip. The defendant gave evidence showing that all its cars were furnished with the same kind of curtains and hooks, and that there was no better way known of fastening the curtains; that its road had been operated for several years, and carried more than a million of passengers every year, and that such an accident had never before occurred; that the springs in the hooks would sometimes break by use; that at the end of every trip the cars were inspected by persons assigned to that duty, and the curtains examined, and, if a broken hook was discovered, it was taken off, and replaced by a perfect one. In reversing a judgment for plaintiff, the reviewing court by Earl, J. (Danforth, J., dissenting), said: "It is difficult to perceive what more the defendant could have done or was bound to do. A defective, broken hook was not of such a dangerous character as to require the very highest degree of diligence to discover and remove it. It was not more dangerous in this car than it would have been elsewhere, where people were passing. No prudent man would have anticipated such an accident as this, or apprehended such an injury from a broken hook. Upon all the evidence, therefore, we are of opinion that the trial judge should have held, as matter of law, that the plaintiff had failed to establish a case entitling her to a recovery." *Kelly v. New York, etc.*, R. Co., 109 N. Y. 44, 14 N. Y. S. R. 36, 15 N. E. 879, reversing 39 Hun (N. Y.) 486.

#### J. Projection of Wheel Guard from Floor of Street Car.

It cannot be said that a street car is negligently constructed because a sheathing, covering the wheels and which is open to the view of passengers, projects a few inches above the floor of the car, that being the usual construction and no better being known. *Farley v. Philadelphia Traction Co.*, 132 Pa. St. 58, 18 Atl. 1090, affirming 6 Pa. Co. Ct. R. 347. And it has been held that the existence of a space of several inches between the sheet iron covering of the wheels of a street car, which project through the floor of the car under the seats to a height of two or three inches, and the side of the car where

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the seats extend down to its edge, does not amount to defective construction. *Thompson v. Metropolitan, etc., R. Co.*, 135 Mo. 217, 36 S. W. 625.

## K. Construction of Steps of Street Cars.

The steps by which passengers get on and off street cars should, of course, be suitable for the purpose. But in an action to recover for injuries received by plaintiff while boarding defendant's open summer car, it appeared that there was a step extending the whole length of the car. The step was seven and three-fourths inches wide, and thirteen inches below the floor of the car. The space between the back of the step and the edge of the floor was not entirely closed; but at the bottom, and resting on the step, was a board four inches high, above it an open space of three and three-fourths inches, and above this a board five and one-fourth inches wide, which reached to the floor. The injury to plaintiff was received, while passing from the step to the floor of the car, by getting his foot caught in the open space at the back of the step. It was held that there was nothing to show that the car was negligently constructed, and plaintiff was nonsuited. *Keller v. Hestonville, etc., R. Co.*, 149 Pa. St. 65, 24 Atl. 159, 30 Wkly. Notes Cas. 416. For very similar cases, see *Werbowski v. Ft. Wayne, etc., R. Co.*, 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120, and *Frobisher v. Fifth Avenue Transp. Co.*, 151 N. Y. 431, 45 N. E. 839, reversing 81 Hun (N. Y.) 544, 30 N. Y. Supp. 1099. For a statement of the facts of the last-cited case see post, this note, III.

## L. Wheel Guards.

It has been held that, although it is provided by statutes that railway companies operating street cars shall have guards upon their cars to protect persons from getting under the wheels, it is a question for the jury whether the absence of guards constitutes negligence. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996, 5 Am. & Eng. R. Cas., N. S., 393.

## M. Motive Power of Street and Cable Cars.

Care must be exercised by a street railway company employing horses as the motive power to select safe and tractable horses considering the use to which they are to be put. *Noble v. St. Joseph, etc., R. Co.*, 98 Mich. 249, 57 N. W. 126; *Wormsdorf v. Detroit, etc., R. Co.*, 75 Mich. 472, 42 N. W. 1000, 40 Am. & Eng. R. Cas. 271, 13 Am. St. Rep. 453. Street railways employing electricity as the motive power must exercise care to have the cars properly insulated and to discover any escape of electricity which may cause injury to passengers. *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Burt v. Douglas County, etc., R. Co.*, 83 Wis. 229, 53 N. W. 447, 58 Am. & Eng. R. Cas. 158, 18 L. R. A. 479. A car run by cable as the motive power should be equipped with a sufficient grip. *Sharp v. Kansas City, etc., R. Co.*, 114 Mo. 94, 20 S. W. 93, 52 Am. & Eng. R. Cas. 561.

## N. Formation of Train.

It is provided by statute in a number of states that, in forming trains, baggage, freight and similar cars shall be placed in front of the passenger coaches. *Mansf. Dig. Ark.*, sec. 5477, in connection with which, see *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Ind. Rev. Stat. 1894*, sec. 5191; 1 *How. Ann. Stat. Mich.*, sec. 3373; *Mo. Rev. Stat. 1889*, sec. 2607; *Mont. Penal Code 1895*, sec. 691; *Nev. Gen. Stat. 1885*, sec. 881; *N. J. Rev. Stat.*, p. 933, sec. 116; *N. Car. Code 1883*, sec. 1971; *R. I. Pub. Stat. 1882*, p. 406, c. 158, sec. 10; 1 *S. Car. Rev. Stat. 1893*, sec. 1680; *Sayles' Civil Stat. Tex.*, art. 4233; 2 *Utah Comp. Laws 1888*, p. 32, sec. 2352. And, irrespective of statute, a railroad company may no doubt lay itself open to a charge of negligence in making up a train in an improper and unsafe order. It has been held that attaching the locomotive at the rear of a train, and operating the train in that manner, justifies a finding of negligence by the jury. *Chicago, etc.,*

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*R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640. See *Louisville, etc., R. Co. v. Weaver*, 22 Ky. L. Rep. 30, 50 L. R. A. 381. And in an action to recover for injuries sustained by plaintiff in consequence of the derailment of the train on which he was a passenger, it was held that the facts that the engine was run backward with the tender in front, so that the headlight could not throw any light on the track, and that a milk car forming part of the train was placed last, should be considered by the jury along with the other evidence in the cause in deciding whether or not defendant had been guilty of negligence. *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, 6 Am. & Eng. R. Cas. 407, 39 Am. Rep. 787. But it has been held that it is not necessarily negligent to make up a train, which is about to pass through a storm along the line, with a snow-plow ahead and a flanger between the leading locomotive and those attached to the cars for traction purposes. *Denver, etc., R. Co. v. Pilgrim*, 9 Colo. App. 86, 47 Pac. 657, 8 Am. & Eng. R. Cas., N. S., 249.

**O. Attaching Improperly Loaded Car, or Car of Wrong Gauge, to Train.**

Several flat cars loaded with logs were attached to a train in front of the passenger car in which plaintiff was riding. There was evidence to the effect that the flat cars were improperly loaded and that the derailment, which resulted in injury to plaintiff, was caused by a log rolling off one of the cars and changing the position of a switch over which the train was passing. A judgment for plaintiff was sustained. *Keating v. Detroit, etc., R. Co.*, 104 Mich. 418, 62 N. W. 575.

A railroad company has been held liable to a passenger for injuries sustained in consequence of the derailment of a train caused by attempting to run in the train cars with a gauge wider than the gauge of the track. *East Line, etc., R. Co. v. Smith*, 65 Tex. 167.

**P. Precautions against Fires and Explosions.**

The legislatures of some of the states have imposed certain duties upon railroad companies intended to protect their passengers against the injuries by fire. Thus, the kind of heaters to be used in railroad coaches has sometimes been regulated by statute. 3 How. Ann. Stat. Mich., sec. 3434b; N. H. Pub. Stat. 1891, p. 453, sec. 13. In at least one state it has been provided that the heat shall be generated outside of the cars (N. Y. Laws 1887, c. 616), and the requirement has been held to be within the police power of the state. *People v. New York, etc., R. Co.*, 5 N. Y. Supp. 945, affirming 55 Hun (N. Y.) 409, 608, 8 N. Y. Supp. 672, affirmed, without opinion, in 123 N. Y. 635, 25 N. E. 953, affirmed in 165 U. S. 628, 41 L. Ed. 853, 8 Am. & Eng. R. Cas., N. S., 172. In quite a number of states the use of illuminating oil which will ignite at a temperature of less than three hundred degrees Fahrenheit is prohibited. Ky. Stat. 1894, sec. 737; N. Y. Laws 1882, c. 292; Ohio Rev. Stat. 1890, sec. 3353; R. I. Pub. Stat., p. 407, ch. 158, sec. 16; 1 S. Car. Rev. Stat. 1893, sec. 1683; Saub. & B. Ann. Stat. Wis., sec. 1806. And to aid passengers to make their escape from wrecked cars, railroads must, in some states, supply their passenger cars with certain prescribed tools such as saws, axes, etc. 1 How. Ann. Stat. Mich., sec. 3433; Minn. Laws 1887, c. 18, sec. 2; N. Y. Laws 1884, c. 439, sec. 8; Saub. & B. Ann. Stat. Wis., sec. 1807. In some states the locking of the doors of passenger coaches while the train is in motion is prohibited. Fla. Rev. Stat., sec. 2266; Ind. Rev. Stat., sec. 2298; W. Va. Code 1891, p. 898, sec. 18; Saub. & B. Ann. Stat. Wis., sec. 1806.

In the statutes of the United States and of at least one of the states, provisions are found which inhibit the transportation of certain kinds of explosives on passenger trains. U. S. Rev. Stat., sec. 4278, 4279, 5353, 5355; Saub. & B. Ann. Stat. Wis., sec. 1805. Section 5353 of the United States prohibiting the transportation of nitroglycerine on a railway train employed in conveying passengers from one state to another has been held to apply to the transportation of dynamite on a freight or mixed train carrying passengers. *United States v. Saul*, 58 Fed. 763.

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**Q. Mixed Trains.**

The line of a railroad may be so short, and the business done by it so small, as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business is sufficiently large and profitable to warrant it, and the safety of the passengers is endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it is clearly the duty of the railway company to run separate trains. *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280.

**R. Vestibule Trains.**

There is no rule of law which requires a railroad passenger carrier to use vestibule cars. But where a company has undertaken to provide a vestibule train, if it negligently permits the appliances to be out of order, or carelessly leaves the doors open so that passengers who rely and have a right to rely upon the safety of and proper management of the train are injured thereby, the company is liable. Thus it has been held to be negligent to leave open an outside vestibule door through which a passenger fell at night. *Bronson v. Oakes*, 22 C. C. A. 520, 76 Fed. 734, wherein the testimony showed that the train was moving rapidly, that the vestibule was poorly lighted and that the passenger mistook the open door for the car door, through which he intended to pass on his way through the train. But it has been held that the placing of a car without vestibules in a vestibule train in the daytime is not negligence. *Sansom v. Southern Ry. Co.*, 111 Fed. 887.

**S. Palace or Sleeping Cars Forming Part of Train.**

The requirement of the law which imposes upon carriers the duty to exercise care in providing safe and suitable vehicles for the conveyance of passengers would lose much, if not all, of its practical value, if carriers were permitted to escape responsibility upon the ground that the cars or vehicles, used by them and from whose insufficiency injury results to passengers, belong to others. Accordingly if cars, although owned and, as to the interior arrangements, controlled by a palace or sleeping car company, constitute a part of a train, the railroad is responsible for their sufficiency and safety to the same extent that it is responsible for the safety and sufficiency of its own vehicles. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225. See *Jenkins v. Louisville, etc., R. Co.* (Ky. 1898), 47 S. W. 761. Applying this rule, railroad companies must be held responsible for accidents caused by the falling of berths which are defectively constructed or negligently allowed to become out of repair. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, 1 Am. & Eng. R. Cas. 225; *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433, 8 Am. & Eng. R. Cas. 371. See this note, ante, II, D., and post, IV.

**III. STAGE AND HACKNEY COACHES.**

A carrier by stage or hackney coach is bound to exercise care to provide a roadworthy coach, good harness, gentle and tractable horses, and a skillful and careful driver. *McKinney v. Neil*, 1 McLean (U. S.) 540, Fed. Cas. No. 8,865; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125; *Sales v. Western Stage Co.*, 4 Iowa 547; *Frink v. Coe*, 4 Greene (Iowa) 555, 61 Am. Dec. 141; *Ingalls v. Bills*, 9 Metcalf 1, 43 Am. Dec. 346; *Caveny v. Neely*, 43 S. Car. 70, 20 S. E. 806; *Fariash v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666. And it may, in some case, be the duty of a carrier by stage coach to equip the coach, when traveling by night, with lights. *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125. In an action by a passenger against an omnibus company the negligence which plaintiff imputed to defendant was the alleged defective construction of the step of the vehicle.



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It appeared that there was but one step, twenty-two inches long and about sixteen inches wide. It was held in position by two large braces, one on each end, and there was corded rubber covering the step. The back of the step was open and not closed. The charge of negligence was based upon this opening. One of the witnesses testified that the open step was used for large cities, and another that he had never seen a stage with a solid back to its step, except the hotel coaches. The trial court refused to charge that there was no evidence that the step of the stage, or the stage itself, was in any way defective. In holding that this was error, the reviewing court said: "It is quite apparent, from the testimony given, that both kinds of steps are in general use, and that each may have its advantage and disadvantage. With the solid back step there would be no danger of the foot slipping through and catching under the bus, but it would be more liable to fill with mud and snow in traveling over the streets, and thus cause the foot to slip forward. It did not appear that any accident of this character had before occurred by reason of the use of the open back step. We think, therefore, that the defendant was not chargeable with negligence by reason of its use of the open step, and that its use did not render the omnibus defective." *Frobisher v. Fifth Avenue Transp. Co.*, 151 N. Y. 431, 45 N. E. 839, reversing 81 Hun (N. Y.) 544, 30 N. Y. Supp. 1099. For very similar cases, see ante, this note, II, K.

## IV. CARRIERS BY WATER.

Carriers by water craft are bound to exercise care to provide good, stanch, and sufficient vessels, equipped with proper and sufficient appliances.

Thus, a carrier by ferry boat should provide a safe way by which passengers may enter and leave the boat. *Le Barron v. East Boston Ferry Co.*, 93 Mass. 312, 87 Am. Dec. 717. The gates used at the ends of a ferry boat to close the ways by which to enter and leave the boat should be maintained in good order. *Peverly v. City of Boston*, 136 Mass. 366, 49 Am. Rep. 37. But in a case where a passenger on a steam boat stumbled over a gang plank of ordinary construction, which was lying on the deck of the vessel in close proximity to the place where it had to be used, there was no proof that the plank was negligently or unusually, constructed or handled, nor any other proof of any specific negligence of the defendant, which produced the plaintiff's fall. Judgment for plaintiff was reversed on appeal, the reviewing court regarding the case as a mere accident not induced by negligence. *Seddon v. Bickley*, 153 Pa. St. 271, 25 Atl. 1104. In a suit to recover for the death of a passenger by falling overboard it appeared that the boat upon which the deceased took passage had a gangway in the forward part about eight feet in width, with a stanchion in the center, which was covered with rails, about three feet high, which were attached by hinges to the bulwarks of the same height, inclosing the residue of the forward part of the boat. The deceased, about dusk, while the boat was running upon her trip, and the deck somewhat icy, and the wind blowing hard, came through a door from the room immediately in rear of this forward part. His hat was blown off and he sprang to recover it, and while so doing fell down and slipped, under the railing upon the gangway, overboard and was drowned. The only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. In sustaining a judgment nonsuiting plaintiff, the reviewing court said: "Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury; but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years; and there was no proof tending to show that any one had ever before fell and gone overboard under the rail-

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ing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur." *Dugan v. Champlain Transp. Co.*, 56 N. Y. 1, affirming 6 Lans. (N. Y.) 430.

Similarly to the obligation which has, in a preceding section of this note (see ante, II, D.), been shown to rest upon railroads, the duty of a carrier by water to exercise care in providing a safe vessel extends to its interior arrangements. Thus, a steamship company has been held liable to a passenger who, while occupying a lower berth, was injured by the falling upon her of the upper berth. *Smith v. British, etc., Packet Co.*, 86 N. Y. 408. The passages by which passengers go about the vessel should be safe for the purpose. Thus it may be negligence on the part of a steamship company to fail to equip the passages of its vessel with handrails to which passengers may cling when necessary. See *American Steamship Co. v. Landreth*, 102 Pa. St. 131, 48 Am. Rep. 196. Where a doorway to stairs leading down to the hold of a boat was so situated that passengers might in the nighttime readily suppose that it was an opening leading to the upper deck, it was held, in an action by a passenger to recover for injuries received by falling down the stairway, that the owners of the boat were guilty of negligence in neither adequately lighting, nor placing obstructions in front of, the doorway. *The Pilot Boy*, 23 Fed. 103.

It has been held that the owner of a steamboat, carrying passengers for hire, is chargeable with negligence in failing to equip the vessel with a small boat, and other convenient appliances, for rescuing passengers who may fall overboard. *Lobdell v. Bullitt*, 13 La. 348, 33 Am. Dec. 567. And no doubt a passenger who is injured by the falling upon him of a small boat may recover for the injuries sustained if the carrier is chargeable with negligence in failing to securely fasten the boat, and the passenger is in the exercise of due care. *Simmons v. New Bedford, etc., Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99.

A carrier of passengers by steamboat must, of course, be held liable to a passenger resulting from the explosion of a boiler in consequence of the carrier's negligence. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282. A ferry company has been held liable for injuries to a passenger caused by the explosion of the boiler upon the boat, in consequence of the use of a higher pressure than that allowed by the certificate of the government inspector. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, affirming 65 Barb. (N. Y.) 32. The fact that the boilers, etc., of a vessel employed in the carriage of passengers have been inspected pursuant to an act of congress by the proper officer, whose certificate shows a compliance with the requirements of the act, does not constitute a defense to an action by a passenger to recover for injuries received in consequence of the carrier's negligent failure to provide a safe vessel; the object of a statute providing for government inspection of steamboats is the greater security of passengers upon steam vessels against disaster, and the common-law duty of the carrier to exercise a high degree of care to provide a safe vessel is not impaired. *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209, 8 Am. Rep. 541; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

## V. ELEVATORS.

The responsibility for the safety of elevators used to carry persons from floor to floor of buildings is governed by the same rules as that of passenger carriers. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673. It has been held that a statute providing that "all elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the said inspectors, whereby the cabs or cars will be securely held in the event of accident to the shipper rope, or hoisting machinery, or from any similar

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cause, "does not impose the duty of having such a mechanical device attached to an elevator as will surely and securely, under all circumstances, hold the cab in the event of an accident such as described in the statute, but that the meaning of the statute is that the elevator is to be provided with some suitable mechanical device, to be approved by the state inspectors of factories and public buildings, designed for the purpose of securely holding the cab in the event of an accident. *Bourgo v. White*, 159 Mass. 216, 34 N. E. 191.

SMALLS *v.* SOUTHERN RY. CO.

(*Supreme Court of Georgia, April 2, 1902.*)

[41 S. E. Rep. 492.]

## Injury to Employee—Assumption of Risk.\*

It was, under the evidence in this case, exceedingly doubtful whether the plaintiff's injuries resulted from the defective condition of the defendant's locomotive, as alleged in his petition; but, even upon the assumption that a defect existed which caused the injuries complained of, the judgment of nonsuit was right, for the plaintiff's own testimony demanded a finding that he was fully aware of the existence of the defect, and voluntarily and deliberately assumed the risk of being hurt in consequence thereof.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Robert Smalls against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Twiggs & Oliver, for plaintiff in error.

Osborne & Lawrence, for defendant in error.

PER CURIAM. Judgment affirmed.

LITTLE and LEWIS, JJ., absent on account of sickness.

STATEN ISLAND MIDLAND R. CO. *v.* HINCHLIFFE.

(*Court of Appeals of New York, April 8, 1902.*)

[63 N. E. Rep. 545.]

## Liability of Directors for Failure to File Reports—Defenses.

It is no defense to an action under the stock corporation law (Laws 1899, c. 354, § 34), declaring that no director shall be liable to a corporate creditor for failure to file an annual report unless notice of an intent to hold him responsible is given within three years of the default, but providing that any such liability because of default "now existing" may be enforced by action within the year 1899, or thereafter, if within such year written notice of intent is given, that no notice was given the director of a corporation within the year 1899 of an intent to hold him liable for defaults in not filing annual

\*See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case, collecting authorities. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

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reports, the first of which occurred in the preceding year, and less than three years before action brought.

**Same—Application of Statute.**

Laws 1899, c. 354, relating to liability of director of company for failure to file annual report, is applicable to foreign as well as domestic corporations.

**Same—Defenses.**

In an action against the director of a corporation to enforce his personal liability for failure to file an annual report as provided by statute, a defense alleging that the debts were paid by a third party, and, if paid by plaintiff, were paid by him as agent therefor, is sufficient.

Appeal from supreme court, appellate division, Second department.

Action by the Staten Island Midland Railroad Company against James C. Hinchliffe. From an order of the appellate division (73 N. Y. Supp. 1148) affirming a judgment sustaining demurrers to the answer, defendant appeals by permission. Modified.

William M. Mullen and John Widdecombe, for appellant.  
Harcourt Bell, for respondent.

WERNER, J. This action is brought to establish the defendant's liability for the debts of a New Jersey corporation known as the Rockwell Construction Company. The defendant was a director of that company continuously from May 6, 1897, down to the commencement of this action, in July, 1900. The ground of liability alleged is the failure of that corporation to file an annual report in the month of January in each of the years 1898, 1899, and 1900, and the failure of the defendant during each of said years to file a certificate showing that he had endeavored to have such a report filed, as then provided by section 30 of the stock corporation law (Gen. Laws, c. 36). The complaint, after setting forth such defaults during the years mentioned, states, in substance, that from December 11, 1897, to June 27, 1898, the Rockwell Construction Company became indebted to the plaintiff on notes and other obligations made and incurred by the plaintiff for the benefit of that company, and paid by the former, in sums aggregating about \$128,000. Eight separate causes of action are stated, and it is alleged that the plaintiff, on or about June 30, 1900, served upon the defendant written notices that it intended to hold him personally liable for each of the amounts claimed by it. The answer contains a general and specific denial to the plaintiff's several causes of action. It admits the service on or about June 30, 1900, of the notices to hold him personally liable upon the claims set forth in the complaint, and then sets up several separate defenses. Two of these defenses (the ninth and thirteenth) were demurred to by the plaintiff upon the ground that they were insufficient in law, upon the face thereof. These demurrers have been sustained by the courts below. The appellate division has

granted the defendant leave to appeal to this court upon two certified questions: "(1) Is the ninth separate defense, contained in the defendant's amended answer herein, insufficient in law, upon the face thereof, to constitute a defense? (2) Is the thirteenth separate defense, contained in the defendant's amended answer herein, insufficient in law, upon the face thereof, to constitute a defense?"

The ninth defense is a plea of the statute of limitations. It sets forth that the defendant's liability accrued and existed, if at all, on April 18, 1899, and prior thereto, and that the plaintiff has not complied with the provisions of chapter 354 of the Laws of 1899. The sufficiency of this defense depends upon the construction of that statute. Said chapter 354, Laws 1899, added section 34 to the stock corporation law (Gen. Laws, c. 36; Laws 1892, c. 688), and provides: "No director or officer of any stock corporation shall be liable to any creditor of the corporation, \* \* \* because of any failure to make or to file an annual report, whether heretofore or hereafter occurring. \* \* \* Unless within three years after the occurrence of the act or the default in respect to which it shall be sought to charge the director or officer, such creditor shall have served upon such director or officer written notice of his intention to hold him personally liable for his claim: provided, nevertheless, that any such liability, because of any such default now existing \* \* \* may be enforced by action begun at any time within the year eighteen hundred and ninety-nine or by action begun thereafter, if within such year written notice of intention to enforce such liability shall have been given as above provided." It is claimed by the defendant that as all the claims of the plaintiff were in existence when this statute was passed (April 18, 1899), and no suit was commenced or notice given during the year 1899, the plaintiff's cause of action is barred. The facts stated are conceded, but the conclusion does not follow, as will clearly appear from a careful reading of the statute, and an investigation into the reasons for its enactment. Prior to the enactment of the statute of 1899, the stock corporation law, as amended by chapter 384, Laws 1897, simply provided that: "Every domestic stock corporation and every foreign stock corporation doing business within this state, \* \* \* shall annually, during the month of January \* \* \* make a report as of the first day of January. \* \* \* If such report is not so made and filed, all the directors of the corporation shall jointly and severally be personally liable for all the debts of the corporation then existing, and for all contracted before such report shall be made." Section 30. It will be observed that this section contains no limitation upon the time within which such liability could be enforced. The only limitation was found in section 394 of the Code of Civil Procedure, which provides that an action to recover a penalty or

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forfeiture, or to enforce a liability created by law, against a director or stockholder of a corporation, must be brought within three years after the cause of action has accrued. The liability of a director under this section being in the nature of a penalty, actions to enforce such liability were governed by the provisions of that Code section. *Losee v. Bullard*, 79 N. Y. 404; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49; *Merchants' Bank v. Bliss*, 35 N. Y. 412. This state of the law, prior to the passage of the act of 1899, frequently visited severe penalties upon directors of corporations which had neglected to file their annual reports. Prior to April, 1899, the three-years statute of limitations could only be set in motion by the concurrence of three things: (1) There had to be a debt in existence; (2) the debt had to be due; (3) the default in filing the annual report had to occur during the existence of the debt. Thus a director who was in office when a debt was incurred, but was out of office when it matured, might be held liable for the debts of the company because a default had occurred in filing the annual report while he was in office. If such a debt, although in existence at the time of the default, had many years to run before it matured, a director could be sued and held liable long after his ability to make an effective defense had been destroyed or greatly weakened by lapse of time. *Morgan v. Hedstrom*, 164 N. Y. 224, 58 N. E. 26. It was this situation which chapter 354, Laws 1899, was intended to relieve. It first provided that: "No director or officer of any stock corporation shall be liable to any creditor of the corporation \* \* \* because of any failure to make or file an annual report whether heretofore or hereafter occurring \* \* \* unless within three years after the occurrence of \* \* \* the default \* \* \* such creditor shall have served upon such director or officer written notice of his intention to hold him personally liable for his claim." If the statute had stopped here, no doubt could have existed as to its meaning. The obvious import of the language just quoted is that a director should have notice, within three years after the default in filing the report, of a debt which could not be barred within that time because not then due. But to this language there was added the following proviso: "Provided, nevertheless, that any such liability, because of any such default now existing \* \* \* may be enforced by action begun at any time within the year 1899 or by action begun thereafter, if within such year written notice of intention to enforce such liability shall have been given as above provided." By reading the statute as a whole, we see that, unless this proviso had been added, a debt which had existed for more than three years at the time the statute was passed, but which was not then due, would have been cut off. The purpose of the proviso, therefore, was to give to a creditor holding such a debt an opportunity during the time between

April 18, 1899, when the statute went into effect, and the end of that year, to save his claim, by either commencing an action within that time, if the debt should become due, or by serving the notice provided within that time. Such being the purpose and meaning of the statute, it had no reference to plaintiff's claims, as they were in existence and due when the first default occurred, at the end of January, 1898; and this action was commenced in June, 1900,—less than three years from that time. *Duckworth v. Roach*, 81 N. Y. 49. Under this construction of the statute in question, the order sustaining the demurrer to the ninth separate defense was right, and should be affirmed.

The respondent suggests two other grounds upon which he claims the demurrer to the ninth defense may be sustained: (1) It is contended that, as the Rockwell Construction Company is a foreign corporation, the provisions of the statute in question have no application to it. In this connection it is to be remembered that section 30 of the stock corporation law was amended in 1897 so as to include foreign as well as domestic corporations within its provisions. Laws 1897, c. 384, § 2. Section 30 creates the liability for a failure to file the report. While section 34 does not, in terms, refer to foreign corporations, and simply uses the words "director or officer of any stock corporation," it nevertheless regulates the enforcement of the liability created by section 30, and the two sections should be read together. When considered together, there can be no doubt that section 34 was intended to apply to the same corporations that are specified in section 30. Thus construed, section 34 applies to both foreign and domestic corporations. (2) It is further urged that, as the defendant is in fact a nonresident of the state, he cannot take advantage of the provisions of said section 34 to shield himself from liability. Upon this point it is enough to say that the record does not disclose that the defendant is a non-resident.

The remaining question to be considered is whether the demurrer to the thirteenth separate defense should be sustained. This defense, in effect, avers that the obligations of the Rockwell Construction Company, for which the plaintiff seeks to render the defendant liable, were in fact paid by a firm known as Robert Wetherell & Co., and that, if they were paid by plaintiff, they were so paid with funds of that firm, and as its agent. This is the substance of the defense, although it sets out at great length the specific transactions between the plaintiff, the Rockwell Construction Company, and the firm of Wetherell & Co., from which that conclusion is drawn. The demurrer assumes the truth of the facts thus alleged. If they are true, it is difficult to see why they do not constitute a valid defense to the cause of action set out in the complaint. It is probably a defense that could be proved under the general denial, but this does not render the specific

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allegations demurrable. There are defenses which may be stricken out on motion, but cannot be reached by demurrer. Section 500 of the Code of Civil Procedure provides: "The answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition." It may be conceded that this defense is not new matter, as it is not in avoidance or confession of the matters set forth in the complaint. But it is none the less a defense, because it is what is termed in pleading a "denial." Bouv. Law Dict.; And. Law Dict.; Moak's Van Santv. Pl. p. 509. If authority for such a plain proposition is needed, we have it in the case of *Benedict v. Seymour*, 6 How. Prac. 298, 304. That was one of the early decisions explaining the nature of pleadings under the Code, and in that case Judge Selden said: "Defenses, then, are divisible into two classes: (1) Those which deny some material allegation on the part of the plaintiff; (2) those which confess and avoid those allegations." It was also decided in that case that demurrer was not the proper method of getting rid of such defenses, for the "plain reason that a demurrer admitted the truth of the plea; and the facts contained in such a plea, if proved or admitted, must necessarily constitute a good defense." *Id.* 308.

It follows, therefore, that the first question certified should be answered in the negative, and the second in the affirmative.

That part of the order appealed from which affirms the judgment of the trial court sustaining the demurrer to the ninth defense should be affirmed, and that part which affirms the judgment sustaining the demurrer to the thirteenth defense should be reversed, with leave to the defendant to amend his answer accordingly within 20 days, without costs to either party.

PARKER, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and CULLEN, JJ., concur.

Judgment accordingly.

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(*Supreme Court of Minnesota, May 13, 1902.*)

[90 N. W. Rep. 381.]

Injury to Railroad Employee—Negligence of Fellow Servant.

In an action brought to recover for personal injuries, it is held that a cause of action is stated in the complaint, in which it is alleged that, while plaintiff was in defendant's employ as a section hand, he was injured by the carelessness and negligence of fellow servants, also section men, while they were engaged, with plaintiff, in removing a hand car from the railway track to make way for an approaching freight train.

(Syllabus by the Court.)



Lindgren v. Minneapolis & St. L. R. Co

Appeal from district court, Sibley county; Lorin Cray, Judge.

Action by August Lindgren against the Minneapolis & St. Louis Railroad Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Albert E. Clarke and H. J. Peck, for appellant.  
Huebner & Quandt, for respondent.

COLLINS, J. In an action to recover for personal injuries, the defendant railroad company interposed a general demurrer to the complaint, and subsequently appealed from an order overruling the same. From the complaint it appears that the plaintiff, when injured, was a section hand, and, with three other men,—one of them being the section foreman,—was running and operating a hand car in an easterly direction upon the section on which he worked, and in the proper discharge of his duty. It is alleged that while so engaged the crew of the hand car discovered a freight train approaching from the east, and, in order to avoid a collision, were compelled to remove the hand car from the track; that, while these four men were engaged in lifting and removing the car, two of them "carelessly and negligently, and without warning to the plaintiff, let go and released" their hold upon it, and "carelessly and negligently, and without warning to the plaintiff, allowed and let said hand car drop with great force to the ground," without notifying him that they were about to do so, whereby he was violently thrown across the car and severely injured. The above are, in substance, the allegations as to the negligence complained of.

1. It is contended by counsel for the defendant that it was incumbent upon the plaintiff to state the exact manner in which the accident occurred, and that the foregoing allegations merely state a conclusion, and, in any event, that they fail to show that there was real or actual negligence on the part of the plaintiff's fellow servants, for which the company can be held liable. We are unable to agree with counsel. If the complaint was more in detail, it might be subject to the criticism that evidence had been pleaded, and not the facts. We regard it as sufficient under our system of pleading.

2. It is further insisted by counsel that the facts, as alleged, do not bring the case within the fellow-servants act (Gen. St. 1894, § 2701). The proper construction of this section is well settled in a number of cases which have been submitted for our determination. It includes within its scope servants exposed to and injured by the dangers peculiar to the use and operation of railroads, and it goes no further. In *Steffenson v. Railway Co.*, 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271, it was held that a section man whose duty required the use of a hand car, and who was injured through the negligence of a fellow servant while they were operating it together, might recover. That case is decisive of this, although the injuries

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may not have been received in the same manner. It was the duty of the plaintiff, and it was a part of the operation of the car, to remove it from the track on the approach of a train. It is evident that such removal would be attended with some haste, and be more or less hazardous. It would be much more dangerous to remove such a car from a railway track than it would be to remove an ordinary vehicle from a highway on the approach of another vehicle which might run it down, and this danger was peculiar to the plaintiff's employment and duty, a proper performance of which required him to remove the car in order to avoid injury to himself and his fellows, and danger to the approaching train and to such persons as might be upon it. While thus engaged, he was operating the hand car just as much as when he was employed in "pumping" it along the track, for the removal was connected with, and in consequence of, its operation, and that of the road. Under the circumstances set forth, the operation of the car did not cease when it was stopped for the purpose of removal.

The ruling of the court below was correct, and stands affirmed.

*PETERS v. MCKAY & CO.*

(*Supreme Court of California, March 19, 1902.*)

[68 Pac. Rep. 478.]

**Injury to Employee—Derailment\*—Defective Rail—Sufficiency of Evidence.**

Where, in an action by an employee on a railroad for injuries resulting from the derailment of a train, which is predicated on negligence in the construction of the track, plaintiff's evidence tends to show no defect in the car, and that the car was derailed at the sharpest part of a curve, where the rails were old, secondhand rails, of different lengths, mashed and stringy, and that the ties were loose, and that the road was out of alignment, and that the curve was a very irregular curve, of about 20 degrees, and that the track was rough, it is sufficient evidence of negligence to sustain a verdict for plaintiff.

**Same—Same—Defective Rail or Obstruction Merely—Conflict for Jury.**

Where plaintiff's evidence in an action by an employee for injuries caused by the derailment of a train tends to show that the derailment was the result of a defective track, and defendant's evidence tends to show that it was caused by a stick of wood, it constitutes merely a conflict for the jury, and does not authorize judgment for defendant, as a matter of law, on the principle that where an injury may have resulted from either one of two causes, and defendant is only responsible for one cause, he cannot be held liable.

**Same—Negligence of Fellow Servant—Pleading.**

Where the defense that the injury was caused by the negligence of

\*Derailment caused by cattle, see *Carper v. Receivers Norfolk & W. R. Co.* (U. S.), 7 Am. & Eng. R. Cas., N. S., 95.

Caused by snowslide, see *Denver & R. G. R. Co. v. Pilgrim* (Colo.), 8 Am. & Eng. R. Cas., N. S., 249.

See generally, note, 16 Am. & Eng. R. Cas., N. S., 570.

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a fellow servant is not raised by the pleadings in an action by a servant against the master for personal injuries, it is not error to refuse to instruct as to the effect of the negligence of fellow servants.

Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Augustus H. Peters against McKay & Co. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Mastick, Van Fleet & Mastick, for appellant.

Gregor & Connick, for respondent.

GAROUTTE, J. This is an action brought by an employee of defendant to recover damages for an injury alleged to have been received by him through its negligence. Plaintiff had a verdict and judgment, and the defendant appeals from the judgment, and an order denying a motion for a new trial.

The defendant is a corporation engaged in the business of logging and lumbering in the county of Humboldt, and in the course of that business it maintains and operates a railroad about seven miles long, over which it hauls its logs. Plaintiff was employed as a train hand on the railroad, and on the occasion in question he was injured by reason of the derailment of the car upon which he was employed. The substance of the complaint is that the railroad track and roadbed were improperly constructed, and also not kept in good repair after construction; that by reason thereof the cars of defendant were derailed, and plaintiff injured. A general and special demurrer to the complaint was overruled, and error is relied upon by reason of such ruling. The complaint states a cause of action. *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Stephenson v. Southern Pac. Co.*, 102 Cal. 146, 34 Pac. 618, 36 Pac. 407; *Cunningham v. Railway Co.*, 115 Cal. 566, 47 Pac. 452, 7 Am. & Eng. R. Cas., N. S., 783. If there be ambiguities and uncertainties in the allegations of the complaint, they are not sufficiently substantial to demand a reversal of the judgment upon appeal. *Alexander v. Mill Co.*, 104 Cal. 536, 38 Pac. 410.

As evidenced by appellant's brief, the important question raised upon this appeal relates to the sufficiency of the evidence to support the verdict of the jury. And in the consideration of this question only the evidence offered by plaintiff will be examined. There is testimony to the effect "that there was a sharp curve in the track where the car was derailed; that the train consisted of eight cars, and was backing at the rate of fifteen miles per hour; that there was no defect in the car which left the track; that the rails were old, mashed, stringy; that the joints were low; that the rails were remnants of a quantity of secondhand old rails, of all lengths; that they were not good rails; that the road was not of alignment; that the ties were loose; and that the degree of cur-

vature at the point of the accident was about twenty degrees and unusual. According to the testimony of an expert engineer, this curve was a 'very irregular curve,'—had several 'sharp kinks in it,'—and that he never found, in all his experience, a railroad 'so much out of line as this road'; and, as expressed by several witnesses, the track at this point was rough,—very rough. The further fact was established that the car left the track at the sharpest point of the curve. Upon the foregoing state of facts the court concludes that the jury were justified in finding a verdict against defendant as to the cause of the accident and as to its negligence. Upon this state of facts the jury were justified in saying that the car probably left the track by reason of the defects above detailed. Upon this point it is a strong case of circumstantial evidence. At least, it may be said that this evidence was sufficient to justify the denial of a motion for a nonsuit. Appellant relies upon the principle of law stated in *Grant v. Railroad Co.*, 133 N. Y. 657, 31 N. E. 220, to the effect that "where there are two or more possible causes of an injury, for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in a case leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover." Now, it seems that this principle of law is more applicable as a rule to guide the jury in its deliberations upon the facts, than it is as a rule to guide the appellate court in passing upon the sufficiency of the evidence. In this case defendant offered evidence tending to show that the car was derailed by a piece of wood placed upon the track unintentionally by a near-by wood chopper; and the principle of law invoked from the New York case is more directly in point when this evidence is considered jointly with the evidence of plaintiff. But, after all, it was for the jury to say from all the circumstances whether it was more probable that the defective roadbed and rails caused the car to leave the track, or more probable that a stick of wood caused it to do so. As far as this court is concerned, in reviewing this question, the testimony tending to show that the car left the track by reason of a mislaid stick presents a mere conflict of evidence. If plaintiff made a *prima facie* case for a recovery, then this evidence as to the stick, as just observed, only serves the purpose of creating a conflict, and such a conflict is not a matter for review by this court. In weighing probabilities as to the two respective causes for the accident, this court would not be passing upon a question of law, but upon a pure question of fact. The jury declared it was more probable that the defective roadbed and rails caused the accident, than it was that the stick caused it, and with that declaration this court will and must be satisfied. The

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facts of plaintiff's case do not fit the facts disclosed in Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 Pac. 480.

It is insisted that the court erred in refusing instructions upon the question of the negligence of a fellow servant. Upon this point it is only necessary to say that no affirmative defense of that kind is made by the pleading, and in the absence of such a pleading the instruction was properly refused. Conlin v. Railroad Co., 36 Cal. 404; Bjorman v. Redwood Co., 104 Cal. 626, 38 Pac. 451; Gibson v. Furniture Co., 113 Cal. 1, 45 Pac. 5; Layng v. Mineral Spring Co. (Cal.) 67 Pac. 48. It is claimed that the principle of law declared by these cases should be overruled. The doctrine has been recognized and approved too long to be set aside without grave reasons. Those reasons do not present themselves to the court. The remaining objections made to instructions given and refused are of a minor importance, and unavailing as grounds for a reversal of the judgment.

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VANN DYKE, J.

## GUSTAFSON v. SEATTLE TRACTION CO.

(*Supreme Court of Washington, April 9, 1902.*)

[68 Pac. Rep. 721.]

## Injury to Employee—Negligence.

Plaintiff was injured while attempting to lower the gins of a pile driver by being caught in the rope of the driver. Defendant's superintendent ordered plaintiff and five other servants to lower the gins. Plaintiff's evidence showed that the men directed to hold the rope and prevent the rapid falling of the gins were unable to do so, and that the safe way to lower the gins was to first let down the hammer, and that there was risk connected with the method adopted under the superintendent's direction. There was a conflict in the evidence as to the number of men actually having hold of the rope: held to warrant the submission of the issue of defendant's negligence to the jury.

## Master's Duty to Furnish Safe Machinery.\*

An instruction that it was the duty of the master to furnish to the servant reasonably safe machinery in the performance of his work, and "not to expose the servant to danger," was proper; the expression "not to expose to danger," etc., when taken in connection with the entire instruction, not being prejudicial.

Appeal from superior court, King county; O. Jacobs, Judge pro tem.

Action by John B. Gustafson against the Seattle Traction

\*See note, 12 Am. & Eng. R. Cas., N. S., 668; Gauden v. Kansas City S. Ry. Co. (La.), 23 Am. & Eng. R. Cas., N. S., 909; Norfolk & W. Ry. Co. v. Cromer (Va.), 23 Am. & Eng. R. Cas., N. S., 720; Kent v. Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 332; 5 Rap. & Mack's Dig. 67 et seq.

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Company. From a judgment for plaintiff, defendant appeals. Reversed.

Preston, Carr & Gilman, for appellant.

Brady & Gay, for respondent.

REAVIS, C. J. Action for damages for personal injuries. The superintendent of the defendant street railway company was driving piles in repairing the track of the street railroad. The pile driver was so constructed that the gins (that is, the upright pieces between which the hammer plays when the driver is in operation) could be raised and lowered. They were built upon a fulcrum about the center of the car. When the driver was removed from place to place, the gins were turned down, so as to lie lengthwise of the car. When the driver was in operation, the gins were turned so as to stand in an upright position. The car was moved from place to place on the track by attaching to it a car with an electric motor. The driver could be raised or lowered by moving on an axle or channel pin. It was about 33 feet in length, 11 feet below the axle or channel pin, and 22 feet above. The hammer weighed about 2,100 pounds. In the end of the car was placed a block with pulleys. There was also another block with pulleys fastened to the bottom of the pile driver. Through these pulleys passed a rope, of which one end was left free, and extended for some distance. The superintendent desiring to remove the pile driver from where a pile had been driven to the opposite side of the track, it was necessary to lower the gins so that they could pass underneath a trolley wire which extended some distance above the level of the track. The hammer was attached to the top of the gins, and left in that position. The blocks and tackle were rigged to the lower end of the gins. The superintendent directed the plaintiff and five other men to take hold of the fall which extended from the blocks, so as to steady the gins. While the gins were being lowered, the rope slipped or was pulled from the hands of the men, and the gins fell rapidly, taking the rope with such rapidity that plaintiff's foot or leg became entangled in it; and he was thrown a considerable distance, and sustained the injuries alleged in the complaint. The verdict was for the plaintiff.

1. The first error claimed by appellant is the denial of defendant's motion for a nonsuit at the conclusion of plaintiff's testimony, and for dismissal at the conclusion of trial. The material conflict in the testimony was as to the ability of the five men to hold the rope which they were ordered to take by the superintendent, and let the gins down slowly. The testimony on the part of the plaintiff tended to show that the men holding the rope were not able to prevent the rapid falling of the gins. There was also some dispute in the testimony relative to the number of men who actually had hold of the rope. It was maintained by plaintiff that the easy and

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safe way to lower the gins was to first let down the hammer, and that there was risk in the method directed by the superintendent. We think the question of negligence on the part of the defendant was appropriately one for the consideration of the jury.

2. Counsel for defendant complain of part of an instruction given by the court as follows: "It is the duty of a master to furnish to the servant reasonably safe and secure machinery and appliances in the performance of his work, and not to expose the servant to danger in the performance of his work." But a careful examination of the whole instruction relative to the master's duty does not leave a prejudicial meaning in the expression "not to expose to danger," etc. The instruction, all together, fairly placed before the jury the duty of the master to provide reasonably safe machinery and appliances in the performance of the work. It, perhaps, may be said that the statement that the master ought not to expose the servant to danger in the performance of his work is correct, as an abstract legal statement; and, while not a happy expression to embody in an instruction, we do not think an inference was drawn from it that was injurious to the defendant.

(Question of evidence omitted.)

For error in this instruction, the judgment is reversed, and the cause remanded for a new trial.

HADLEY, FULLERTON, WHITE, and MOUNT, JJ.  
concur.

### MISSOURI, K. & T. RY. CO. OF TEXAS v. JOHNSON.

(Court of Civil Appeals of Texas, Nov. 30, 1901.)

[67 S. W. Rep. 769.]

#### Contributory Negligence—Instructions.

In an action for injuries, an instruction that contributory negligence is negligence of plaintiff which, concurring with negligence of defendant, is the proximate cause of the injury, is not objectionable as requiring that the contributory negligence of plaintiff be the proximate cause of the injury.

#### Injury to Employee—Excavation\*—Duty to Light—Instructions.

In an action against a railway company for injuries sustained by an employee in falling into an open ditch in going forward at night to the engine in discharge of his duty to assist in taking water, an instruction requiring a finding for defendant, though its servants

\*See *Pool v. Sou. Pac. Co. (Utah)*, 16 Am. & Eng. R. Cas., N. S., 551; *Chicago B. & Q. R. Co. v. Oyster*, 12 Am. & Eng. R. Cas., N. S., 655, and note at end of case. See also, note, 11 Am. & Eng. R. Cas., N. S., 484 et seq.; *Middle Georgia & A. Ry. Co. v. Barnett*, 12 Am. & Eng. R. Cas., N. S., 532, and note at end of case; *Hurst v. Kansas City, P. & G. R. Co. (Mo.)*, 21 Am. & Eng. R. Cas., N. S., 899; *Hauss v. Lake Erie & W. R. Co. (C. C. A.)*, 22 Am. & Eng. R. Cas., N. S., 864; *Bradley v. Chicago, M. & St. P. Ry. Co. (Mo.)*, 8 Am. & Eng. R. Cas., N. S., 728; *Larsson v. McClure (Wis.)*, 8 Am. & Eng. R. Cas., N. S., 763.

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left the excavation without covering or without any sign of warning, but at the time the train stopped there was an electric street light near the point sufficient for the excavation to be readily seen by a person exercising ordinary care, and such employee failed to exercise such care, and in so leaving the excavation under such surroundings defendant exercised the care of a person of ordinary prudence, etc., is not erroneous in employing the words "readily seen," as the requirement of the charge was equivalent to an instruction that the lights should be sufficient to make the excavation obvious.

**Same—Same—Sufficiency of Light—Opinion of Employees.**

Where a railway company leaves an excavation adjacent to its track unguarded by lights, except that an electric street light was in the vicinity, and an employee is injured in falling into such excavation while in the discharge of his duty, whether the employees who dug the ditch acted as ordinarily prudent persons in leaving it unguarded, except by the street light, cannot relieve the company from liability for its negligence, since the duty it owed such employee cannot be determined from the point of view of the servants who dug the ditch.

**Personal Injuries—Testimony of Physician as to Expressions of Pain as Res Gestæ.**

In an action for injuries, a physician who examined plaintiff professionally pending the suit to qualify as an expert as to the nature and extent of his injuries may testify that on such examination plaintiff complained of pain, over objection that the evidence was self-serving and hearsay, since the complaint, being the natural expression of existing pain, was *res gestæ*.

**Same—Extent of Injuries—Testimony of Physician.**

Where, in an action for injuries, plaintiff claims the presence of anæsthetic spots on portions of his body, a physician who examined him professionally pending the litigation to qualify as an expert as to the extent of his injuries may testify that on such examination he stuck pins into such portions of plaintiff's body, and he showed no signs of pain.

**Same—Same.**

Where, in an action for injuries, a physician in examining the plaintiff, who complains of anæsthetic spots in portions of his body, testifies that he stuck pins into portions of his body not affected, and plaintiff flinched, such testimony, though it may not have been a necessary part of the examination, is not injurious to defendant.

**On Rehearing.****Injury to Employee—Failure to Guard Excavation—Negligence—Instructions.**

Where a railway company, knowing that an employee would have occasion in the performance of his duty to go past a ditch at night, the presence of which was not known to him, placed no covering or guard at the ditch, relying on the presence of an electric street light near the place to excuse it from such precautions, it is not entitled to an instruction that, though the lights near the excavation were not sufficient to make it obvious, it was not negligent if an ordinarily prudent person would have left the ditch without guards.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by Walker Johnson against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant.

Wolfe, Hare & Semple, for appellee.

TEMPLETON, J. Walker Johnson was a porter on one of appellant's passenger trains. On the night of August 16,



1899, the train stopped at a water tank in Dallas to take water. Johnson, acting within the line of his duty, thereupon got off the train and went toward the tank for the purpose of assisting in turning the water from the tank into the tender. In doing so he stepped or fell into a ditch which had been dug by some of appellant's employees on that day for the purpose of laying a drainpipe. He was injured by the fall, and brought this suit to recover damages on account of his injuries. He obtained judgment for \$2,500.

There was no covering, railing, or guard about the ditch, and Johnson did not know that the ditch was there. He had been on that run for a long time, and had frequently gone from the train to the tank to assist in turning on the water. Prior to the day of the accident, the ground over which he was compelled to travel was smooth and free from obstructions. An electric street light and an electric power house stood near the ditch, and appellant contends that the light therefrom was such as to make it unnecessary to put any guard about the ditch. The evidence is sufficient to justify the conclusion that it was negligence on the part of appellant to dig the ditch and leave it unguarded, and that Johnson was not guilty of contributory negligence. The court, in the general charge to the jury, defined contributory negligence in this language: "By contributory negligence is meant negligence as just defined on the part of plaintiff, which, concurring or operating with negligence as just defined on the part of defendant, is the proximate cause of the injuries complained of by plaintiff." The charge is objected to on the ground that it requires the contributory negligence of the plaintiff to be the proximate cause of the injuries, whereas it is sufficient if such contributory negligence aids in causing them. The objection is not well taken. The charge does not state that, in order to establish contributory negligence, the negligence of plaintiff alone must be the proximate cause of the injuries, but declares that contributory negligence is shown if the negligence of plaintiff concurred or operated with the negligence of the defendant in causing the injuries, which is the very principle contended for by appellant. It was unnecessary to give the special charges requested by appellant on the issue of contributory negligence, as that issue was sufficiently presented in the main charge.

Under the second assignment of error, complaint is made of a paragraph of the general charge which reads thus: "However, if you believe from the evidence that the defendant, its agents, servants, and employees, made said excavation or ditch, and left the same uncovered or without any railing, or without any sign or warning of the existence thereof, but you further believe from the evidence that at the time defendant's train stopped for water there was an electric light and light from a certain power house near said point, which furnished light around such point sufficient for the same to be readily seen

by a person in the exercise of ordinary care in going up to said excavation or ditch, and if you further believe from the evidence that in so leaving said ditch under said circumstances and surroundings the defendant exercised such a degree of care as a person of ordinary prudence would exercise under the same circumstances, you will find for the defendant; or, if you believe from the evidence that said excavation was left by defendant's agents and employees without any covering over or railing around same, and without any sign or warning of the existence thereof, and there was an electric light and light from a power house which gave light sufficient for said excavation to be readily seen by a person in the exercise of ordinary care going up to same, and if you further believe from the evidence that plaintiff, in going from the place where he got off the train to the point where he was to assist in filling the tank, in the manner in which he went failed to exercise such degree of care as an ordinarily prudent person would exercise under the same circumstances, and if you further believe from the evidence that his injuries, if any were received, were proximately caused by such failure on his part to exercise ordinary care, you will find for the defendant; and this, even though you may believe the defendant, its agents and employees, were guilty of negligence in failing to cover over said excavation, or in failing to place a railing around the same, or in failing to place any sign of warning at same." By the propositions under this assignment it is contended that the court erred in using the word "readily" in the paragraph quoted, because (1) it required that the lights should have been furnishing more light than was necessary under the law in order to excuse appellant from specially lighting or guarding the ditch, and (2) it was a charge upon the weight of the evidence. It was the duty of the railway company not to put any pitfall or obstruction in the path of its servant, and Johnson had the right to assume that his master would not thus endanger his safety. He was not bound to use care to ascertain whether the company had performed its duty to him. If, however, he knew, or should have known, that the ditch was there, it was his duty to use ordinary care to avoid falling into it. He could not go blindly about his work, and, if the lights around and about the excavation were such as to render obvious the existence thereof to one situated as Johnson was, then it would be held that he should have known of the same. But unless the lights were sufficiently strong to make the existence of the ditch patent and obvious, it was the duty of the company to warn Johnson that the excavation was there, or to place a covering, railing, or other guard over or about the same. Under the facts of this case, the court would not have been justified in charging that the lights were not strong enough to make the excavation obvious; but if, nevertheless, an ordinarily prudent person would have left the same without being otherwise guarded, then the company

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would not be guilty of negligence, because a prudent master would not have sent his servant over a way which he had rendered dangerous, without warning him of the danger or making it obvious. Unless the lights were sufficient to make the excavation obvious, there was no foundation for a defense based on the fact that the lights were near the excavation, and it was not a charge on the weight of the evidence to submit appellant's theory on this issue in accordance with the rules stated above. Such, we take it, is the effect of the charge given, and we find no error therein. The requirement of the charge that the lights must have been such that the ditch could have been "readily seen" is simply equivalent to an instruction that the lights should have been sufficient to make the excavation obvious. The definition given by Webster of the word "obvious," when used in this sense, is, "readily perceived by the eye." The term "readily seen," in the connection in which it appears in the charge, while not happily employed, is the equivalent of "patent" or "obvious," which are the terms generally used in legal parlance in stating the rule under consideration.

Appellant requested special charges, which were refused, to the effect that if its employees who dug the ditch acted as ordinarily prudent persons would have done in leaving the same uncovered and unguarded, except by the lights, then appellant would not be guilty of negligence, and appellee could not recover. The duty appellant owed to Johnson cannot be determined from the point of view of its other servants who dug the ditch. They may not have known that Johnson would have occasion, in the course of his employment, to travel along there in the nighttime, and, not being aware of that fact, it may have reasonably appeared to them that they might prudently leave the ditch without other safeguards than the light. But appellant knew that Johnson would be called upon, in the performance of duty, to go over the ground where the ditch was, and that fact should be taken into consideration in determining whether there was negligence. In other words, the question of negligence must be determined from the standpoint of the company, and in the light of its duty to Johnson, and not from the standpoint of its employees who dug the ditch, and who knew nothing of Johnson and owed him no duty. There was no error in refusing to give the special charges.

It appears from a bill of exceptions that Dr. Field testified that some six months before the trial—which was after this suit was begun, and about a year after the accident—he was called on by appellee to examine him professionally for the purpose of qualifying himself to testify on the trial of the cause, as an expert, as to the nature and extent of appellee's injuries, and that on such examination appellee complained of suffering considerable pain in certain portions of his back, and that when Dr. Field would stick pins in him along his

right leg he would exhibit no signs of suffering pain, but that when he would stick pins in at corresponding places on his left leg he would flinch and complain a great deal. Appellant objected to Dr. Field testifying to anything appellee said or did while he was being examined by the physician for the purpose of testifying in the case, and not for the purpose of treating appellee for his injuries; the grounds of objection being that such evidence would be self-serving, hearsay, immaterial, and irrelevant. The objections were overruled, the testimony admitted, and exception was duly reserved. In *Wheeler v. Railway Co.*, 91 Tex. 356, 43 S. W. 876, Wheeler, the plaintiff, who was injured in a railway accident, caused himself to be examined by a physician, after suit brought, for the purpose of procuring testimony as to his injuries for use on the trial. The physician testified that Wheeler complained all the time with a roaring and dull aching pain in his head, more especially in the back of his head. The testimony was objected to on the ground that it was hearsay. It was held that the complaint, made under the circumstances stated, was the natural expression produced by the roaring and pain in the head at the time,—that is, that the complaint made was induced by the roaring and pain as it then existed,—and that the complaint itself was in fact a part of the *res gestæ*, and therefore not subject to the objection that it was hearsay. The court declined to determine the question whether the expression of pain was self-serving, as the objection had not been made. The declaration made by the appellee in the case before us, that he suffered considerable pain in certain portions of his back, appears to have been made under circumstances practically identical with the circumstances surrounding the declaration of the plaintiff in the Wheeler Case. It must be held, therefore, that the complaint of appellee was the natural expression produced by the pain then existing, and that, this being so, the complaint was a part of the *res gestæ*, and not hearsay. If it was a part of the *res gestæ*, then the objection that it was self-serving cannot be sustained. The *res gestæ*—the whole of the transaction under investigation, and every part of it—is always admissible. An act or statement of a party which is a part of the transaction is original evidence, and the courts will not inquire into the question whether the same was calculated and designed, for the purpose of determining its admissibility.

The testimony of Dr. Field to the effect that he stuck pins in appellee's right leg, and that he showed no signs of suffering pain, was properly admitted. It appears that appellee was claiming that there were anæsthetic spots on certain parts of his body; that is, that certain parts of his body were devoid of all sense of feeling. It seems that one means of testing the truth of the claim was to stick pins in the parts supposed to be affected, and watch the result of such action. Appellee had a right, even pending the litigation, to have all

proper examinations and tests made to ascertain the nature and extent of his injuries, and the result thereof could be proven on the trial. This was the matter under investigation, and how appellee bore the tests applied was a part of the transaction and clearly admissible. It was a question for the jury to decide, in the light of circumstances shown to have attended the experiment, whether his indifference to pain was simulated. No statement of appellee that it did not hurt him to stick pins in his right leg was admitted. Only the negative fact that he did not flinch when the test was applied went to the jury, and it was not error to admit such evidence.

The testimony of Dr. Field that when he stuck pins in appellee's left leg he flinched and complained of pain simply tended to show a normal condition of that part, a fact which would have been presumed without such test and proof. Whether this was a necessary part of the transaction—that is, of the examination—may be doubted, but it can hardly have been injurious to appellant.

The judgment is affirmed.

On Rehearing.

(January 11, 1902.)

Complaint is made in the motion for rehearing that we erred in holding that appellant was not entitled to a charge that if the lights near the excavation were not sufficient to make the same obvious, but if, nevertheless, an ordinarily prudent person would have left the ditch without other guards, appellant would not be guilty of negligence. The holding was based on the theory that the evidence showed conclusively that there was negligence, if the lights were not such as to make the ditch obvious, and not upon the theory that appellant owed Johnson any duty except to use ordinary care to prevent him from being injured on account of the ditch having been dug in the way over which he was compelled to travel. Of course, appellant had a right to dig the ditch, as the same was a necessary work; but the ditch, in its unfinished condition, was manifestly dangerous to any one traveling along there in the dark, under the circumstances surrounding the appellee, and appellant was therefore bound to use ordinary care to protect Johnson from the danger. Appellant knew that Johnson would have occasion, in the performance of duty, to go past the ditch in the nighttime, that he did not know that the ditch had been dug, and that he would naturally suppose that the way was safe and clear. Knowing these facts, it placed no covering over, railing around, or guard at the ditch, and did not notify Johnson of its existence. These facts were uncontroverted, and establish a clear case of negligence. The only excuse offered by appellant for not taking some precautions to prevent the accident was that there were lights near the place which illuminated the same to some extent. The jury found, in accordance with the preponderance of the evidence, that the lights were not sufficient to make

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the excavation obvious. The mere fact that some lights happened to be in that vicinity, which lighted up the scene of the accident imperfectly, would not, when considered in connection with the other facts, warrant the conclusion that there was no negligence. Such insufficient lights would afford little or no protection to one circumstanced as was appellee, and ordinary care required appellant to adopt some more efficient means of protection. A finding that there was negligence could not be predicated upon the existence of the imperfect lights, when considered together with the uncontroverted facts, and the court properly declined to submit such facts to the jury as a basis for such finding. It also follows, for the reasons given, if for no other, that there was no error in refusing the special charges discussed in the opinion. We will say, however, with reference to those charges, that they appear to us to be so worded as to render them subject to the construction that if the employees of appellant who dug the ditch acted as ordinarily prudent persons, viewing the situation from the standpoint of the said employees as individuals, and not as representatives of appellant, and chargeable with the knowledge possessed by it, would have done, then appellant would not be guilty of negligence. So construed, the charges would be erroneous. It is doubtless true that it was not intended for the jury to so construe the charges, and, in most cases, there would be no danger of the jury doing so. This case, however, is peculiar, in that appellant owed a duty to Johnson of which its other employees were actually, though not constructively, ignorant, and knew the facts which made it dangerous to leave the ditch unguarded, while its said employees did not. Such being the case, the charges should have been so framed as to meet the exact case made by the evidence; otherwise, they were calculated to mislead. In the original opinion, the contention of appellant was not fully discussed, and the opinion is, in some particulars, subject to the criticisms urged against it. We are satisfied, however, that the proper conclusion was reached, and the motion for rehearing is therefore overruled.

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*(Court of Civil Appeals of Texas, March 8, 1902.)*

[68 S. W. Rep. 323.]

**Injury to Conductor—Collisions\*—Contributory Negligence—Signals.**

A conductor on a south-bound freight attempting to enter a switch at a station was injured by collision with a north-bound freight. He was at the rear of his train, which was a long one, and his brakeman was at the front. The track curved about three-quarters of a mile from the south of the switch, and a flagman would have had to pass such curve before a signal would have been sufficient to warn the

\*See *Pittsburgh, C., C. & St. L. Ry. Co. v. Martin (Ind.)*, 23 Am. & Eng. R. Cas., N. S., 485.

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north-bound train, and the conductor stated his flagman would not have had time to get beyond the curve. Red lights were displayed on the caboose, which stood in the middle of the main track, and were visible to the employees on the north-bound train. The headlight was left uncovered, which indicated the train had not cleared the track. There was no switch tender at the station, in which case the rules required the conductor to see that switches were properly adjusted after his train got on the switch. The rules required a train detained by accident or stops at an unusual point to send out a flagman with signals, and freight trains were required to approach all stations under complete control: *held*, that an instruction submitting to the jury, as a basis of recovery, whether the conductor acted as a person of ordinary prudence, etc., was not erroneous, as excusing him from all blame if he was justified in remaining at the rear of the train, when it was for the jury whether he was negligent in not seeing that his brakeman went ahead to signal while he remained at the rear.

**Same—Same—Same.**

The evidence justified a finding that the conductor was not negligent in remaining in the caboose for the purpose of adjusting the switches.

**Same—Same—Violation of Rules\*—Negligence.**

An employee's violation of the rule of his employer is not negligence per se, as it is a question for the jury whether failure to obey the rules is excusable.

**Same—Same—Same—Evidence.**

Where a conductor is injured in a collision occurring from delay in his train in taking a side track, an expert cannot testify as to the precautions he should have taken under the rules for his protection, over objection that the rules were the best evidence.

**Same—Damages—Pleading.**

Where, in an action for injuries, plaintiff seeks recovery for lost time on the basis of the amount he was earning, and the evidence justifies a finding for a larger amount, the court cannot properly instruct the jury to allow him the reasonable value of his services without limiting them to the amount claimed in the petition.

**Same—Same—Same—Remittitur.**

Where, in an action for injuries, plaintiff alleges the value of his services at \$100 per month, the evidence authorized a recovery of \$125 per month, and the trial takes place 11 months after the injuries, error in allowing the jury to find the reasonable value of the services for the time lost, without limiting them to the amount claimed in the petition, may be cured by a remittitur of \$25 per month for the 11 months.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by W. S. Pawkett against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed unless remittitur is entered; otherwise affirmed.

Head & Dillard and T. S. Miller, for appellant.

Smith, Templeton & Tolbert and Wolfe, Hare & Semple, for appellee.

**BOOKHOUT, J.** Appellee was in the employ of appel-

\*Wright v. Sou. Pac. Co. (Utah), 5 Am. & Eng. R. Cas., N. S., 559; Allison v. Sou. Ry. Co. (N. Car.), 23 Am. & Eng. R. Cas., N. S., 714; Jarvis v. Flint & P. M. R. Co. (Mich.), 22 Am. & Eng. R. Cas., N. S., 312; Lonzer v. Lehigh Val. R. Co. (Pa.), 21 Am. & Eng. R. Cas., N. S., 333.

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lant as freight conductor on one of its trains. On the night of June 19, 1900, he was injured by a collision of another train with his. On September 6, 1900, he instituted this suit to recover \$20,000 damages alleged to have been sustained by reason of the injuries received as aforesaid. On May 18, 1901, a trial before a jury resulted in a verdict and judgment in favor of appellee for \$4,000, to reverse which this appeal is prosecuted.

1. Complaint is made of the following clause of the charge: "And if you further believe from the evidence that when his [plaintiff's] train had reached Sadler, and part of the same had been placed on the side track at said point, the engine slipped, and on this account plaintiff failed to clear the main track with his train; and if you further believe from the evidence that plaintiff remained at the rear of his train to adjust the switch, and that under all the circumstances and conditions surrounding plaintiff at the time, taking into consideration all the rules introduced in evidence, in so remaining at the rear of his train he acted as a person of ordinary prudence would have acted under the same circumstances; and if you further believe from the evidence that the employees on said north-bound train were running at a high rate of speed, and failed to reduce said speed as said train approached the station of Sadler, and to get said train under control before reaching said station, as provided in rule 95a, introduced in evidence; and if you further believe that said north-bound train collided with said south-bound train at Sadler, and that plaintiff was thereby injured in his back and hip, as alleged in his petition; and if you further believe that the employees in charge of said north-bound train were guilty of negligence, as will hereinafter be defined, in failing to reduce the speed of said north-bound train; \* \* \* and if you further believe from the evidence that such failure to reduce the speed and get the train under control was the proximate cause of the collision and of the injuries received by plaintiff, and were not caused or contributed to by any negligence of the plaintiff,—you will find for the plaintiff." It is contended that this charge excuses plaintiff from all blame if he was justified in remaining at the rear of his train, when it was for the jury to say whether or not he was guilty of contributory negligence in not seeing that his brakeman went ahead to signal the north-bound train while plaintiff himself remained at the rear; and (2) that the undisputed evidence shows that plaintiff was guilty of a negligent violation of the rules of the company in remaining at the rear of his train without seeing or making an effort to see that his brakeman performed his duty in going ahead to signal the north-bound train. The appellee was a conductor of a freight train operated over appellant's road. On the 19th day of June, 1900, he was injured at Sadler, a station on appellant's road between Denison and Whitesboro. The train upon which he was injured was a



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south-bound freight train, which he was attempting to get on a side track at Sadler station in order to let a north-bound freight train pass his train. His train arrived at Sadler at 1:55 a. m. In attempting to run his train on the switch he says: "The engine slipped down; that is, it failed to pull the train, and the wheels began to slip on the rails." His train consisted of from 20 to 25 cars, and the cars averaged from 30 to 34 feet in length. About 18 of the cars had got on the side track when the north-bound train came along at a rapid rate of speed and collided with the rear part of appellee's train, pushing it back about 90 or 100 yards. Appellee was standing on the rear platform of the caboose, to look after the switches and see that they were lined up or set for the main track. He was thrown back by the collision several feet into the caboose on the plate which covers the king pin, and received permanent injuries. Appellee testified: "In making the change from one track to another an engine will slip more than on a straight track. I heard this one slipping while I was in the caboose about the time it got on the side track at 1:55 a. m. Cars are from 30 to 45 feet long. They average from 30 to 34 feet; some of them are 36 feet; and there were from 20 to 25 cars on my train. I was then back a train's length from the switch. The engine continued to slip until we stopped, and we failed to get 5 cars and the caboose on the side track. About 18 cars of our train, making 700 feet, got on the side track, and this required nearly 13 minutes. I knew all this time that my train was slipping. I knew the other train was coming from Whitesboro. I know I could not have gone forward and protected my train in 10 minutes of the time my train was slipping, for the reason that, from where my brakeman was standing at the time to a point on the track where he could have done any good, was three-fourths of a mile. From the time my engine first began to slip I had 13 minutes. I did not do anything myself to protect my train, except to give it slack. I did not get off the caboose to try to protect it, although I knew the engine was slipping. When our engine was slipping I knew that another train having superior rights would arrive from Whitesboro. It left Whitesboro at 2 a. m., and it is 3 9-10 miles from Whitesboro to Sadler. I have made that distance in 8 or 9 minutes. I knew that, even with ordinary running, that 8 or 9 minutes after 2 o'clock another train would be at Sadler on the main line, if orders were obeyed. I knew I had a right to look for the train and expect it, and was looking for and expecting it. I knew that there were some cars of my train on the main track over which the other train had the right of way. Knowing these things, I remained in the caboose, and did nothing myself to protect my train. \* \* \* A passenger train is a first-class train, and a freight train is a second-class train. The only two classes of trains on the M. K. & T. Railroad are passenger and freight trains. Sadler was a station.

I took no steps to protect my train, because the time card protected me at the station. The switch tracks at Sadler are straight, there is a curve one-half to three-quarters of a mile south of the south switch. The track at that point curves to the left, going south. I say I did not have time to get off and flag the other train because, by the time I could have gotten to where my head brakeman was to tell him to flag it, he would not have had time to go further than the south switch, and he could not have flagged it any better from that position than from his original position. I do not know whether the headlight on my engine was covered or uncovered. My head brakeman was G. M. Ham. He was on the engine until he got off to throw the switch and let us in on the side track. His place on the train was on the engine. It was his duty to throw this switch. I was there at Sadler 15 minutes, and would not have stayed much longer before sending out somebody to flag the passenger train from the north, which is No. 4. I would have sent somebody out on account of the passenger train, because I am supposed to protect against a first-class train. I am not to protect myself against a freight train which has right of way over me at a station. If I had sent any one out on account of this train it would have been a matter of extra precaution, to keep others out of trouble, and not myself. I would not have taken any extra precaution, as I expected the north-bound freight to stop at Sadler, unless we were in clear and had our headlight covered and our cupola lights covered. Sadler was not necessarily a place for the train to stop. I expected them to find out that we were not in clear, because the light was burning so brightly and because my head brakeman was flagging. My head brakeman said he flagged them. He was flagging there just as a matter of extra precaution. It was not expected of him to necessarily flag there at all. They were supposed to come into that station under perfect control, abiding by the time-card rules. The red lights in my caboose were right in the center of the main track, and they could have seen them. I did not call on the head brakeman to go out and flag the train. It was not my business to see that the head brakeman did go there and flag that train, and I did not undertake to see that he did." It is provided by rule 99 of the company that, "when a train is detained by an accident or obstruction, or stops at an unusual point, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point 15 telegraph poles from the rear of his train he must place one torpedo on the rail on the engineman's side. He must then continue to go back at least 20 telegraph poles from the rear of his train and place two torpedoes on the rail on the engineman's side, 10 yards apart (one rail length), when he may return to a point 15 telegraph poles from the rear of his train, where he must remain until the approaching train has stopped or he is recalled by the

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whistle of his engine. When he comes in he will remove the torpedo nearest to the train, but the two torpedoes must be left on the rail as a caution signal to any following train." The rules further stipulate that "conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their train," and that when a train turns out to meet or be passed by another train the red lights must be removed and green displayed as soon as the track is cleared, but the red lights must be again displayed before returning to the main track. Headlights on engines, when on the side track, must be covered up as soon as the track is clear and the train is stopped. Rule 95a, provides: "Freight and extra trains are required to approach and pass all water tanks, coal chutes, and stations completely under control. Speed must be reduced and enginemen and trainmen must commence to get their trains in hand in ample time so that under no circumstances whatever shall it be possible for it to strike any train, car, or engine which may be occupying the track. The responsibility for safety rests with the approaching freight or extra train. This rule must not be considered as relieving enginemen and trainmen from responsibility resulting from failure to comply with rules 85 and 91." It is further provided that "conductors will be held responsible for the proper adjustment of switches used by them and their trainmen, except where switch tenders are stationed." The evidence shows that there was no switch tender at Sadler. Whether the appellee was guilty of contributory negligence in remaining on the caboose at the rear of his train under the circumstances was a question for the jury. It was a long train. Appellee was at the rear of the train. The brakeman was at the front end of the train. The track curved about a half or three-fourths of a mile from the south end of the switch, and a flagman would have had to pass this curve before a signal could have been seen a sufficient distance to have warned the north-bound train. Appellee had red lights displayed on the caboose, and the caboose stood in the middle of the main track, and the evidence is that the lights could be seen by the employees on the north-bound train. The headlight of his train was uncovered, which, by the rules, indicated that his train had not cleared the main track. There being no switch tender at Sadler, it was the duty of appellee to see that the switches were properly adjusted after his train had got on the switch and cleared the main track. Under these facts the court properly left to the jury for their determination the question as to whether appellee should have gone forward and given the signals called for in rule 99. The evidence shows that the brakeman did go out on the main track a short distance and flag the north-bound freight by swinging his lantern across the track. We are, however, of the opinion that rule 99 did

not apply under the facts shown in this case. This rule would seem to apply only where trains of different classes are about to meet. A passenger train is a first-class train. Freight trains are second-class trains. Had the north-bound train been a passenger train, then, it seems, it would have been the duty of appellee to have seen that his brakeman went forward with torpedoes and lantern and gave the signals provided for in said rule. The rules require freight trains, when they approach and pass water tanks, coal chutes, and stations, to reduce the speed and bring the train under control, so that under no circumstances whatever shall it be possible for it to strike any train, car, or engine which may be occupying the track. The evidence clearly shows that the conductor and engineer on the north-bound train failed to observe this rule, in that they ran into the station at a speed of 25 miles per hour. The jury found, under all the facts, that appellee was not guilty of contributory negligence, and that there was negligence on the part of the engineer and conductor of the north-bound train which was the proximate cause of the collision, and, as a result, of the injury to appellee. There is ample evidence to support their finding.

2. The second objection to this charge is based upon the theory that the appellee, having violated a rule of the company in not seeing that his brakeman went forward with flag and torpedoes, as stipulated in rule 99, he was, as a matter of law, guilty of contributory negligence. This objection is not tenable. It is held that a servant who disobeys a rule of the company is not guilty of negligence per se. *Railroad Co. v. Adams* (Tex. Sup.) 58 S. W. 831; *Same v. Sweeney* (Tex. Civ. App.) 36 S. W. 800; *Bonner v. Bean*, 80 Tex. 155, 15 S. W. 798. It is a question of fact whether, under the circumstances, the servant is excusable in failing to obey the rule.

3. It is contended that the court erred in refusing to permit defendant to prove by the witness C. L. Harris the precaution plaintiff should have taken under the orders and rules for the protection of his train after it failed to clear the track at Sadler in the time required. It was proposed to prove by this witness "that, under the rules and orders under which plaintiff was operating his train, plaintiff, under the circumstances stated, should have seen that his brakeman had gone ahead to signal and flag north-bound train No. 106, as specified in the rules read in evidence, and that it was not proper for him to rely upon the brakeman doing this or the engineer having it done without him, as conductor, taking any steps to see that it was done." This evidence was objected to as being an opinion, and because the rule was the best evidence. It was shown that the witness was train master for certain divisions of the railway company, and had been engaged in the railroad business for 20 years. There was no error in excluding this evidence. The rules had been read in evidence; they were in writing, plain and intelligible, and were

the best evidence of the matters sought to be proved by the witness.

4. It is contended under appellant's fifth and sixth assignments of error, which are grouped, that plaintiff's own evidence shows that he permitted his train to obstruct the main track for about 13 minutes without using any precaution to protect it from other trains, and that this was contributory negligence per se. As above stated, the violation of a rule of the company by one of its servants is not negligence per se, but it is a question for the jury to determine whether, under the circumstances, he was excusable for failure to obey the rule. The evidence was sufficient to justify the jury in finding, if it be conceded that the rule applies, that plaintiff was excusable in remaining in the caboose for the purpose of adjusting the switches, and that he was not guilty of negligence.

5. Complaint is made of the following clause of the charge: "If, under the foregoing instructions, you find for plaintiff, you will find such sum as you may believe from the evidence will reasonably and fairly compensate him, as a present cash payment, for the mental and physical pain he suffered, if any, on account of the injuries, if any, received by him; for the reasonable value of his services for the time lost, if any, by reason of his injuries, if any, received by him; for his diminished capacity to labor and earn money in the future, if any." The petition alleged "that plaintiff was thrown through the open door of said caboose with great violence upon the floor of said caboose, and on an iron plate on the floor of said caboose that was raised above the level of said floor, and plaintiff's spine and back were injured, and his head was lacerated and bruised, and his side and hip were sprained, and his internal organs were bruised and impaired, and plaintiff was bruised and injured for life; that at the time plaintiff was injured as aforesaid he was a stout man, in good health, was twenty-eight years old, and was earning one hundred dollars per month; that by reason of his injuries plaintiff has not been able to do any work since he was injured, and he will not be able to do any work for a year from the time he was so injured, and after said time his ability to earn money and labor has been lessened, by reason of his injuries, one-half for lifetime; that by reason of his injuries he has incurred expenses, for medicines and medical attention, three hundred dollars, and has suffered and all his life will continue to suffer great physical pain and mental anguish, and has sustained damages in the sum of twenty thousand dollars." Appellee testified that: "Since the accident I have not been able to do anything. I have been nervous at times when I exert myself. I suffer pain all the time; I can't rest at night; my head aches continually; my neck feels stiff and sore, and I have pains all over. Before I was injured my health was good; my back was as strong as

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anybody's. Since the accident I have no strength in my back; I can't bend over and lift anything to amount to anything. It hurts me; I can't describe the feeling. \* \* \* At the time of the accident I had been earning from one hundred to one hundred and twenty-five dollars per month. I was paid by the mile; I was paid according to the amount of work I did. I was an extra man at the time. \* \* \* I can't see any difference between the condition of my back at the present and in June, 1900, just after the accident." The evidence as to the value of the services of the plaintiff during the time lost by him as a result of his injuries authorized a recovery for a larger sum than was claimed in the petition, and the charge instructed the jury that they could find "the reasonable value of his services for the time lost." This charge was affirmative error. *City of Dallas v. Jones* (Tex. Sup.) 53 S. W. 377. The error does not necessarily require that the judgment should be reversed. The charge of the court authorizes a recovery for the reasonable value of his (appellee's) services for the time lost. This charge clearly has reference to the past, and means the time lost at the time of the trial. The trial took place just 11 months, lacking 1 day, after the injuries were inflicted. The evidence authorized a recovery for services of \$125 per month; the pleading claimed \$100 per month. The jury may, in their finding, have included \$25 per month for 11 months, or \$275 more than was justified by the pleadings. If the appellee will enter a remittitur for that amount as of date of the judgment within 10 days, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

## GULF, C. &amp; S. F. RY. CO. v. MANGHAM.

(*Supreme Court of Texas, April 14, 1902.*)

[67 S. W. Rep. 765.]

**Injury to Employee—Right of Defendant to Special Charge on Contributory Negligence.**

Where, in an action for personal injury to an employee, defendant pleaded contributory negligence, in general terms, and introduced evidence under such plea, and the court charged in general terms as to contributory negligence, defendant was entitled to a special charge on such negligence, in which the facts were grouped, and the law applied thereto.

**Personal Injuries—Damages—Evidence—Life Tables.\***

Where, in an action for personal injury, plaintiff's capacity for

\*See *Missouri, K. & T. R. Co. v. McGlamory* (Tex.), 3 Am. & Eng. R. Cas., N. S., 434; note, 5 Am. & Eng. R. Cas., N. S., 6; *Rooney v. New York, etc., R. Co.* (Mass.), 14 Am. & Eng. R. Cas., N. S., 425, and note at end of case; *Trott v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 391; note, 5 Am. & Eng. R. Cas., N. S., 361; *Arkansas Midland Ry. Co. v. Griffith* (Ark.), 9 Am. & Eng. R. Cas., N. S., 846; *Harrison v. Sutter St. Ry. Co.* (Cal.), 8 Am. & Eng. R. Cas., N. S., 200; *Macon, etc., R. Co. v. Moore* (Ga.), 5 Am. & Eng. R. Cas., N. S., 355, and note, 361.

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earning money was permanently impaired, but not wholly destroyed, testimony as to the probable duration of his life, according to life tables in use by life insurance companies, was admissible.

Certified questions from court of civil appeals of Fifth supreme judicial district.

Action by A. D. Mangham against the Gulf, Colorado & Santa Fe Railway Company. On questions certified from the court of civil appeals.

Ramsey & Odell and J. W. Terry, for appellant.

S. C. Padelford, Henry & Brown, and D. M. Walkins, for appellee.

BROWN, J. The court of civil appeals for the Fifth supreme judicial district has certified to this court the following statement and question:

"The following, taken from appellee's brief, states the nature of the cause, viz.: 'This suit was brought by the plaintiff, A. D. Mangham, in the district court of Johnson county, Texas, against the defendant, the Gulf, Colorado & Santa Fe Railway Company, for damages resulting from injuries inflicted on him by the negligence of the defendant, which injuries caused him the loss and amputation of his right leg. At the time of the injury, plaintiff was in the employ of the defendant as cinder-pit and roundhouse man, and on the morning of his injury was ordered by his superior to perform the duties of assistant hostler, in carrying the engines from the roundhouse to the depot in Cleburne, and in carrying engines from the depot to the roundhouse. It was the duty of such assistant hostler to ride upon the engine in going through the switch yards of the defendant, and from the roundhouse to the depot, and from the depot back to the roundhouse, and, if any of the switches upon said track upon which said engine was running were closed, to get off said engine and open said switches, so as to let the engine pass, and, as the engine came along by him, to catch hold of the handholds, put his foot on the step, and climb upon the engine. That on the — day of October, 1900, the plaintiff was ordered by his superior to go with the hostler as his assistant in carrying the engine of the Cleburne and Paris train from the roundhouse to the depot. That he got upon said engine at the roundhouse, as was his duty to do, and started from the roundhouse with said engine, to go to the depot. That the step on said engine which was used in getting on and off the same was defective, and that after said engine had gone some distance a switch on the track a short distance ahead was discovered to be closed, and that when the engine got near said closed switch the hostler stopped the same, and plaintiff, as was his duty, got off said engine, and opened said switch, and signaled the hostler to come on. That as the engine was slowly passing him, he, as was the custom of employees in defendant's employment, and as was

his duty, caught hold of the handholds on said engine, and placed his foot on the step of said engine; and, as he attempted to get back on said engine, the said step, by reason of being defective, turned, and caused the plaintiff's foot and leg to be thrown on the iron rail, and the wheels of the engine were caused to roll over same, and to crush and mangle same, which necessitated the amputation of his said foot and leg. That the defective condition of said step was caused by the negligence of the defendant, and that, by reason of the negligence of the defendant in causing said step to become and remain defective, plaintiff was injured as stated above,' etc. The defendant plead merely: (1) A general denial. (2) A general plea of contributory negligence. The plea fails to set forth any acts of contributory negligence on the part of the plaintiff, but simply pleads that 'plaintiff's injury was caused by the lack of care and contributory negligence, under the circumstances of the case, in getting upon, or attempting to get upon, the engine of defendant, which defendant pleads in bar of plaintiff's cause of action.' (3) And the general plea that plaintiff assumed the risk of said defective step. There was evidence tending to support the issues presented by the pleas of the respective parties.

"(1) The appellant asked a special charge on contributory negligence, in which the facts were grouped, and the law applied thereto. This charge was refused, and error is here assigned therefor. The court's charge on contributory negligence was in general terms, but as full as defendant's plea, and correct as far as it went.

"Question. Where the facts in evidence relied on by the defendant to constitute contributory negligence are not specifically pleaded, and the court fails to group the facts, but charges in general terms on contributory negligence, is the defendant entitled to have given a special charge, grouping the facts, and applying the law thereto?

"(2) Error is assigned on the action of the court in admitting testimony as shown by bill of exceptions following: 'While the witness S. D. Mobley was on the stand as a witness in behalf of plaintiff, after stating that he was the agent of the Kansas Mutual and New York Life Insurance Company, that they were first-class companies, and that he had the tables of life expectancy used by these companies, he was asked by counsel for plaintiff to turn to his tables and see what would be the life expectancy of a man forty-three years of age. That thereupon, in order to test the knowledge of the witness in reference to the matter inquired about, he was asked the following questions by counsel for defendant, and made the following replies: "Q. These books are furnished as information and guides of insurance agents, as a basis of premiums on insurance policies? A. These tables are compiled from the observations that have been made of men. Q. Well, these tables are sent to you as a matter of instruction,



for your guidance? A. Yes, sir. Q. All you know about the book is that it is in general use by the Kansas Mutual Life Insurance Company? A. Yes, sir; they are the tables based on the average mortality of the average man in good health. They take a number of men, say 10,000, and get the average life of a man. Q. You don't take any special class of men? A. No, sir. Q. Has it got any average life of a hostler helper? A. No; this company will not insure certain kinds of certain occupations. Q. This book simply shows how many years a man has coming to him, whether he gets it or not? A. Yes, sir." Whereupon said question asked by counsel for plaintiff was objected to by defendant—First. Because the witness has no personal information or knowledge about the matter, except what he derived from these books, which are not standard at all, but are merely some rules, together with some instructions, that are furnished him, and do not come up to the standard requirement of the law. Second. Because the witness has disclosed the fact that these tables are based on the mortality of men in different walks of life, and not of the life of a man engaged in this kind of business,—which said objection was by the court overruled, and the witness permitted to answer that the life expectancy of a man forty-three years of age was 26.59 years, to which action and ruling of the court the defendant then and there in open court excepted, and here and now tenders his bill of exceptions, and asks that the same be approved and filed, which is accordingly done.' The bill of exceptions is allowed, with the following corrections and explanations: 'The witness testified that he was the regular agent of the New York Life Insurance Company in Cleburne, and also of the Kansas Mutual Life Insurance Company. He had in his possession the mortality tables compiled by the actuary of said company, and were their approved tables, and were used by these companies in their business by this agent (the witness), and that part of the tables which applied to the life expectancy of a man forty-three years of age was only permitted to be read in evidence by the plaintiff. The same showed that the life expectancy of a man forty-three years of age was 26 59-100 years; and this portion of the tables which applied only to a person of the same age as plaintiff was permitted to be read in evidence to the jury, and was admitted solely on the issue of the measure of damage, and the jury were permitted to receive it for what they thought it was worth.' It was shown by the evidence that plaintiff was permanently disabled, but his capacity to earn money was not totally destroyed, but only partially destroyed for life.

"Question. Where the capacity to earn money is partially impaired permanently, for life, but not entirely destroyed, are such tables as above mentioned admissible for consideration in determining the amount of damage? See *Railway Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77; *City of Honey Grove*

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v. Lamaster (Tex. Civ. App.) 50 S. W. 1053. Contra, Railroad Co. v. Morgan (Tex. Civ. App.) 46 S. W. 672; Railway Co. v. Cooper (Tex. Civ. App.) 20 S. W. 990."

Answer to first question: If the facts grouped in the appellant's charge were admissible under the plea of contributory negligence, and the charge was correct, it should have been given. A defendant may plead contributory negligence in general terms, and, if not excepted to, the plea will authorize the introduction of testimony to establish the fact of negligence. Telegraph Co. v. Jeanes, 88 Tex. 230, 31 S. W. 186. The pleadings furnish the standard by which the court determines the admissibility of evidence, but it is the duty of the court to instruct "the jury as to the law arising on the facts." Rev. St. art. 1317. The charge which was refused is not submitted in the statement nor by the question, and its correctness is not involved in this answer.

Answer to the second question: The testimony which was offered to show the probable duration of the plaintiff's life was admissible, under the facts certified. When the capacity of one to earn money or to perform labor has been destroyed totally, or partially impaired, by the negligent act of another, so that the injured party is entitled to recover, the measure of damages therefor is the loss which has occurred and will probably occur by reason of the injury. Whether the impairment is partial, or a total destruction of the capacity to labor or to earn money, the damage can be ascertained by determining what the capacity was at the time the injury occurred, and how long the impairment will continue, which in either case must be coextensive with the future life of the injured party. Railway Co. v. Putnam, 118 U. S. 554, 7 Sup. Ct. 1, 30 L. Ed. 257; Railway Co. v. Cooper, 20 S. W. 990. In the last case cited this question was directly decided by the court of civil appeals of the First district, and an application was made to this court for a writ of error from that decision, in which this point was made one of the grounds upon which the writ was sought, the contention being that, because the impairment was partial, the testimony was not admissible; and it was claimed that the case of Railway Co. v. Douglass, 69 Tex. 694, 7 S. W. 77, was overruled. The application was refused by this court, with the indorsement: "The questions passed upon were properly decided, although the application made of some cases cited may not have been strictly correct." The question submitted was directly passed upon in the case of Railway Co. v. Cooper, and therefore the refusal of the writ involved the overruling of the case of Railway Co. v. Douglass. In City of Honey Grove v. Lamaster, 50 S. W. 1053, Chief Justice Finley, of the court of civil appeals of the Fifth district, expressed the opinion that there was no necessary conflict between the case of Railway Co. v. Cooper and the case of Railway Co. v. Douglass; but an examination of the two cases and the application, as it appears in the files

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of life while lawfully employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: provided, that this section shall not apply to passengers." The siding on which the car was being loaded and the one on which was shunted the car which struck Weaver were on the land of the iron company, but the cars and all the rolling stock used on these sidings belonged to the railroad company. The railroad company operated the railroad sidings for the benefit of the iron company. The railroad's switch superintendent directed what cars should be shunted in and drawn out for the iron company, and this last-named company directed the switchman where they should be placed, and when they should be drawn out after being loaded. The stoppage and movements of the cars on the siding were directed by the iron company to suit its business purposes and convenience. The manner and method of stoppage and movement were under the control of the railroad company through its trained railroad employees. About 15 to 20 cars per day were received and dispatched from the sidings in and about the mill of the iron company. In this case the car being loaded with iron was for shipment to Milton, Pa. The car which was shunted in and struck Weaver was loaded with cinder; it being moved to the scales, a few feet from where the accident occurred, to be weighed, and then taken out, consigned to the Keystone Furnace at Reading, Pa. In loading and unloading the cars upon the siding, from the testimony, more in number of the iron company's servants were engaged each day in loading and unloading than the number of railroad men moving the loaded and unloaded cars. The iron company's servants, while in the performance of their duties, necessarily had to cross and recross the sidings to go from the mill to the cars and back again. The facts embraced in defendant's ninth point, with the somewhat more particular statement of them we have here given, are undisputed. With the act of 1868 before us, what is the inevitable legal inference from them? In *Mulherrin v. Railroad Co.*, 81 Pa. 366,—arising from an accident occurring within three years after the passage of the act,—plaintiff was employed by another company, which had the right to a restricted use of the tracks of the defendant company. While so employed he was injured by the train of the defendant, with which company he had no relation as employee. The court below held the act of 1868 did not apply, and there was a judgment for the plaintiff. This court reversed the judgment without a venire, holding that the case was clearly within the act. In the case referred to, the assault, although somewhat covertly, was really made upon the act itself. It was argued by appellee's counsel that the stat-

ute was in derogation of the common-law right of the citizens, and should be construed strictly against the defendant. We held that the facts of the case brought it clearly within the meaning of the act; that, although plaintiff was not an employee of defendant, he was employed in and about their road; that it was not a question of the extent of his employer's title; the road of defendant was its road for the purpose of moving its trains, and that was sufficient to bring it within the terms of the act of 1868. In this first case we started with the proposition that the act was not to be narrowed and restricted to only those cases technically within its exact words, as a criminal statute, but that our duty was to give to it its plain meaning. This was followed by *Cummings v. Railroad Co.*, 92 Pa. 82. In this case one McCue owned a private coal yard. A side track led from the main tracks of the railroad into the coal yard, the side track being partly on railroad land and partly on McCue's, and constructed at the cost of both. When a train of coal cars arrived near the yard, it was changed by a switch from the main track to the side track, on which it passed to McCue's private coal-yard track. On reaching this side track, the car was shunted by the railroad company's locomotive onto the private track into the coal yard. The locomotive did not follow. Cummings, the plaintiff, was employed by McCue to unload a car in the yard. As the result of a collision, caused by an open switch, the plaintiff, while unloading the car, was seriously injured. We held that: "Though the side track was on the property of plaintiff's employer, it nevertheless was used by the defendant [the railroad company] by his license. The plaintiff was, therefore, employed on or about defendant's road, and within the very terms of the act of 1868." It rarely happens that the material facts of two cases are so nearly alike as those in that case and in this. Appellee's counsel undertakes to point out a distinction between the facts in the two cases. He argues that there was no partial ownership of the side tracks between the employer and the railroad company, as in the Cummings Case, and no formal license in the railroad company to use the tracks of the iron company, but these are not material facts controlling the application of the statute. The iron company's tracks, though upon its own land, were constructed and located to be used by the railroad company. Without a railroad it could neither bring in its raw material nor ship out its finished product. With the iron company's consent and request, the railroad ran its rolling stock over the siding as if they were part of its own property. What matters it whether this was by reason of an ownership of the land, a formal written license, or by a parol permission of the iron company? For all the purposes of a common carrier, the premises were the premises of the railroad company in shipping in and out the iron company's freight. *Stone v. Railroad Co.*, 132 Pa. 206, 19 Atl. 67, and *Christman v. Railroad Co.*, 141 Pa. 604, 21

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Atl. 738, are directly in line with *Cummings v. Railroad Co.*, supra. The latter case distinguishes it from the *Cummings* Case on this significant difference in the facts, because, as the court says, "The plaintiff was not employed in any business connected with the railroad." This vital distinction in the cases, many of them being noticed, is clearly pointed out by Justice Mitchell, who delivered the opinion in *Spisak v. Railroad Co.*, 152 Pa. 281, 25 Atl. 497. In the case before us, Weaver, in the very terms of the act, clearly "sustained personal injury \* \* \* on or about the premises of a railroad company" about a train or car thereon. Therefore, if this was caused by the negligence of the railroad company's servants, they were his fellow servants or co-employees, and he cannot recover from his employer.

We think defendant's ninth point should have been affirmed; therefore the judgment is reversed.

## SHOOK v. ILLINOIS CENT. R. CO.

(*Circuit Court of Appeals, Fifth Circuit, April 22, 1902.*)

[115 Fed. Rep. 57.]

## Master and Servant—Release for Injuries—Fraud—Evidence—Sufficiency.\*

Where an employee, a few months after being injured, executed a release, and afterwards became insane from wounds in his head, and defendant, in an action for injuries, pleaded the release in bar, an averment that plaintiff in his mentally weak condition, by false and misleading statements by defendant's surgeon, was kept in ignorance of his true condition, and by feigned promises of employment was induced to execute the release for an inadequate consideration, is not sustained, in the absence of positive testimony on such issue, where it appears that he was restored to his employment, and at the time the release was signed the injuries to plaintiff's brain from the wounds in his head were not known to the defendant's surgeon.

## Same—Questions for Jury—Directing Verdict.

An employee received wounds in his head, which injured his brain, and subsequently produced insanity. After the accident his mental temperament was changed from that of a kind and considerate man to one of seemingly clouded intellect and irritable disposition. After the injuries he resumed his employment as a locomotive engineer without showing any incapacity for the service, and executed a release to the company for his injuries. The testimony as to his mental condition when he executed the release and as to whether the injury to the brain was in contemplation of the parties was conflicting. The company's physician, who examined him shortly after the accident, did not examine his head, stating the wounds there were merely scalp wounds. He continuously suffered from pains in his head until he was adjudged insane, about three years after the accident, and continued his employment for over two years, when he was discharged for disobedience of the company's rules: *held*, that the issues as to such employee's sanity at the time he executed the

\*See notes, 19 Am. & Eng. R. Cas., N. S., 421; 6 Am. & Eng. R. Cas., N. S., 94; 9 Am. & Eng. R. Cas., N. S., 527; 6 Am. & Eng. R. Cas., N. S., 95. See also, *Rhoades v. Ches. & O. Ry. Co.* (W. Va.), 22 Am. & Eng. R. Cas., N. S., 283; *Boutten v. Wellington & P. R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 576, and foot-note; and see notes at end of case.

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release, and, if he was mentally sound, whether the injuries to his brain were in the contemplation of the parties, were, under the evidence for the jury, and it was error to direct a verdict for defendant.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

This action was brought by the plaintiff in error, George A. Shook, a person of unsound mind, by his wife, Mary G. Shook, as guardian and next friend, against the Illinois Central Railroad Company, the defendant in error. The declaration is in the common form. The answer, in addition to the general issue, presented a special plea in confession and avoidance, which, in effect, was a plea of accord and satisfaction, setting up a written release. The release was not attached to the plea, but is shown by the evidence to have been literally as follows:

"The Illinois Central Railroad Company to George A. Shook, Engineer, Dr.

"Address: Water Valley, Miss. (General Voucher. Voucher No. —. Month of —, 18—. ) Charge to Per. Inj., Miss. Div. 140.00.

"In full payment, satisfaction, and discharge of all claims, demands, and rights of action whatsoever, in any wise connected with or arising out of personal injuries sustained by the said George A. Shook on or about November 22, 1896, at or near Water Valley, Mississippi (Mississippi division), while employed as engineer in service of the Illinois Central Railroad Company he sustained injuries by jumping from engine No. 863 to avoid collision, and in release of all claims for all injuries then and there received, however caused, 140.00. Voucher made Jan. 27th, 1897.

"I certify that I have examined all extensions, additions, and calculations in this account, and that they are correct.

"W. S., 1-29, Clerk.

"I certify that the above account has not been previously paid.

"J. M., 1-29, Clerk.

"Certified correct: A. W. Sullivan, Genl. Supt.

"Correct: L. L. Losey, Chief Claim Agent.

"Audited for \$140.00: J. W. Anderson, Auditor of Disbursements.

"Approved for payment: J. C. Welling, Vice President.

"Approved: J. T. Harahan, 2nd Vice President.

"Received of the Illinois Central Railroad Co., Mch. 4, 1897, one hundred and forty 00-100 dollars in full of above account.  
G. A. Shook.

"Illinois Central R. R. Company, Southern Division. New Orleans, 12 Feby., 1897. No. 19,946. \$140. Canal Bank: Pay to the order of Geo. A. Shook (\$140.00) one hundred forty and no-100 dollars.

"R. S. Charles, Local Treasurer.

"Indorsed: Geo. A. Shook."

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To this plea the plaintiff replied (omitting the formal parts) as follows: "Plaintiff says it is not true that he executed a release from all damages for the injuries sustained by him mentioned in his declaration filed in this cause on the 4th day of March, 1897. It is not true that plaintiff was of sound mind, and capable of executing such release as is by the defendant pleaded, on the 4th day of March, 1897." By a second additional replication the plaintiff averred: "That at the time when said supposed release is alleged to have been executed he was bruised and sick and sore, and mentally and physically weak, and unable to attend to his business as he was accustomed to do, and was unable to appreciate the meaning of his action in the execution of such paper as that pleaded by the defendant, nor was he able to comprehend his condition physically or mentally, nor to understand the full extent of his injuries complained of in his declaration herein filed; and, being in such a condition physically and mentally, he was misled and deceived by the physician and surgeon of the defendant, who was also its agent and employee, and who was also the only physician who at that time had examined the plaintiff, and who repeatedly stated to him (the plaintiff) that he was not seriously hurt and that he would soon be well and entirely cured of his wounds, when in truth and fact he (the plaintiff) was seriously and permanently injured, and in such a way as to cause him to become violently insane, all caused by the injuries sustained by him and complained of in his declaration aforesaid, his head being broken and his skull depressed so that it rested on his brain, which fact was unknown to him at the time of the alleged execution of the release pleaded by defendant; wherefore, by the false and misleading statements of the defendant's agent and surgeon, plaintiff, in his mentally weak condition, was kept in ignorance of his rights in the premises and of his true condition, and was, by means of false and feigned promises of employment made to him by the defendant, induced to sign said alleged release for a grossly inadequate consideration, and said release was made broad enough in its terms to cover all damages sustained by this plaintiff, when in truth and in fact the damages to his head and brain were unknown to him, he being kept in ignorance thereof by the repeated statements of defendant's surgeon and employee, as aforesaid, and were not contemplated by him at the time of said alleged release, and were not intended to be and were not included in the settlement then and there made with the said defendant, evidenced by the release pleaded by it in its second plea."

The usual proceedings were had. The case came on for hearing before a jury. When the testimony was all in, counsel for the defendant moved the court to charge the jury peremptorily to return a verdict for the defendant; and, after hearing the argument of the counsel for both sides, the court gave the jury a peremptory instruction to return a verdict for

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the defendant, to which action of the court the plaintiff duly excepted. In obedience to the instruction there was a verdict for the defendant, on which the judgment was rendered.

J. J. Lynch, John H. Kimmons, and R. F. Kimmons, for plaintiff in error.

Edw. Mayes and J. B. Harris, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Four errors are assigned. We will consider only the second, the substance of which is: The court erred in giving the instruction to the jury to find for the defendant, for the reason that there was a conflict in the testimony in regard to the sanity of Shook when he is said to have executed the release pleaded in bar; and, further, even though the testimony might be convincing that Shook, the plaintiff, was of sound mind at the time of the execution of the release pleaded by the defendant, yet there can be no doubt from all the testimony in the case that the fact that plaintiff's brain was injured was wholly unknown to him at the time he signed the release, and was not contemplated by him or by the defendant in the making of any settlement that may have been entered into by him at that time.

Counsel for the defendant in error submits that the only questions raised by the pleadings in this case were two: (1) The bare fact of the execution of the release; and (2) the sanity of the plaintiff at the time of such execution. Both his oral argument before this court and the printed brief which he filed proceed on that view of the pleadings.

It is to be observed that the language of the original replication joining issue on the plea is that "it is not true that he (the plaintiff) executed a release from all damages for the injuries sustained by him mentioned in his declaration filed in this cause." And the amended replication, in addition to the charge of fraud, expressly avers that "in truth and in fact the damages to his head and brain were unknown to him, \* \* \* and were not contemplated by him at the time of said alleged release, and were not intended to be and were not included in the settlement then and there made with the said defendant evidenced by the release pleaded by it in its second plea." Counsel for the defendant suggests that we may eliminate all questions of the original liability of the defendant, for that, so far as the issue of negligence is concerned, the case went off without reference to that point, and on the trial the defense relied on was the release executed by Shook in March, 1897. The trial court having given the peremptory instruction, the transcript before us contains all the testimony given in the case.

The counsel for the defendant states the evidence of Mrs. Shook substantially as follows:



"The accident occurred on November 22, 1896. Plaintiff was unconscious about thirty-six hours, then recognized witness. There were two wounds on the top and back of his head,—one a scalp wound, and the other tolerably deep and about two inches long. Shook was then thirty-nine years old. 'Never thought he was right mentally after the accident. First noticed symptoms of insanity in February or March, 1900.' He suffered with his head, and from time to time complained of it, until he lost his mind entirely. He was a religious man, but lost his interest in religious matters after the accident. He was an indulgent husband and father before the accident, but after that got irritable toward his family, and little things seemed great to him, and he got worse, and 'it gradually grew worse,'—'got worse toward the last.' His irritability was by spells. Cannot say when it began,—so far back,—but it was some time after the accident. He threatened the life of his oldest boy, who was about seventeen years of age. He was first able to go down town three or four weeks after the accident on crutches, and was then very weak. He did not rest well at night; sometimes would groan, etc.; and when she would wake him up he would seem like somebody crazy, and maybe it would be several minutes before witness could get him to recognize her. He went back to work in the latter part of December, 1896, or 1st of January, 1897. He remained in the railroad's employment until October 18, 1899, running when called on, and drew his salary regularly. After he was discharged he took a trip to Louisiana, where he stayed 'hardly a month.' Then went to Texas, where he stayed a month or six weeks. He was taken to Dr. Briggs, at Nashville, in May, 1900, and was then insane. Cannot say she knows his physical and mental condition on the 4th of March, 1897."

The Dr. Briggs just referred to was Charles S. Briggs, of Nashville, Tenn., a surgeon. Counsel for the defendant gives the evidence of this witness substantially as follows:

"He only knew Shook about three weeks, from June 2 to June 22, 1900. He was then insane from a chronic irritation of the brain caused by a depression of the skull. Trephined it to remove the depressed bone. His brain was diseased. The operation was not successful, because of the long time which had elapsed since the injury. From the nature of the accident described by counsel's questioning and from the injury to the skull, Shook 'would gradually become crazy, and his mind from the time of the accident would not enable him to appreciate the scope and meaning of his action in making a contract. He could not attend to his duties with any degree of intelligence.' "

On cross-examination Dr. Briggs said he only knew the cause of Shook's insanity by inference. He had never treated any other case of insanity caused by injury. He was asked the following questions, and answered them thus:

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"X-Int. 33. Assuming that it is proven in this case that George A. Shook prior to the 22d day of November, 1896, was a competent and trusted engineer of the defendant railroad company, then engaged in operating a locomotive engine and a train of cars, and that on that day he received the injury to his head which you have described; assuming, further, that it is proven that after about one month from the 22d of November he (Shook) again entered the employment of the company, and was placed in charge of an engine and train of cars, and operated it successfully and to the entire satisfaction of his superior officers of the road for the space of two or three years after the injury and before you treated him,—that is, running over the main line of the road on schedule or on telegraphic orders, receiving and receipting for his wages, acting as a committeeman for a secret order to which he belonged, and transacting his business affairs generally in a satisfactory manner,—wouldn't the mind of a man capable of doing successfully and to the satisfaction of his superiors the acts mentioned and assumed in the foregoing enable him to appreciate as well as he ever could the scope and meaning of his action in signing a paper or in making a contract? Ans. I don't think that his mental capacity was ever as good after the injury as before, and I think that he was in no mental condition after the accident to appreciate the value of any document involving his personal interests. X-Int. 34. Would you say that an insane man could run a locomotive as they were operated on the I. C. R. R. for a space of two or three years,—I mean so successfully as to escape the notice of his co-employees and superior officers in daily contact with him? Ans. It depends on how insane he is. X-Int. 35. How often did you see him after he received the injury and before you treated him last? Ans. Not at all."

The record of the adjudication of insanity bears date May 4, 1900.

Emma Massey, a servant in the plaintiff's family at the time of the accident, testified that from that time she noticed a change in Shook's manner of treating his family and in his religious life.

Mr. Hogan, a minister of the gospel, and who was pastor of the church of which Shook was a member, testified that after the accident Shook became negligent for a time in his attendance at church, and became remarkably impatient and harsh in his family. He was allowed to testify, without objection, that Shook had remarked to him that the railroad had proposed to allow him to go back to work on condition that he sign the release. That his condition got worse gradually,—so gradually that the stages were hardly perceptible.

G. D. Able, a banker with whom the plaintiff did business, testified that after the accident his manner changed entirely. He grew to be excitable and disconnected in conversation,

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Could not with any degree of certainty state from what time these little peculiarities dated. Considered him just unbalanced,—not an insane man, but just in that state you might feel uneasy about him.

G. W. Price, a merchant with whom the plaintiff dealt, testified that he never considered Shook the same man after the accident, and it seemed like he gradually got worse. Children, from having been very fond of him, did not seem to want to be around him; that was the marked change; that he was an insane man after that, and had gradually grown worse. Cannot give the date when he first noticed anything wrong. Could not say it was within six months after the accident.

Tom Shipman, a merchant, testified: Did not regard Shook as a sane man. Bored witness, repeating things over and over, and swore a good deal, after his injury. Did not consider Shook capable of attending to business. Cannot say what his condition was in March, 1897. Shook bought goods from witness. Witness regarded him as having sense enough to trade with.

R. H. Ramsey, a machinist, testified: Right after the accident noticed something wrong with Shook, but did not think he was insane. He now considers that he was mentally unbalanced. Noticed a change in his mentality. He became very nervous and excitable. Did not consider that he was capable of conducting his business with the same good judgment and in the same manner as he did before.

T. P. Coleman, a physician (the wound being described by counsel), testified that he thought it would cause some mental derangement. Could not say what would be the effect on his mental capacity when it comes to reasoning and the making of contracts. If, as a fact, he was capable of running his train satisfactorily for three years after, it looks as if he was capable of understanding a contract like the release. Thinks it would require a sane man to do such work.

P. W. Rowland, a physician, testified: An injury to the skull producing pressure on the brain will cause mental disease, etc. Several questions were asked of this witness by counsel and answered, and then his honor, the judge, interposed and asked a couple of questions, as follows:

"By Court: Let me put a question. Suppose the proof to show that George A. Shook received an injury in a railroad accident in the fall of 1896, which caused a depression in his skull, and was insane when carried off after the accident, and so continued for a time, and was troubled continuously at frequent intervals with a pain in his head up to the time when he was pronounced a lunatic by the court; and suppose, further, that his whole mental temperaments after the accident were changed, as manifested in his treatment of his family and in his intercourse with his friends and acquaintances, from that of a man once clear-headed, cool, just, firm,

kind, and considerate to that of a man of seemingly clouded intellect, changeable, and irritable to such an extent that he himself called the attention of his friends to the fact, and was conscious of it, but was unable to alter or control it. Now looking at all of these supposed proven facts, would you say that George A. Shook was a sane or insane man, and that he could successfully operate a train and engine on his road on schedule time, for a period of two years and ten months? A. In answer to that question, I will have to give you my knowledge gained from several accounts of injuries of that character,—the course they usually take. I can do that in a very few words. The cases are on record, and a great many of them, where an injury has been done to the brain, and where the skull presses on the brain under similar circumstances, a man who has been cheerful and gentle in disposition becomes, in the main, nervous and irritable and cross, and still carries on his business, but in a manner unsatisfactory to himself and to his friends. It frequently happens that a man goes on for some time, and there are even instances where they have gone on for years, but finally the result was insanity and death. Q. Do you think it reasonable and probable that he could operate a railroad locomotive for two years and ten months under those circumstances? A. I do not think he would be apt to do it."

Earl Brewer, an attorney at law, testified: Saw Shook once a week or once a month after he got out from his accident until he went to the asylum, and from his appearance witness never thought Shook was sane. Shook talked the accident over and over, and would curse and swear and talk about the master mechanic. He consulted witness about suing the company, and discussed with him about making the settlement, and then told him he had settled. He would say he did not know he was hurt badly when he signed the release, and that he thought he could get around it. In the conversation witness had with Shook, when witness would first commence talking with him he would seem to be perfectly sane, and he would talk with you for some time that way until he would become irritated, and would begin cursing, and then you could notice that he was not exactly right.

Joe Baker, a conductor, one of the defendant's witnesses, testified: Shook was one of his regular engineers for three or four years after the injury. Witness saw no difference in his manner of conversation and conduct before and after the accident. Shook was finally discharged for violating a rule of the company up in Tennessee.

The defendant's counsel asks the court to note that the company not only took Shook back to work, but that he remained at work from the time of the signature of the release, March 4, 1897, until he was discharged for breach of rules, on the 18th of October, 1899, drawing large compensation all of the time.

In the foregoing recital we have adopted substantially, as far as we have quoted the evidence, the statement of it which we find in the brief of counsel for the defendant. The witnesses named went much more largely into detail, and both they, and other witnesses not named, on direct and cross-examination (with the usual difference in answers so drawn out, respectively), gave testimony tending to support the contention of the plaintiff on the issue of sanity, and made admissions or gave answers to cross interrogatories tending to qualify their direct testimony, and to an extent to support the defendant's contention on the issue of sanity.

There was evidence that Dr. Shoffner, the railroad surgeon at Water Valley, was called in to see the plaintiff immediately after he was injured, and had charge of his case during his confinement, and that when the plaintiff's wife called this physician's attention to the wounds on Shook's head the doctor said they did not amount to anything; that they were just scalp wounds. He never examined his head at all. He told Mrs. Shook that Mr. Shook was not hurt very seriously; that he would soon be all right. This he said after she had called his attention to the scalp wounds.

Mrs. Mary Howard, an employed nurse, testified that she was present in the family at the time the plaintiff was brought home injured, and helped to nurse him, and that the doctor gave him calomel and fever powder.

We conclude, therefore, that there was no evidence offered to support the plaintiff's charge in his second replication, that by the false and misleading statements of the defendant's agent and surgeon the plaintiff, in his mentally weak condition, was kept in ignorance of his rights in the premises and of his true condition, and was, by means of false and feigned promises of employment made to him by the said defendant, induced to sign the alleged release for a grossly inadequate consideration. Nearly the whole of the proof drawn out by the defendant's cross interrogatories, or embraced in the testimony of the witnesses whom the defendant called to meet the issue of insanity submitted by the plaintiff, tends to show that at the date of the signing of the release it was not in the contemplation of the plaintiff nor of the defendant that the plaintiff had received any injury to his brain by reason of the wounds appearing on his head, and that it could not have been intended by either of the parties that any injury to the brain of the plaintiff was to be included, or was included, in the settlement made on March 4, 1897, referred to in the defendant's second plea as a release, which it sets up in bar.

It appears to have seemed incredible to the trial judge that the plaintiff should have been on March 4, 1897, mentally disordered to such an extent that he could not bind himself by a written release, when in fact at that time, and for 2 years and 10 months thereafter, he was engaged in the service of the defendant as a locomotive engineer in pulling its

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freight trains on schedule and telegraphic orders, without showing any incapacity for that service. Assuming that the view of the trial judge on this subject is correct, it seems equally incredible that the defendant should have employed the plaintiff for that service if its representative agents knew or believed or suspected that his brain had been materially injured by the wounds appearing on his head. The amount received in the settlement was substantially equal to the wages of the plaintiff for one month's service, which was approximately the time he was out of employment,—from the 22d of November, 1896, the day on which the accident occurred, until his return to service, the latter part of the following December. It is hardly credible that if the plaintiff knew or believed, or had adequate reason to suspect, that his skull was fractured, and resting on his brain, and causing him to experience the pain in his head of which he at times complained, he would have consented, for so inconsiderable a sum, to release the defendant from all claims for damage on that account. There is, moreover, proof that when, some time after the settlement with the defendant, it was suggested to him that his mind was affected, he scouted the suggestion as preposterous, and resented it as offensive.

There having been offered on the trial material evidence, pro and con, on the issue of the plaintiff's sanity on the 4th of March, 1897, and bearing also on the issue of whether the injury to the plaintiff's brain was in fact in the contemplation of the parties and included in the settlement, the case was one for the jury. *Railroad Co. v. Harris*, 158 U. S. 320, 15 Sup. Ct. 843, 39 L. Ed. 1003.

For the error of the court in withdrawing the case from the consideration of the jury, the judgment of the circuit court is reversed, and the cause is remanded, with direction to award the plaintiff a new trial.

## NOTES.

**MASTER AND SERVANT—RELEASE OR LIMITATION BY  
CONTRACT OF MASTER'S LIABILITY  
FOR NEGLIGENCE.**

1. In General.
2. Contracts Entered into Prior to the Occurrence of the Injury.
  - a. Majority Rule.
  - b. Minority Rule.
  - c. Option to Sue or Accept Benefits of Relief Department.
    - (1) Validity of Optional Contract.
      - (a) In General.
      - (b) As Affected by Public Policy.
      - (c) As Affected by the Consideration.
      - (d) As Affected by Mutuality of Agreement.
      - (e) As Affected by Alleged Insurance Feature.
      - (f) As Affected by the Railroad Company's Failure to Pay Money into the Treasury of the Relief Association.
    - (2) Avoidance of Contract by Employee.
      - (a) Failure to Read and Understand Contract as Ground of Avoidance in the Absence of Fraud.

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- (b) When Evidence of Coercion Is Insufficient to Enable an Avoidance.
- (3) Election to Receive Benefits as Barring Suit.
- (4) Estoppel to Sue.
  - (a) Estoppel to Sue after Receiving Benefits, and Giving Release.
  - (b) When Acceptance of Benefit from Association Does Not Estop Claim as against Railroad Company.
  - (c) When Rules of Association Relative to Determination of Claims Does Not Estop Enforcement of Claim by Beneficiary.
- 3. Contracts Entered into Subsequent to the Occurrence of the Injury.
  - a. When Release Not Obtained by Fraud or Misrepresentation.
    - (1) General Rule.
    - (2) Consideration.
    - (3) Mutuality.
    - (4) Scope of Contract Releasing Claims for Specified Personal Injuries.
    - (5) Effect of Release Where Death Subsequently Results from Injuries.
    - (6) Release by Widow as Affecting Her Right to Sue in Representative Capacity for Benefit of Her Child.
    - (7) Contract Releasing Express Company from Liability as Affecting Liability of Railroad Company.
    - (8) Rights of Employee upon Breach of Contract by the Employer.
  - b. When Release Fraudulently Obtained.
    - (1) Validity in General.
    - (2) What Constitutes a Fraudulent Inducement to Give Release.
    - (3) Return of Consideration as a Condition Precedent to Avoidance of Release and Institution of Suit.

## I. IN GENERAL.

**Duty of Master Regarding Protection of Servant and Effect of Failure to Perform Duty.**

It is the duty of railroad companies in employing servants, to use care and diligence to provide a safe place for the servants to work; to use care and diligence to provide tools and appliances and keep them in proper condition and repair; to select only those persons who are fit and proper for the positions they are intended to fill; and where necessary to make and enforce reasonable rules for the conduct of the work; finally, the company should use its superior skill, judgment and foresight to protect its servants from latent or unknown defects and dangers. The degree of care is measured by the nature of the duties to be performed by the servant. The more important the duties the greater the care. Consequently it is negligence on the part of a railroad company to fail to adopt such rules and regulations as are proper and necessary for the protection or the safety of its employees; or to fail to furnish a safe place and appliances in accordance with the duty incumbent. It is equally negligent to adopt rules tending to impair the safety of their employees. And for a breach of duty in any of these respects resulting in injury to the employee, the employer is liable for damages to such employee, there being an absence of contributory negligence on the part of the employee.

*United States.*—*Crew v. St. Louis, K. & N. W. Ry. Co.*, 20 Fed. 87; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. Rep. 756; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 845. *Virginia.*—*Norfolk & W. R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604; *McDonald v. N. & W. R. Co.*, 95 Va. 98, 27 S. E. 821.

*West Virginia.*—*Jackson v. Norfolk & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278.

As to the extent to which the liability of a railroad company for the performance of these duties may be restricted by contract, either

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in express terms, or impliedly by the acceptance of employment under conditions imposed by rules or by-laws of the company, it is the purpose of this note to ascertain.

## 2. CONTRACTS ENTERED INTO PRIOR TO THE OCCURRENCE OF THE INJURY.

### a. Majority Rule.

As a general rule, prevailing in most jurisdictions, a railroad company cannot, by its contract of employment, exempt itself from liability for injuries that may be caused by its negligence. Such agreements are, either by special statutory provision or by judicial construction, unlawful and void.

*Alabama*.—*Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276.

This rule is applicable to a parent, or one standing in loco parentis to a minor, so as to make void a contract of the former exempting the minor's employer from responsibility to the minor for permanent injury inflicted upon him. *International & G. N. Ry. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681.

Express contracts of this character made in most solemn form by an employee, exempting his master from liability for negligence in the performance of his personal duties toward the former have many times been declared in the courts of this country to be illegal, on the grounds that the subject-matter was contrary to sound public policy.

In *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, it was held that an agreement entered into by one with a railroad company, upon being employed as brakeman, to take upon himself all risks incident to his position on the road, and not to hold the railroad company liable for any injury he might sustain by accident or collision on the trains of the road, or by defective machinery, or carelessness, or misconduct of himself or any other employee of the company, is not binding on him. The court said: "In 1880 the English Parliament passed the 'employers' liability act,' the object of which was to make employers liable for injuries to workmen caused by the negligence of those having the supervision and control of them."

And in *Johnson v. Charleston & S. Ry. Co.*, 55 S. Car. 152, 32 S. E. 2, 33 S. E. 174, where it was alleged in an action against a railroad company for damages on account of injuries received, that the plaintiff had entered into a contract with the defendant whereby it was agreed, upon a certain consideration, that the defendant should be released from all claims of the plaintiff for damages by reason of accidental injury or death; it was held that such contract was contrary to law and against public policy, and a release thereunder could not therefore, be pleaded as a defense to an action for damages caused by the defendant's negligence. The plaintiff's demurrer to the defense by way of release was based solely upon the above ground, and the demurrer was overruled.

Upon the grounds that it was without consideration, when the employee was at the time of its making in the employment of the railroad company, and there was no new employment tendered to or accepted by him, and no promises to continue to employ him after the execution of the agreement, an agreement that the employee would not hold the company liable for damages resulting from the negligence of the latter, or the servants or agents, was declared void. *Purdy v. Rome, etc., R. R. Co.*, 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736.

*Alabama*.—*Hissong v. Railroad Co.*, 91 Ala. 514, 8 So. 776.

*Arkansas*.—*Railway Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808; *Ohio River R. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467.

*Kansas*.—*Kansas P. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630.

*Kentucky*.—*Newport News & M. V. Co. v. Eifert*, 15 Ky. L. Rep. 600.

*Maine*.—*Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447, 58 Am. Dec. 718.



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*Missouri*.—Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149.

*United States*.—Roesner v. Hermann, 10 Biss. (U. S.) 486.

And while in Iowa a statute makes illegal any agreement between the railroad and an employee made for the purpose of restricting the liabilities of the railroad for injuries received by such employee (Code 1873, sec. 1307; Code 1897, sec. 2071); yet a paper containing such an agreement may be introduced into evidence to show the existence of a rule of the railroad for the government of its employees and the knowledge of the rule on the part of the employee who executed the agreement. Sedgwick v. Illinois Cent. R. Co., 73 Iowa 158, 34 N. W. 790.

So far has this policy of not recognizing contracts of this character as valid been extended, that it is held that notwithstanding an employee signs a contract to use a coupling knife, yet in an action by such employee for injuries caused by his being caught between dead-woods, while attempting to make a coupling with his hands, evidence is admissible that it was not customary for the employees to use the coupling knives furnished them by the company, and that they were dangerous. Bonner v. Beam, 80 Tex. 152, 15 S. W. 798.

And for a much stronger reason such contract for exemption is prohibited to be carried by implication into an ordinary written agreement for service. The "usual risks" which the servant is justly regarded as having assumed by reason of his entry into service are certainly not those arising from neglect to furnish a reasonably safe place for the work, safe appliances, etc., especially so, where the employee is entirely unaware of any danger so created by a failure on the part of the railroad company to comply with duties placed upon it by law.

*Massachusetts*.—Myers v. Iron, etc., Co., 150 Mass. 125, 22 N. E. 631.

*Missouri*.—Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149.

*New York*.—Abel v. Canal Co., 128 N. Y. 662, 28 N. E. 663.

*Wisconsin*.—Dorsey v. Phillips, etc., Co., 42 Wis. 597.

As being within the inhibition of the general rule laid down, it is not permissible for a railroad company to exempt itself from responsibility for negligence by its rules and regulations.

*United States*.—Crew v. St. Louis, K. & N. W. Ry. Co., 20 Fed. 87.

So an employer cannot provide that his employees shall look after and be responsible for their own safety.

*Alabama*.—Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360.

But where a railroad company by rule forbids its brakemen going between freight cars to couple them, and provides that coupling must be done by means of a stick, the company is not liable for the death of a brakeman who, in consideration of employment by the company, signed a written recognition of such rule, waiving all liability of the company to him for any results of disobedience thereof, when it appears that he understood what he was signing, that the company had provided coupling sticks for the train, and that the death was the result of the disobedience of the rule. Russell v. Richmond & D. R. Co., 47 Fed. 204.

And an application for employment, by which a servant undertakes to make a careful examination of all things near the tracks, so that he might understand the dangers attending them, is held in Massachusetts not to be contrary to Pub. St., ch. 74, sec. 3, which provides that no person or corporation can, by special contract with their employees, become exempt from its liabilities to them for injuries suffered by them in their employment, which resulted from the employer's own negligence, or that of any other person in its employ. Quinn v. New York, N. H. & H. R. Co., 175 Mass. 150, 55 N. E. 891.

However, a stipulation, in a contract of employment between a railroad company and a brakeman, requiring the brakeman not to attempt to couple cars unless he knows the coupling is in proper condition, is not binding, so as to require the brakeman to perform the master's duty of seeing that its appliances are in proper condition. Missouri, K. & T. Ry. Co. v. Wood (Mo. 1896), 35 S. W. 879.

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In Ohio contracts exempting a railroad company from liability to their employees for the consequences of their negligence were by statute declared void. The statute provided that no railroad company, insurance company, or association of other persons shall require any agreement or stipulation with any other person, in or about to enter the employment of a railroad company, whereby such person agrees to waive any right to damages from such railroad company for personal injuries, or any other right whatever, and all such agreements and stipulations shall be void. See 87 Ohio Laws, p. 149.

The validity of this act was tested in *Shaver v. Pennsylvania Co.*, 71 Fed. 931. It was declared to be violative of the 14th amendment of the constitution of the United States, by depriving a person affected by it of their liberty of contract, without due process of law; and, also, violative of art. 2, sec. 26 of the Const. of Ohio, providing that all laws of a general nature shall have uniform operation throughout the state, since such statute is class legislation affecting only railroad employees, and accordingly that such statute was void.

## b. Minority Rule.

Some of the courts have entertained a contrary view to the one expressed in the general rule relative to contracts between an employer and an employee, by which the employer is exempted from liability for his negligence toward the employee.

*Georgia.*—The rule was formerly announced in *Georgia*, in *Western, etc., R. Co. v. Bishop*, 50 Ga. 465, that a railroad employee might by special contract assume the risks incident to his position, including the risk of liability from the negligence of fellow servants, except that the company could not by such contract waive its liability for criminal negligence.

In discussing this question, the court said: "Labor is property, and the laborer has, and ought to have, the same right to contract in reference to it as other persons have in reference to their property. Generally the duties cast by law upon employer and employee are only implications of law; in the absence of stipulations by the parties, it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them on one point, may claim to do so upon others, and thus step by step they cease to be free men. We do not say that employer and employee may make any contract; we simply insist that they stand on the same footing as other people. Will it for a moment be insisted that one who borrows a horse may not stipulate that he shall exercise only the care cast by law upon one who hires a horse? May not a warehouseman stipulate that he will take extraordinary care, when the law, in the absence of such a stipulation, would cast upon him only ordinary care? May he not even stipulate that all the risk shall be upon the bailor?" In this case, however, it was held that the employee might not waive liability for criminal neglect. See also, *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Hendricks v. Western, etc., R. Co.*, 52 Ga. 467; *Galloway v. Western, etc., R. Co.*, 57 Ga. 512.

While this rule as respects masters and servants generally still subsists, in support of which see *Fulton Bag, etc., Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322, yet railroads cannot stipulate against the negligence of their employees resulting in serious bodily injury because such negligence is, by special statute made criminal, and is thus brought within the exception. See *Georgia Code 1895*, vol. 3, sec. 115; *Cook v. Western, etc., R. Co.*, 72 Ga. 48.

*Indiana.*—In *Pittsburgh, C., C. & St. L. Ry. Co. v. Mahoney*, 148

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Ind. 196, 46 N. E. 917, 40 L. R. A. 101, it is held that a contract by which an employee assumes all liability for injuries by reason of the employer's negligence or otherwise is not against public policy. See Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93.

*England.*—In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, it is held that a workman may contract with his employer not to claim damages for personal injuries caused by the negligence of the vice principal of the master although the employers' liability act passed by Parliament provides that the master shall be liable for injuries to a servant caused by the negligence of a fellow servant under whose control and supervision he is working.

c. Option to Sue or Accept Benefits of Relief Department.

(1) Validity of Optional Contract.

(a) In General.

A contract whereby an employee of a railroad company agrees that the company shall be relieved from all liability for damages for injury or death resulting to the employee from the negligence of the company in consideration of benefits from a relief fund which the railroad company helps to provide, but leaving the employee or his beneficiaries who are entitled in their own name or through another to maintain an action for damages by reason of injuries received or death produced from such injuries, the option of choosing the benefits of the relief fund or bringing action against the railroad company is, as a general rule, valid and binding.

*United States.*—While contracts of the character under discussion have been maintained and given effect in well nigh every jurisdiction where their validity has been tested, yet in one case in the federal court it was held that such a contract, even after acceptance of benefits under it from the relief association and the release of all claims, did not bar the employee's right of action against the railway company to recover damages for his injuries. The facts in the case, *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. 305, were that a railway company organized a relief department among its employees for the purpose of giving pecuniary aid to those who might be injured or sick. The funds of the department were provided by contributions from the members, the company agreeing to make up any deficiency which might occur in any year. The rates of contribution by the members were such that a deficiency would seldom occur, and in fact was a very rare occurrence. In the application for membership in the relief department and in the contract of insurance a clause was inserted providing that, in consideration of the payment of the company, the acceptance of benefits by a member should operate as a release of all claims for damages against the company. Plaintiff, who was a member of the relief department received injuries in consequence of the negligence of the railway company, and thereafter received benefits as a member of the relief department. The court held that the plaintiff's right of action against a railway company to recover damages for such injury was not barred by the acceptance of such benefits. In the course of its opinion the court said: "In respect to this contract the defendant is an insurance company, and, having received the premium demanded of the plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railroad company as an employee. Having paid for them, the plaintiff is as much entitled to the benefits received by him under the contract of insurance as to his monthly wages for service rendered to the railroad company. It was long ago wisely held that an employer cannot relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action. No more can it be said that payment and receipt of benefits under a contract of insurance, such as is alleged in the answer, should bar

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the plaintiff's action. I am amazed to find that in several courts of unquestioned dignity the defense here made has been fully sustained, —citing *Clements v. Railway Co.* (1894), App. Cas. 482; *Johnson v. Railroad Co.*, 163 Pa. St. 127, 29 Atl. 854; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423. I can only say that I agree with none of them. The reason of the thing stands altogether on the other side." This case cannot, however, be regarded as lending any support to the view which would hold such contracts to be invalid, as it was out of line at the time when it was decided with the cases upon this subject in other federal district courts. And the decision has been disregarded as a binding authority, and disapproved in later cases.

The validity of these optional contracts leaving the employee free to elect either to accept benefits from the relief department, or sue the railway company, came in question subsequent to the decision in *Miller v. Railway Co.*, 65 Fed. 305, in the case of *Otis v. Pennsylvania Co.*, 71 Fed. 136. In the opinion rendered, Baker, J., said: "The question of the validity of such a contract as that relied upon in the paragraph of the answer under consideration is a new one in this court, but it has been considered by a number of reputable courts in other jurisdictions, and, with a single exception, so far as I am advised, it has been uniformly held that such a contract is not invalid for repugnancy to sound public policy, or for want of consideration, or for want of mutuality. In the views expressed in these cases I entirely concur. A review of the cases supporting this view would not be profitable, and I therefore content myself with simply citing them. *Owens v. Railroad Co.*, 35 Fed. 715; *State v. Baltimore & O. R. Co.*, 36 Fed. 655; *Martin v. Railroad Co.*, 41 Fed. 125. \* \* \* The single case holding such a contract to be void is *Miller v. Railroad Co.*, 65 Fed. 305." See also, *Vickers v. Chicago, B. & Q. R. Co.*, 71 Fed. 139, disapproving the *Miller Case*.

*District of Columbia*.—*Brown v. Baltimore, etc., R. Co.*, 6 App. Cas. (D. C.) 237.

*Georgia*.—*Petty v. Brunswick & W. Ry. Co.*, 109 Ga. 666, 35 S. E. 82.

*Illinois*.—*Eckman v. Chicago, etc., R. Co.*, 169 Ill. 312, 48 N. E. 496.

*Indiana*.—*Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423; *Pittsburgh, Cin., C. & St. L. R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638, disapproving *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419.

*Iowa*.—*Maine v. Railroad Co. (Iowa)*, 70 N. W. 630; *Donald v. Railway Co. (Iowa)*, 61 N. W. 971.

*Maryland*.—*Spitze v. Railroad Co.*, 75 Md. 162, 23 Atl. 307; *Fuller v. Association*, 67 Md. 433, 10 Atl. 237.

*Michigan*.—*O'Neil v. Iron Co.*, 63 Mich. 690, 30 N. W. 688.

*Nebraska*.—*Railroad Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Railroad Co. v. Wymore*, 58 N. W. 1120, 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42.

*Ohio*.—*Pittsburg, etc., R. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641.

*Pennsylvania*.—*Ringle v. Railroad Co.*, 164 Pa. St. 529, 30 Atl. 492; *Johnson v. Railway Co.*, 163 Pa. St. 127, 29 Atl. 854; *Graft v. Railway Co. (Pa. St.)*, 8 Atl. 206; *Baltimore & Ohio Employees' Rel. Ass'n v. Post*, 122 Pa. St. 579, 15 Atl. 885, 2 L. R. A. 44.

*South Carolina*.—*Johnson v. Charleston, etc., R. Co.*, 55 S. Car. 152, 32 S. E. 2.

## (b) As Affected by Public Policy.

These contracts are not regarded as contracts of exemption from future liability for negligence, or in any respect as being agreements contrary to public policy. They do not have the effect of a release until the member accepts the benefit.

Thus, it is held, that, where a railroad relief association, composed of associated companies and their employees, is in charge of the companies, who guaranty the obligations, supply the facilities of the business, pay the operating expenses, take charge of and are respon-

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sible for the funds, make up deficits in the benefit fund, and supply surgical attendance for injuries received in their service, an employee's agreement, in his voluntary application for membership, that acceptance of benefits from the association for an injury shall release the railroad company from any claim for damages therefor, is not invalid as being against public policy. *Otis v. Pennsylvania R. Co.*, 71 Fed. 136.

In *Beck v. Pennsylvania Co.*, 63 N. J. Eq. 232, 43 Atl. 908, an action to recover damages from a railroad company for an injury received while the plaintiff was in its employ, it was proved by the company that it and some of its employees had established a relief fund, under regulations requiring the members to contribute certain sums out of their wages, and requiring the company to take charge of the fund and manage it at its own expense, and out of it to make payment of certain specific benefits to sick or injured members, or, in case of the death of a member to a beneficiary named by him, and, in case the fund was insufficient to make such payment, to supply the deficiency; and the plaintiff had become a member, and in his application had agreed that the acceptance of benefits from the fund for injury or death should operate as a release of all claims for damages against the company arising from such injury or death, and that, after the injury for which the action was brought, the plaintiff accepted such benefits. The trial judge, on motion in behalf of the plaintiff, overruled and excluded this evidence. It was held to be error, because the transaction created a contract between the company and its employee which was not against public policy. It was therefore a complete defence to the action.

And in *Eckman v. Chicago, B. & Q. R. Co.*, 169 Ill. 312, 48 N. E. 496, the contract of a railroad employee, becoming a member of the relief department, organized and managed by the railroad company, and largely contributed to by it, under its agreement to make up or guaranty deficits and pay expenses of management, which contract entitled him in case of disability from injury received at work or from sickness, to a daily payment from the relief fund, in proportion to his contribution, was held not to be against public policy, as an attempted exemption of the company from liability to its employees for its negligence, because providing that the acceptance of benefits for injury from the relief fund shall operate as a release and satisfaction of any claim against the company on account of the injury; the employee, after the injury, being at liberty to accept the benefit or look to the company for damages.

So a stipulation, in a certificate of membership in a benefit association organized by a railroad company, to which it contributes and the expenses of which are paid by it, that, in case suit is brought against the railroad company by the member or by his representatives to recover for injuries or death, and it is prosecuted to judgment or compromise, recovery under the certificate shall be precluded, is not against public policy. Nor is such stipulation invalid, in that it "restricts the liabilities of railroads" for the negligence of other employees. See Iowa Code, § 1307. See also, *Donald v. Chicago, B. & Q. Ry. Co.* (Iowa 1895), 61 N. W. 971.

Consistent with the general rule as regards the validity of such agreements, by-laws of a railroad association which require its members to release the railroad company from any claim for damages before applying to the association for relief are not against public policy. *Owens v. Baltimore & O. R. Co.* (Ohio), 1 L. R. A. 75.

(c) As Affected by the Consideration.

Contracts of this nature are held to be based upon a valuable consideration. As illustrating this ruling, an employee of a railroad company voluntarily, and with full knowledge of the character and effect of the contract he was assuming, applied for admission to an association composed of the company and a portion of its employees, called the "Voluntary Relief Department," and, being admitted, contracted that the company might deduct from his wages the sum

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of 75 cents per month for the purpose of forming with other like contributions by other employee members, and contributions which by the contract the company was obligated to make, a relief fund for the benefit of the employees in case of sickness, accident, or death; and contracted further, that in case of accident the acceptant by him thereafter of the relief from the relief fund so accumulated should have the effect to release the company from liability for damages. In *Pittsburg, C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio 497, 45 N. E. 641, it was held that the contract was based on a valid consideration.

*Indiana*.—*Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423.

*Nebraska*.—*Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42.

*New Jersey*.—*Beck v. Pennsylvania R. Co.*, 63 N. J. Eq. 232, 43 Atl. 908.

*United States*.—*Otis v. Pennsylvania Co.*, 71 Fed. 136.

(d) **As Affected by Mutuality of Agreement.**

And an employee's agreement, in his application for membership in a relief association, that acceptance of its benefits in case of injury shall release any claim against the railroad therefor, is not bad for want of mutuality, where it appears that the company is a member of the association, and a party to the contract by which the employee becomes a member.

*Indiana*.—*Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423.

*Ohio*.—*Pittsburg, C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio 497, 45 N. E. 641.

(e) **As Affected by Alleged Insurance Feature.**

The validity of the optional agreement to accept benefits or sue, as the employee, or beneficiary may elect, cannot be attacked successfully on the ground that the contract is an insurance contract, it being held that they are not in their nature insurance contracts. *Beck v. Pennsylvania R. Co.*, 63 N. J. Eq. 232, 43 Atl. 908. But see *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. 305, which was disapproved in *Otis v. Pennsylvania Co.*, 71 Fed. 136; *Vickers v. Chicago, B. & Q. R. Co.*, 71 Fed. 139.

(f) **As Affected by Railroad Company's Failure to Pay Money into the Treasury of the Relief Association.**

And where the railroad company organizes a relief department for the benefit of its employees, and those electing to participate in its benefits, it is not essential to the validity of an option to accept benefits or sue that the corporation shall have itself pay money into the treasury of the relief association, if it assumes the obligation of taking charge of the administration and of paying the operating expenses; guarantees the obligations of the association, and supplies all the deficiencies in the revenue. *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628.

(2) **Avoidance of Contract by Employee.**

(a) **Failure to Read and Understand Contract as Ground of Avoidance in the Absence of Fraud.**

A railroad employee who, upon becoming a member of a voluntary relief association, composed of employees, and to whose funds the railroad company is bound to contribute in case of deficiency, signs, without fraud or undue influence, a contract that in case of injury he shall elect either to take the benefits provided by the association or have his action against the company, cannot avoid the effect thereof on the ground that he signed the agreement without reading it or understanding its purport, and that he was at a disadvantage in dealing with the company. *Vickers v. Chicago, B. & Q. R. Co.*, 71 Fed. 139; *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. 305, being disapproved by this case.

(b) **When Evidence of Coercion Is Insufficient to Enable an Avoidance.**

Evidence that a railroad employee was advised on three occasions by the superintendent, who had power to discharge him, to join a

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relief department by the railroad company, and that he did so not because he desired to, but because he felt that he would stand better with the company, does not show coercion. *Eckman v. Chicago, B. & Q. R. Co.*, 169 Ill. 312, 48 N. E. 496.

## (3) Election to Receive Benefits as Barring Suit.

The fact that at the time of receiving relief from the association the employee is not aware of the strength of his case against the company, is ignorant of certain important facts and of the witnesses by whom he can prove them, is to be regarded merely as a misfortune, and does not avoid the effect of his election, in barring an action against the company. *Vickers v. Chicago, B. & Q. R. Co.*, 71 Fed. 139. But see *Miller v. Chicago, B. & Q. R. Co.*, 65 Fed. 305.

## (4) Estoppel to Sue.

## (a) Estoppel to Sue after Receiving Benefits, and Giving Release.

Where an employee of a railroad company becomes a member of a relief association, and as a condition of membership, and in consideration of the contributions of the railroad company to such association, and of the company's guaranty of the payment of the benefits of the association in case of injury, signs a contract by which he releases the company from liability by reason of any accident that may happen to him while in the company's employ, an action will not lie against the company, where, both before and after bringing action, he receives money from the association on account of the injury, and gives a receipt releasing and discharging the company from all claims for damages.

*Maryland.*—*Fuller v. Association*, 67 Md. 433, 10 Atl. 237.

*Pennsylvania.*—*Graft v. Railroad Co. (Pa.)*, 8 Atl. 206.

*United States.*—*Martin v. Baltimore & O. R. Co.*, 41 Fed. 125; *Owens v. R. R. Co.*, 35 Fed. 715, 1 L. R. A. 75.

## (b) When Acceptance of Benefit from Association Does Not Estop Claim as against Railroad Company.

A member of a railroad relief association is not estopped from claiming compensation from the railroad company, being a distinct corporation, for an injury from a collision, by the fact that he had previously been compensated by the relief association for the injury, which he then falsely alleged was caused by malaria, etc. *Owens v. Baltimore & O. R. Co. (U. S.)*, 1 L. R. A. 75, 35 Fed. 715.

## (c) When Rules of Association Relative to Determination of Claims Does Not Estop Enforcement of Claim by Beneficiary.

One of the rules in the relief department of a railroad company provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal be final and conclusive upon all parties, without exception or appeal. It was held that, after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action in court for the recovery of the money due thereon, and that such rule is not a bar to the action. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381.

## 3. CONTRACTS ENTERED INTO SUBSEQUENT TO THE OCCURRENCE OF THE INJURY.

## a. When Release Not Obtained by Fraud or Misrepresentation.

## (1) General Rule.

As a general rule the courts of this country regard as valid and maintain contracts between an employee and a railroad company after the servant has been injured through the company's negligence, by which the employee agrees upon a valuable consideration to release the master from all liability for damages resulting from such negligence. There is this qualification, however, that the contract shall be free from any undue influence or other act constituting fraud.

Thus, in *White v. Richmond & D. R. Co.*, 110 N. Car. 456, 15 S. E. 197, the plaintiff, a conductor, injured by defendant railroad executed

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a release providing that, "in consideration of \$6,000 to me in hand paid \* \* \* (I) do hereby release \* \* \* (defendant) from all claims upon them for damages received by me by the collision, \* \* \* and covenant with them that I will not sue them \* \* \* for damages received in said collision. \* \* \* I hereby release (defendant) from any further liability or care of me on account of said accident." Subsequently plaintiff brought suit alleging as a further consideration for such release that defendant agreed to keep him in its employ for life at a stipulated sum per month, and that it, having discharged him, was liable, averring that the release was given with the understanding and agreement that it did not extend to the contract of life employment, "and, if of meaning and law to the contrary, it was so expressed unintentionally and by mistake." It was held that where the evidence of plaintiff alone tended to prove no more than a mistake, that the lower court properly refused to submit the same to the jury, the complaint containing only a simple allegation of mistake, there being neither allegation nor evidence that would entitle plaintiff to recover. Accordingly the contract was upheld.

And where an employee who had been injured in the service of the railroad company, agreed with the claim agent to receive \$300 for his loss of time and to get an artificial foot, the agreement was sustained in part, though some stipulations in the contract were declared not binding, but not on the ground of public policy, or on account of the nature of the subject-matter of the contract. Some of the facts and the conclusions of the court are as follows:—the voucher which the employee signed was presented to him folded, so as to show only a receipt "for the above account." He signed the receipt without reading the voucher and relying on the agent's representation that the settlement was only for the time lost. The voucher was in fact a release of all claims on account of the injury. It was held that the release was not binding except for loss of time, and that, without a return of the \$300 received, it could be avoided by reply to an answer setting it up. *Mateer v. Missouri Pac. R. Co.* (Mo. 1891), 15 S. W. 970.

*Indiana.*—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

*Iowa.*—*O'Brien v. Chicago, M. & St. P. Ry. Co.*, 89 Iowa 644, 57 N. W. 425.

*Michigan.*—*Hobbs v. The Brush Elec. L. Co.*, 75 Mich. 550, 42 N. W. 965.

*Minnesota.*—*Smith v. St. Paul & D. R. Co.*, 60 Minn. 330, 62 N. W. 392.

*Mississippi.*—*Welsh v. Alabama & V. Ry. Co.*, 70 Miss. 20, 11 So. 723; *Jackson v. Illinois Cent. R. Co.*, 76 Miss. 607, 24 So. 874.

*North Carolina.*—*White v. Richmond & D. R. Co.*, 110 N. Car. 456, 15 S. E. 197.

*Pennsylvania.*—*Hill v. Pennsylvania R. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196.

*United States.*—*Union Pac. R. Co. v. Artist*, 60 Fed. 365, 23 L. R. A. 581.

So the beneficiary of an employee, who is killed or receives injuries from which he subsequently dies, may contract to exempt the railroad company from liability to such beneficiary by reason of any right which may have accrued to him from the negligence of the railroad company, resulting in the death of, or injury to, the employee.

Thus, the widow of an employee of the B. & O. R. Co. after the death of her husband released any claims that she might have against the railroad company for causing his death for the purpose of enabling her husband's mother to obtain from the B. & O. Association payment of an amount of life insurance, which, under its constitution, was payable only on condition that all persons entitled to sue the railroad company for his death should release the railroad company from liability. In *State v. B. & O. R. Co.*, 36 Fed. 655, which was a suit by the widow against the railroad company, it was held that the release



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was not invalid as against public policy. *Owens v. B. & O. R. Co.*, 35 Fed. 715, 1 L. R. A. 75.

But the widow's release of a right of action for the death of her husband does not affect her right to maintain an action for her child in her representative capacity. See *Burns' Rev. St. Ind.* 1894, sec. 285; *Pittsburg, C., C. & St. L. R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638.

## (2) Consideration.

The consideration to support a contract of this character, may be money, an increase in wages, or an agreement to retain employee in the service of the railroad company.

Thus, it is held in *Hobbs v. The Brush Elec. L. Co.*, 75 Mich. 550, that taking a discharged employee back into service at fixed wages, with a promise of steady employment, is a sufficient consideration for the release by the employee of a claim for damages for injuries received through the negligence of the employer prior to such discharge; and if he is afterwards discharged without cause his remedy is upon said agreement.

And in *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289, it is held that if a yard brakeman, employed by a railroad company, is injured through the negligence of the company, while performing his duties, and the company, in consideration of a written release executed by the brakeman, discharging the company from liability pays him \$100, and promises verbally to give him "steady and permanent employment," at a stated compensation, such payment and promise is an acknowledgment of the company's liability and the release is a good consideration for the verbal promise. Hence, if the company breaks such promise by discharging the employee without cause, the latter can maintain an action for damages for breach of the contract and need not make the release a part of his complaint as the action is not upon a written instrument but upon the company's parol promise.

As to the adequacy of a money consideration, it is held, that, a release of all claims arising from the injury, signed by the brakeman, in consideration of a small sum, would be a bar to an action unless obtained by false representation. *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

## Construction of the Term "Steady and Permanent Employment."

A verbal promise on the part of a railroad company to give an employee, who is injured while performing his duties, "steady and permanent employment," in consideration of a release by the employee, is construed to mean an agreement to retain the employee as long as the latter is able, ready and willing to perform such services as the company may have for him to do.

*Indiana.*—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

*Mississippi.*—See also, *Jackson v. Illinois Cent. R. Co.*, 76 Miss. 607, 24 So. 874.

## Validity of Such Promise as Affecting Performance of a Quasi Public Duty.

And such a stipulation binding the railroad company is not void as being against public policy, on the ground that the company is a quasi public servant, and cannot, by this kind of an agreement, "tie its hands," as the public could not be affected by holding the company to its contract. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

## (3) Mutuality.

And such contracts are held not to be void on the ground of lacking mutuality. Thus, where an employee, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim the employee

## Notes

has paid in advance for an optional contract, and he has the right to have it remain optional. *Smith v. St. Paul & D. R. Co.*, 60 Minn. 330, 62 N. W. 392.

So there is no want of mutuality in a contract made by a person having a cause of action against another for injuries sustained through the latter's negligence, whereby the former relinquishes his claim in consideration of a sum of money advanced, and of the latter's promise to furnish him with "steady and permanent employment" at stated wages, as the claim relinquished has a certain value. *Pennsylvania Co. v. Dohan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

(4) **Scope of Contract Releasing Claims for Specified Personal Injuries.**

A release of claims against a railroad company for specified personal injuries will not include a claim for damages not then known to either party for negligent treatment of such injuries in a hospital maintained by such company, although the release was expressly made to cover all claims and demands whatsoever in law or in equity "by reason of any matter, cause or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day." *Union Pac. R. Co. v. Artist*, 60 Fed. 365, 23 L. R. A. 581.

(5) **Effect of Release Where Death Subsequently Results from Injuries.**

A release of damages resulting from injuries, given by the party injured, and who but for such release might have sustained an action, continues operative on his subsequent death from such injuries. Under this ruling the personal representative, or other person designated in a statute giving a right of action on behalf of certain named persons as beneficiaries of one whose death has been caused by a wrongful act, is precluded by such release from suing on account of the death of the employee subsequently resulting from his injuries.

*Pennsylvania*.—*Hill v. Pennsylvania R. Co.*, 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196.

*South Carolina*.—*Price v. Richmond, etc., R. Co.*, 33 S. Car. 556, 12 S. E. 413, 26 Am. St. Rep. 700.

(6) **Release by Widow as Affecting Her Right to Sue in Representative Capacity for Benefit of Her Child.**

The widow's release of a right of action for the death of her husband does not affect her right to maintain an action for her child in her representative capacity, under Burns' Rev. St. Ind. 1894, sec. 285. *Pittsburgh, C., C. & St. L. R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638.

(7) **Contract Releasing Express Company from Liability as Affecting Liability of Railroad Company.**

A release by an employee of an express company of all liability for injuries sustained by negligence of the employer "or otherwise" includes the liability of the express company to hold a railroad with which it does business harmless against claims by the express company's employees for injuries, and precludes an action against the railroad company for causing his death by suddenly closing the opening between parts of a train while he was passing between them. *Pittsburgh, C., C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 40 L. R. A. 101.

(8) **Rights of Employee upon Breach of Contract by the Employer.**

Where a corporation in whose service a workman is injured in consideration of a release of all claims for damages, and an agreement to do such work as he is able, agrees to pay him certain wages and furnish him certain supplies, etc., so long as his disability to do full work shall continue, but afterwards repudiates the obligation and assumes to finally discharge him from service, he is not confined to successive actions for damages, as the right to wages, etc., accrued under the contract, but may treat the contract as finally broken, and

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sue at once to recover all that he would have received in the future, as well as in the past, if the contract had been kept.

*Missouri.*—Compare *Mateer v. Missouri Pac. R. Co.* (Mo. 1891), 15 S. W. 970.

*United States.*—*Pierce v. Tennessee Coal, Iron & R. Co.*, 173 U. S. 1, 19 Sup. Ct. Rep. 335.

## b. When Release Fraudulently Obtained.

## (1) Validity in General.

A release, constituting a contract, is upon the principles which would vitiate other contracts under similar circumstances, void and of no effect, when it is procured through misrepresentation, undue influence, or other act constituting fraud.

*Georgia.*—*Hayes v. East Tennessee, V. & G. Ry. Co.*, 89 Ga. 264, 15 S. E. 361.

*Illinois.*—*Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593.

*Iowa.*—*O'Brien v. Chicago, M. & St. P. Ry. Co.*, 89 Iowa 644, 57 N. W. 425.

*Missouri.*—*Mateer v. Missouri Pac. Ry. Co.* (Mo. 1891), 15 S. W. 970. Compare *Och v. Missouri, Kan. & Tex. R. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442.

## (2) What Constitutes a Fraudulent Inducement to Give Release.

As to what constitutes such a misrepresentation as to render a release fraudulent and void, it was held that where a plaintiff, while an employee of a defendant railway company, sustained a personal injury by reason of its negligence, and having thereafter released his right to action for such injury by a contract of accord and satisfaction fully executed, he did not have the right to maintain an action against the company for inducing him to enter into the contract, and accept satisfaction under it by fraudulently persuading him through its superintendent and its employed physician to believe that the injury was not a material one, and would not be permanent,—it not being alleged that any artifice, trick, or contrivance was used to prevent him from ascertaining the true end of his injury, and its probable duration,—these matters lying as much within his knowledge or means of knowledge, as within the knowledge of the defendant, its officers, agents, and employees.

*Georgia.*—*Hayes v. East Tennessee, V. & G. Ry. Co.*, 89 Ga. 264, 15 S. E. 361.

*Missouri.*—Compare *Mateer v. Missouri Pac. R. Co.* (Mo. 1891), 15 S. W. 970.

## (3) Return of Consideration as a Condition Precedent to Avoidance of Release and Institution of Suit.

And one may sue for personal injuries without tendering a return of money received for the release of his claim, which he claims was obtained by fraud and while he was mentally incapacitated, it being sufficient that the court instructs that, if the jury find for plaintiff, they deduct from the amount awarded, the sum already received. *O'Brien v. Chicago, M. & St. P. Ry. Co.*, 89 Iowa 644, 57 N. W. 425.

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TEXAS & P. RY. CO. v. SMITH *et al.*

(Circuit Court of Appeals, Fifth Circuit, April 22, 1902.)

[114 Fed. Rep. 728.]

Railroads—Hand Cars—Injury to Employee—Negligence of Fellow Servants.\*

A hand car is within the meaning of Acts Tex. 1897, p. 14, § 1,

\*See generally, article, "Fellow Servants," 12 Am. & Eng. Enc. Law 893. Also, see notes, 20 Am. & Eng. R. Cas., N. S., 296; 9 Am. & Eng. R. Cas., N. S., 9.

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providing that railroad companies shall be liable for all damages sustained by any servant or employee, while engaged in the work of operating their "cars, locomotives, or trains," by reason of the negligence of any other servant or employee, and the fact that such servants or employees were fellow servants shall not destroy such liability.

Same—Vice Principal—Right to Recover for Injuries.

A foreman of a gang of men engaged in repairing the tracks of a railroad company is within the protection of the section recited (Acts Tex. 1897, p. 14, § 1), and the fact that by section 2 he is made a vice principal does not bar his recovering for injuries resulting from the negligence of the men under his control.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

By an action commenced in the circuit court of the United States for the Northern district of Texas, Mrs. F. S. Smith, for herself and as next friend and guardian of her two minor children, C. F. and B. S. Smith, sued the Texas & Pacific Railway Company for damages on account of the death of F. S. Smith, her deceased husband, and the father of the minor children. In her petition she alleges that on April 11, 1899, Smith was in the employ of the defendant company as foreman of an extra gang of trackmen, whose duty it was to lay steel, etc., and, while thus employed, received certain personal injuries which resulted in his death, while exercising due care; that the company was negligent in delivering to Smith a defective and unsafe hand car to be used by him and his men in the performance of their duties; that at the time of receiving the injury Smith was riding on the front hand car, with a number of his men, returning from their work, and that the rear hand car was defective, and, being operated by some of the other men, was permitted by them to run into and collide with the front car, and caused Smith to be thrown off and killed; that one of the causes of the collision was the inability of the men on the rear hand car to control the same, by reason of its being in defective condition. It is also alleged that the accident was directly caused and contributed to by reason of the negligence and carelessness of the agents and servants in charge of the rear hand car, in permitting the same to run into and strike the front hand car, and that the company was liable by reason of such negligence; that the agents of defendant on the rear hand car were not fellow servants of Smith, under the statutes of Texas, and were engaged in the operation of one of the cars of the defendant, within the meaning of the Texas statutes relating to the liability of railroad companies for personal injuries; and that the railroad company was liable to plaintiff for the negligence of its servants and agents. The defendant answered, among other things pleading general denial, contributory negligence, act of fellow servant, and that Smith could, by ordinary care, have known of and had knowledge of the condition of the hand car which was being operated, and of the results which

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would follow, and that he remained in the service with such knowledge, and assumed all risk arising from the condition of the car.

On the trial the material evidence was substantially as follows: That F. S. Smith was dead. That he left the plaintiff Mrs. F. S. Smith, his surviving wife, and two minor children, Courtney F. Smith and Bert S. Smith, and that during his lifetime he had contributed toward their support an amount sufficient to warrant the jury in the verdict given. The evidence also showed that the deceased was in the employ of the Texas & Pacific Railway Company just prior to his death as foreman of what is known as the "extra gang." This force consisted of from 15 to 20 men, whose business and duty it was to look after and repair the track, and to perform such other duties as might be required in the maintenance of said track. This extra-gang force had their headquarters at the town of Eagle Ford, on the line of the Texas & Pacific Railway Company, and their section extended several miles west. All of this force, except the deceased, Smith, were negroes; and all worked together while engaged in the repairing and keeping the track in order, and were under the supervision and control of Smith. He kept their time, and had the power to hire and discharge them, and had, in fact, hired the most of the gang or force of men working under him at the time. He had been working as foreman of this extra gang for about six weeks. Prior to that time he had been regular section foreman, working for the defendant company. He had worked a while as extra-gang foreman in the yards at Ft. Worth, and then was moved with his force to Eagle Ford; had been there just one day prior to the accident. This force had in use at the time two hand cars, which were used to carry the men and tools out to their work in the morning, and bring them in to their quarters in the evening. It was usual and customary for eight or ten men to ride upon each hand car. These cars were propelled by levers, usually from four to six men on the car, working the lever while in motion, unless same should be going down grade. It appears that on the 11th day of April, 1899, this extra gang had used two hand cars to go out to work about four miles from Eagle Ford, and after the day's work was through they got upon the hand cars for the purpose of returning to Eagle Ford. Smith, the foreman, got upon the front car, and took his seat upon the front part of the front hand car, with about six men with him. This car was set in motion, going toward Eagle Ford. Shortly afterward the remainder of the men, to the number of about six or eight, got on the second car, and followed them. After proceeding on their way about 1½ miles, the first or front car was run into or struck by the rear car, which caused Smith, who was seated on a water keg, to fall or be thrown forward, so that the front car ran over him, inflicting injuries upon him from which he died. The evidence shows, also,

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that this rear car which ran into the one upon which Smith was riding had been delivered to Smith, by the direction of the defendant's road master, that morning, at Eagle Ford, for use.

E. Greer, a witness for the plaintiff, testified by deposition that the accident occurred about 20 minutes after 6, after they had done the day's work, and had gone a distance of about 1½ miles from where they had been at work during the day. The front car, on which he was riding, was larger than the second car. One Les Johnson, one of the laborers, was in charge of the second car, and, when the order to quit work was given in the evening by Mr. Smith, the hand cars were placed on the track by the men, and everything gotten ready to go back to Eagle Ford, and they started, and after they got started the car was going at a rapid rate of speed. At the time of starting, the front car was about 120 feet ahead of the second car, and when they reached the top of the grade, and started down, the second car ran into the first car, on which Smith was riding, which threw him over, and the car ran over him, which resulted in his death. The front car at the time of the accident was going about 10 or 12 miles an hour, and where the accident occurred the ground was practically level. He gave it as his opinion that the brakes of the second car were in good condition, and it could have been stopped in about 60 feet, but did not know when the man on the rear car first applied the brakes. Will Hurd, another of the laborers, testified with reference to the accident, and testified that the brakes on the rear hand car were not in good condition, and that the brakes were defective. John Page and Wheeler testified to the same effect. The testimony of Murphy, Lothron, and Fitzgerald was to the effect that the rear hand car was in good condition; that the accident was caused by the negligence of the men on the rear car, in allowing it to run too close to the front hand car, and in not stopping it in time to avoid the collision; and that, if the brakes had been properly applied, the hand car could have been stopped. There was testimony also tending to show that Smith, the foreman, was guilty of negligence in allowing the men on the rear hand car to run too close to the front hand car. The testimony of the plaintiffs' witnesses Lesser and Lambert was to the effect that the hand cars were kept a reasonably safe distance apart. Murphy, road master of the Texas & Pacific Railway Company, testified that he had general supervision over the foreman, Smith; that he had been employed by him as foreman of the extra gang, and that he had been acting as such for about six weeks; that prior to that time he had been a regular section foreman, and, as extra-gang foreman, Smith had power to employ and discharge all hands who worked under him; that he had employed some of those working under him at the time of the accident; that

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plaintiff in error, further than to say that they do not commend themselves to us as having sufficient force to warrant us in setting aside the judgment of the circuit court.

We conclude that that judgment was right, and it is therefore affirmed.

PARDEE, Circuit Judge, dissents.

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INTERNATIONAL & G. N. R. CO. v. BRANCH.

(Court of Civil Appeals of Texas, April 9, 1902.)

[68 S. W. Rep. 338.]

**Collision between Hand Car and Other Vehicle—Liability for Negligence of Employee Running Car for His Private Use\*—Instructions.**

In an action for damages from collision with a hand car on defendant's railroad, an instruction that, as the employee who was running the car was using it for his private use, defendant was not liable unless said employee was a disobedient and untrustworthy servant, in the habit of disobeying the rules in running the car, and the defendant knew of such habit, or could have known of it by the exercise of ordinary care, was not erroneous because omitting to include the condition that the employee must have been negligent in operating the car; that condition being clearly set forth in the instruction following.

**Contributory Negligence—Instructions—Appeal—Review.**

Where defendant requested two instructions on contributory negligence, both of which could not be given without giving undue prominence to that defense, and there was nothing in defendant's brief on appeal to show that they were not requested at the same time, defendant could not complain of the court's selection.

Appeal from district court, Comal county; L. W. Moore, Judge.

Action by John Branch against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

For former hearing, see 56 S. W. 542.

S. R. Fisher and N. A. Stedman, for appellant.

F. J. Maier, for appellee.

KEY, J. The nature of this suit is disclosed by the instructions given to the jury, which are as follows:

"(1) The plaintiff sues the defendant company for injuries inflicted upon the wife of plaintiff, damages to his buggy and horse, and expenses incurred in the treatment of his wife, alleging that these injuries were caused by a hand car of said company striking the buggy in which they were riding at the crossing of one of the streets of New Braunfels, alleging that

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\*See note, "What Acts of a Servant Amounting to a Tort Constitute an 'Acting within the Scope of Employment,'" 2 R. R. R. 431, 25 Am. & Eng. R. Cas., N. S., 431.

said hand car was negligently used, and thus negligently caused this injury.

"(2) The defendant company, as a defense, alleges that at the time of said injury the hand car was not being used in the business of the company, but that said car was then being used only for the private use of the person operating it.

"(3) The jury are charged that the uncontradicted testimony shows that at the time of the injury one Maloney, an employee of the company, who had charge of the hand car, was using said car for his own private use, and was not using same for the company's business; and the company would not be liable unless the evidence shows said Maloney to be a disobedient and untrustworthy servant, and was in the habit of disobeying the company's rules in running and using said car, and that said company knew, or could have known by the use of ordinary care, that said Maloney was in the habit of disobeying the rules of the company which forbid the use of the hand car at night unless by order of the company.

"(4) You will determine from all the facts and circumstances in proof whether said Maloney was a disobedient and untrustworthy servant, and did frequently use said hand car when forbidden by the rules of the company, and that the company did know or could have known this fact by the use of reasonable diligence; and if you so believe, then you will find for the plaintiff, if said car was negligently run and used, and did thus cause the injuries. If, upon the other hand, you do not so believe, you should find for the defendant. If you find for plaintiff, you will find such an amount as damages as will fairly and justly compensate the plaintiff for the injuries he has sustained. In doing this, you will consider the pain and suffering of his wife, the value of the loss of time from labor caused by the injury, the value of any impairment she has suffered to labor or earn wages, and whether temporarily or permanently. You will estimate the value of the injury to the buggy and horse; also the expenses incurred incident to her injury, such as doctor's bill and medicine, not to exceed the several amounts sued for in plaintiff's petition."

The court also gave the following special instructions at the instance of the defendant: "(2) Negligence is the failure on the part of the defendant, while resting under a legal duty or obligation to the plaintiff, to do what an ordinarily prudent and careful person would have done under the facts and circumstances surrounding the transaction complained of, or the doing by the defendant, while resting under a legal duty or obligation to the plaintiff, of some act resulting in injury to the plaintiff, which an ordinarily prudent and careful person, under the same or similar circumstances, would not have done.

(3) The jury are instructed that by the term 'ordinary care,' as used in the charge of the court, is meant such care as an ordinarily prudent and careful person would have exercised



under all the facts and circumstances surrounding the transaction under investigation." "(10) The jury are instructed that it devolved upon the plaintiff, John Branch, in driving his buggy to a railroad crossing on one of the streets of the city of New Braunfels, to exercise such care as an ordinarily prudent and careful person would have exercised under similar circumstances; and that if he failed to exercise such care, and it contributed directly and proximately to producing or causing the injuries complained of, you will return a verdict for the defendant. In this connection you are also instructed that it likewise devolved upon Lavina Branch, plaintiff's wife, for alleged injuries to whom he seeks damages, also to exercise ordinary care in going upon the crossing; and if from the evidence you believe that the said Lavina Branch failed to exercise such ordinary care, and that such failure on her part contributed directly and proximately to the infliction of the injuries complained of, you will return a verdict for the defendant." "(16) The jury are instructed that the fact that the defendant, after the happening of the accident complained of, did not discharge John Maloney for using the hand car upon his own business at the time mentioned in plaintiff's petition, does not prove or tend to prove that he was using the same in furtherance of the business of the company." From a judgment in favor of the plaintiff, the defendant has appealed.

#### Opinion.

Numerous errors are assigned upon the action of the court in admitting testimony. Some of the questions thus presented were decided against appellant on a former appeal. We have reconsidered them, however, and adhere to the ruling then made. We also hold that the other rulings complained of in reference to the admission of testimony were correct.

The criticism is made against the third paragraph of the court's charge that it authorized a finding for the plaintiff without any finding by the jury that Maloney was guilty of negligence in using and handling the hand car on the occasion of the accident. We hold that this criticism misconstrues the paragraph of the charge referred to, and that that paragraph is to be considered with the succeeding paragraph; and, when so considered, the jury must have understood the charge of the court to mean that the plaintiff was not entitled to recover unless Maloney was guilty of negligence at the time of the accident. Several other criticisms are urged against the court's charge, but we hold that they are without merit.

Error is also predicated upon the action of the court in refusing the following special instructions: "(8) If, from the evidence, the jury believe that an ordinarily careful and prudent person, in approaching and going on a railroad crossing in the nighttime, in the dark, would have stopped and

looked and listened for the approach of a train or a hand car along the track to the crossing, and that neither the said John Branch nor his wife, at the time and place of the accident, stopped and looked and listened, and that such failure on their part was negligence which directly and proximately contributed to and concurred in causing the accident resulting in injury, you will return a verdict for the defendant. (9) The jury are instructed that the plaintiff rested under the legal duty and obligation of exercising ordinary care in driving on and over the railroad crossing,—that is, such care as an ordinarily careful and prudent person would, under the circumstances, have exercised in driving on such crossing; and if you believe from the evidence that at the time and place referred to in plaintiff's petition he drove upon the crossing without exercising such care as an ordinarily prudent and careful person would have exercised under similar circumstances, and that such want of care on his part contributed directly and proximately to the accident complained of, and that but for such conduct it would not have happened, you will return a verdict for the defendant." It will be observed that the court had already given special instruction No. 10 requested by appellant, relating to and covering the subject of contributory negligence. It was quite as full and specific as No. 9. It was not as specific as No. 8, but, if the court had given both No. 8 and No. 10, it would have subjected itself to the criticism of giving too much prominence to the question of contributory negligence. Appellant's brief does not show that No. 8 was requested and refused before No. 10 was submitted to the court, and it is fair to presume that all the special charges were requested at the same time. This being the case, and the appellant having requested more than one instruction covering and submitting the issue of contributory negligence, and it not being proper for the court to give but one, appellant should not be heard to complain because the court selected No. 10 instead of No. 8.

No error was committed in the matter of correcting and receiving the verdict. The correction merely placed in proper form that which was already indicated by the verdict as prepared by the jury. *Railway Co. v. Locke* (recently decided by this court) 67 S. W. 1082.

The last two assignments charge that the verdict is contrary to both the law and the evidence, is excessive, outrageous, and unconscionable; but, as there is no assignment complaining of the action of the court in refusing to set the verdict aside, we are not required to revise the action of the jury. *Scott v. Bank*, 3 Tex. Ct. R. 876. However, the evidence supports findings, and we therefore find that the defendant's employee Maloney was a disobedient and untrustworthy servant, and frequently disregarded the rules of the company, which disobedience, by the exercise of reasonable diligence, could have been known to the company. We also find that

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Maloney was guilty of negligence on the occasion in question in the manner charged in the plaintiff's petition, and that the plaintiff and his wife were not guilty of contributory negligence, and that the verdict is not excessive.

No reversible error has been pointed out, and the judgment will be affirmed. Affirmed.

JEAN v. BOSTON &amp; M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, April 2, 1902.)

[63 N. E. Rep. 399.]

**Injury to Employee—Contributory Negligence.\***

Plaintiff's husband, a railroad employee, jumped off a moving switch engine on which he was riding, and stepped on a parallel track, on which a freight train was moving in the same direction as the switch engine, and was run down by the freight engine. The track over which the freight train had passed was straight for 600 feet. Deceased knew that at any time trains might come on that track. His duty did not require him to walk on the track, and when he went on it he was looking in the direction opposite to that from which the train was approaching: *held* that, even if the engine bell was not rung, he could not be found to have been in the exercise of due care at the time he was killed.

Exceptions from superior court, Middlesex county; A. Gaskill, Judge.

Action by one Jean against the Boston & Maine Railroad. There was a verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

W. H. Bent and A. O. Hamel, for plaintiff.

Richardsons, Trull & Wier, for defendant.

BARKER, J. We are of opinion that there was no evidence for which it could be found that the plaintiff's husband was killed while in the exercise of due care. It might be found from the evidence that the bell of the engine which struck him was not rung. But the engine was drawing a freight train, the speed of which was from seven to nine miles an hour. This train was going in the same direction as the switching engine and cab from which the deceased jumped to the ground, and upon a track parallel with that on which was the switching engine. The two tracks were about 6 feet apart, and the deceased jumped from the cab to the space between the two tracks, and then walked onto the track on which the freight train was approaching. Both these tracks were substantially straight at the place of the accident, and for some 600 feet in the direction from which the freight train was approaching. The track onto which the deceased walked

\*See *Whitton v. South Carolina & G. R. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 776, and note at end of case; *Quinlan v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 385; *Jones v. Flint & P. M. R. Co.* (Mich.), 21 Am. & Eng. R. Cas., N. S., 904.

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was the outward-bound track, and trains in the regular course passed over it in the same direction in which the switching engine was passing when the deceased jumped off. As he jumped off and walked upon the outward-bound track, he was not looking in the direction from which the freight train was coming, but in the opposite direction. The engineer of the switching engine saw the danger of the deceased, and called to him to look out. We assume, in favor of the plaintiff, that the deceased did not know when he jumped from the cab that the freight train was actually so near as to endanger him, or that it was so near that its approach had been seen or heard by others upon the cab, and that the work which he had to do made it right for him to leave the cab at the place where he jumped from it. But he must be held to have known that trains might at any time come upon the outbound track from the direction from which the train which ran over him did come. His duty did not require him to walk upon that track. He might have remained in the space between the tracks, or have gone upon the inward track after the passing of the cab. Whether he went at once upon the outward-bound track after jumping, and was at once run over by the freight train, or whether he walked upon that track until struck by a train which was in full view from where he was while it was passing some 600 feet, he could not be found to have been in the exercise of due care. He either stepped upon the track directly in front of the engine, or walked upon the track without perceiving the train while it was approaching him from behind for a distance of several hundred feet. It was his duty to look out for himself while on the tracks, and, even if the engine bell was not rung, the noise of the train must have been enough to give him warning of its approach, if he had been in the exercise of due care. The burden was upon the plaintiff to show due care by evidence from which it could be inferred reasonably, and for lack of such evidence it could not be inferred reasonably simply because the engine bell was not rung.

Exceptions overruled.

HAWORTH v. KANSAS CITY SOUTHERN RY. CO.

(*Court of Appeals of St. Louis, Mo., April 29, 1902.*)

[68 S. W. Rep. 111.]

**Injury to Section Man Running Hand Car at Dangerous Rate of Speed—Sufficiency of Evidence.**

In an action by a section hand for injuries sustained by being thrown from a hand car, plaintiff testified that the car was running at the rate of 15 miles an hour. Other evidence showed that its speed was from 8 to 12 miles an hour, and a witness for defendant stated that its speed did not exceed 6 miles. The usual rate of speed was shown to be from 8 to 10 miles an hour. The foreman of the section crew was on the car, and directed the men to pump up in order to escape a gravel train. The car was on a steep downgrade: *held,*

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that the evidence supported a finding that the car was run at a dangerous rate of speed.

**Same—Overcrowding Hand Car—Question for Jury.**

Eleven men were on the car, and two switch joints were loaded on. The car's platform was 4½ feet wide, with 12 or 16 inches on either side of the levers. There was a foot of space between the levers and ends of the car, and the men had to stand at the sides, instead of the front, of the handle bars. Four men were on the front and four on the rear of the car, and two on one side and one on the other. Plaintiff testified that he could not hold the handle bars for want of room. Defendant did not deny that the car was crowded, but claimed that it only had on the usual number of men: *held*, that the question of overcrowding the car was for the jury.

**Same—Same—Assumption of Risk.\***

The law of this state having been settled that the section hand did not assume the risk as a matter of law in riding on the crowded car, the court, in absence of proof to the contrary, will assume that the law of the foreign state, the place of the accident, is the same; and therefore the question of the servant's assumption of risk was properly submitted to the jury.

**Same—Failure of Foreman to Give Signal to Stop at Proper Place—Sufficiency of Evidence.**

In an action by a section hand for injuries sustained by being thrown from a hand car, the complaint alleged that defendant's foreman of the crew, who was on the car, failed to give the customary signal to stop, or, if given, that it was not given at the customary time, and plaintiff's testimony tended to show that the foreman usually gave the signal to stop from three to four rail-lengths before reaching the stopping point, but gave no signal in this instance. The foreman testified that he gave the signal when within one and a half or two rail-lengths from the intended stopping place. The servant in charge of the brake, when within 40 feet from stopping place, threw his weight on it, and stopped the car's speed so suddenly that plaintiff was thrown off: *held*, that the evidence warranted a finding that the accident was due to the failure of the foreman to give the signal to stop at the customary place, before reaching the stopping point.

**Same—Foreman of Section Gang Is Vice Principal—Statute.**

Under Sand. & H. Dig. Ark. 1894, § 6248, which provides that all persons engaged in the service of a railway corporation, who are intrusted with the "authority of superintendence, control, or command" of others in the service of the corporation, are vice principals, a foreman of a section gang, with power to employ and discharge men, and to control them in the performance of their duty, is a vice principal, rendering the corporation liable for an accident due to his negligence.

**Same—Giving Signal to Stop—Question for Jury.**

Whether the failure of a foreman in charge of a section crew to give the customary signal to stop the car on approaching the place to stop, when he had previously stated to the crew where to stop, was negligence, was a question for the jury.

**Same—Section Foreman as Vice Principal.**

A section foreman, engaged with the section crew in operating a hand car, is not a fellow servant with the men, but a vice principal, rendering the railway company liable for an injury to one of them through his negligence.

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\*See note, 9 Am. & Eng. R. Cas., N. S., 347; *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

**Haworth v. Kansas City Southern Ry. Co****Competency of Section Man to Testify as to Speed of Train.**

A section man of four months' standing is competent to testify as to the speed of a hand car on which he was riding.

**Competency of Physician to Testify as to Patient's Condition.**

In an action by a section man for injuries, a physician called by defendant cannot testify, over plaintiff's objection, as to what he learned of plaintiff's condition while professionally treating him; Rev. St. 1899, § 4659, providing that a physician shall be incompetent to testify concerning information acquired from a patient while professionally attending him.

**Injury to Section Hand—Failure to Give Customary Signal to Stop—Instruction.**

In an action by a section hand for injuries sustained by being thrown from a hand car by reason of its being suddenly checked, the evidence showed that it was checked by a fellow servant, and that the section foreman failed to give the usual signal to stop at the customary distance from the stopping place. There was evidence that such signal was given when the car had nearly approached to the stopping place: *held*, that it was not error to refuse a peremptory instruction that the foreman was free from negligence, especially where the court charged that plaintiff could not recover if the injury was caused solely by the negligence of the fellow servant in stopping the car.

**Same—Damages—Evidence.**

In an action for personal injuries by a section man working for stipulated wages, an instruction authorizing the jury to find substantial damages, not to exceed \$300, for loss of time, was erroneous, in the absence of any evidence as to the value of his time, the wages of such men not being so uniform or so generally known as to dispense with the necessity of such evidence.

Appeal from circuit court, Newton county; Henry C. Pepper, Judge.

Action by W. T. Haworth against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Modified.

Cyrus Crane and O. L. Cravens, for appellant.

White & Clay and J. G. Park, for respondent.

GOODE, J. Haworth, the plaintiff, was hurt by being precipitated headlong from a hand car which was running on the line of the defendant's railway, and instituted this action to recover damages for the injuries sustained. He was a member of a gang of workmen about 35 in number, under the superintendency of James Dyson, whose business it was to ballast and repair the railroad track. Dyson called out his men one morning at the station of Decatur, Ark., and had 11 of them, including the plaintiff and himself, get on a hand car to go to a station named "Gravett." The hand car encountered a gravel train about a mile from Decatur, standing on a siding, with its rear end projecting on the main track. Dyson ordered it carried around the train and reset on the track beyond. He also ordered the men at that time to put two switch points on the car, remarking they would stop at a steel pile from an eighth to a quarter of a mile further down the track, and get some rail braces. A hand named Bodkin was charged with the duty of slackening the speed of the car

by placing his foot on the brake, which projected above the floor of the car, and controlled the speed. After getting the hand car around the gravel train and loading the switch points, the men resumed their places on it, and Dyson told them to pump up and get out of the way of the gravel train, which was backing towards them. There was a very steep grade from that point to the steel pile, and the testimony of some of the witnesses is that the car acquired a velocity of 12 or 15 miles an hour as it went down the grade, instead of 6 to 8 miles, which was the usual velocity. When from 40 to 50 feet from the steel pile, Bodkin threw his weight on the brake, diminishing the car's momentum so suddenly that four of the men on the front end were thrown from their positions to the ground, and the plaintiff seriously injured by the fall and the car running on him after he fell. The petition contains three specifications of negligence against the defendant: First, that the hand car was run by Dyson at a dangerous rate of speed, to wit, at the rate of from 12 to 20 miles an hour; second, that Dyson's habit had been theretofore, when directing the operation of a hand car, to give an order (styled a "cautionary command") to stop at from 150 to 200 feet from the place at which it was intended to stop, but that he neglected to give such command on this occasion, or to give it at the proper and customary time; third, that the defendant failed to use ordinary care to provide plaintiff a reasonably safe place in which to work, the hand car on which he was ordered to ride being overcrowded, as it contained 11 men and 2 switch points, so that plaintiff's footing was precarious, and he had no room in which to brace himself. A verdict for \$1,100 in favor of plaintiff was rendered. At the conclusion of plaintiff's evidence, as well as at the conclusion of all of the evidence, an instruction in the nature of a demurrer to plaintiff's case was requested by the defendant, and refused. This ruling, as well as the rulings on other instructions and on the evidence offered, are assigned as errors.

A careful perusal of the testimony has convinced us the charges of negligence were supported by substantial proof, and that the circuit court ruled correctly in submitting the case to the jury. The evidence in regard to the speed at which the car was running varied widely, plaintiff testifying it was making 15 miles an hour, while one witness for the defendant swore its speed was not higher than 6 miles an hour. Other witnesses testified to 8, 10, and 12 miles. There was testimony also that the usual rate of speed was 8 or 10 miles an hour. Dyson told the men who were working the handles to pump up in order to escape the gravel train. The grade was steep, and, if an excessive speed was attained, it was with his knowledge, as he was on the car, and he does not pretend he gave any direction to lower it. That the car was crowded is not denied, but it is claimed there were no more than the usual number of men on it. The ques-

tion in this connection is, not whether there were more than usual, but more than were compatible with the reasonable safety of the men. The speed of the car was so high that the hands who were working the handles had to let go on account of the violent motion, and there was so little room they had to stand at the sides of the handle bars instead of in front of them. There was only about a foot of space between the levers and the ends of the car. The platform on which the occupants of the car stood was  $4\frac{1}{2}$  feet wide with 12 or 16 inches on either side of the levers. Four men were on the front and four on the rear, besides two on the left-hand side and one on the right. Plaintiff testified he could not hold the handle bars without more room. The foregoing is according to the proof made by the plaintiff, and we do not think such testimony should have been excluded from the consideration of the jury because the defendant had theretofore loaded as many men on the car. Neither do we think plaintiff is debarred from recovering because he assumed the hazard, unless the danger was so great and obvious that men of ordinary caution would have refused to encounter it. The decisions of our supreme court have established that rule. *Pauck v. Provision Co.*, 159 Mo. 467, 61 S. W. 806; *Hurst v. Railway Co.*, 163 Mo. 309, 63 S. W. 695. We are bound to defer to the authority of those decisions, as no proof was made of a different law in Arkansas, and hold the issues on the question of plaintiff's assumption of the risk to which he was exposed in riding on the crowded car was properly submitted.

As to the warning or signal which the plaintiff claimed Dyson was accustomed to give before the speed of the car was checked, when it was running fast, there was testimony he usually, if not always, exclaimed, "Hold the car!" or similar words, from three to four rail-lengths before the stopping point was reached; and Dyson swore himself that on this occasion he cried out to Bodkin to hold the car when within  $1\frac{1}{2}$  or 2 rail-lengths; that is, he allowed about one-half the customary distance in which to stop, and, of course, necessitated a much quicker stop than usual. An ingenious argument is made by appellant's counsel on this assignment of negligence, which they are disposed to treat as the only one meriting serious attention and as disproved by the whole evidence. After an attentive consideration of their presentation of the question in connection with the record, we think they are at fault in contending the case rests solely on the failure of Dyson to give the usual warning or "cautionary command" to stop, and also in fault in their argument that an analysis of the evidence shows the accident is to be ascribed solely to Bodkin's carelessness in stopping the car too suddenly. The common-law rule of the nonliability of an employer for an injury to one of his servants by the negligence of a co-servant prevails in Arkansas, and, if no one but Bodkin was to blame



for the accident, the railroad company cannot be held responsible, because Bodkin was Haworth's fellow servant. Dyson was not. He was the foreman of a large gang of men, had authority to employ and discharge help, and the men in the gang were under his control in the performance of their duty. His relation to the plaintiff is controlled by the following statute of the state of Arkansas: "All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any such duties, are vice principals of such corporation, and are not fellow servants with such employee." Sand. & H. Dig. Ark. 1894, § 6248. The argument advanced by the counsel for appellant in regard to Dyson's giving or failure to give an order to stop is as follows: If no command to stop the car was given by Dyson to Bodkin,—as the plaintiff's testimony tends to prove,—then Bodkin's action in stopping it was the sole cause of the injury, and the company is not liable. If, on the other hand, Dyson commanded Bodkin to hold the car, as he, Bodkin, and others swore, the usual warning was thereby given to the crew, and the accident was caused solely by the careless obedience of Bodkin in slackening speed too suddenly; and hence his negligence was the sole cause of the injury, and the defendant is not liable. But no such dilemma arises on the pleadings and the evidence. The petition in this case was carefully drawn, and does not confine the negligence in respect to the "cautionary command" to a statement that it was not given at all, but says it was either omitted or given at the wrong time. Dyson's own testimony is that he gave it when the car was at a point about one-half the distance from the stopping point that it was wont to be when the order to stop was given, which, as said before, made it necessary for Bodkin to apply the brake more forcibly than he otherwise would have done in order to bring the car to a stop at the steel pile; that is, he had to reduce the speed of the car more rapidly than was customary. So Dyson's testimony supports one allegation of the petition on this point, while Haworth's supports the alternative averment that no notice to stop was given. The argument is also advanced that it was unnecessary to give the command to stop the car, or any notice of the reduction of its speed, as was usually done, because Dyson had notified the crew, when they picked up the switch points, that a stop would be made at the steel pile to get rail braces, which was sufficient notice. This argument will not hold water. After the car had passed the point at which a reduction of speed should have begun to stop at the steel pile, and the speed was neither reduced nor anything said about stopping, the crew may have been put off their guard by an impression that no stop would be made.

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It is for the jury to say whether it was incumbent on Dyson, as he was in charge of the car, to sound some note of warning to the crew at the usual place if he wanted the car checked, and this assignment of negligence, in all its phases, was for the jury to decide on the whole evidence.

Neither can we adopt the suggestion that Dyson was a fellow servant with Haworth when the accident occurred, though a foreman at other times, because they were then engaged in a common duty. No Arkansas case holding such a doctrine has been cited, and it is unacceptable to us on principle, and opposed to the rule in this state. A superior or vice principal in charge of workmen does not become a co-workman whenever he actively assists in the manual performance of a task, instead of superintending it. If he chooses to take on himself the role of laborer, he may do so; but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent to see that precautions are taken to avoid harm to his gang continue to be exacted of him by the law, although he may have stepped down from his pedestal for an interval. *Russ v. Railroad Co.*, 112 Mo. 45, 20 S. W. 472; *Dayharsh v. Railroad Co.*, 103 Mo. 570, 15 S. W. 554, 23 Am. St. Rep. 900; *Steube v. Foundry Co. (St. L.)* 85 Mo. App. 646. Dyson was Haworth's superior, and the superior of all the men in his crew. He was selected by the defendant company to direct the operation and movement of the car, as well as to control the other work of the hands under him. He was in fact directing them, and the company is liable for his negligent act or omission while so doing. *Railway Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56; *Hoben v. Railroad Co.*, 20 Iowa, loc. cit. 568; *Schroeder v. Railroad Co.*, 108 Mo. 588, 18 S. W. 1094, 18 L. R. A. 827; *Moore v. Railway Co.*, 85 Mo. 588; *Railway Co. v. Josey's Adm'x (Ky.)* 61 S. W. 703, 54 L. R. A. 78.

No error was committed in receiving plaintiff's estimate of the speed of the car. He had been working in the employment he was then in for more than four months, and was sufficiently expert to give testimony on that point; as much so as the other witnesses who testified about it. *Walsh v. Railroad Co.*, 102 Mo. 586, 14 S. W. 873, 15 S. W. 757.

Cope's testimony as to the custom in handling hand cars when he worked for the company two years previous to the accident had better be omitted on a retrial of the case, as relating to too remote a date.

The plaintiff went to Neosho after he was injured, and was driven to the office of Dr. H. H. Johnson, who is the company's local physician. Johnson examined and dressed Haworth's wound, and drove him to the depot in his own buggy, when he went to the company's hospital at Pittsburg, Kan. The defendant offered Dr. Johnson as a witness, and

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he testified as some length in answer to hypothetical questions concerning injuries similar to plaintiff's, and was then asked what was the result of his examination of the plaintiff himself. The court refused to permit him to answer the question on the objection that it called for privileged communications. Thereupon defendant's counsel made the following offer of proof: "I offer to show by this witness that he made a physical examination of the plaintiff, Walter Haworth, on the 14th day of May, 1901, just after receiving the injury for which this suit is brought; and he made such an examination, not as the physician of Walter Haworth, but as the physician of the defendant company, and that Haworth at the time knew he was such a physician; and I offer to show from that examination that nothing was discovered save and except a scalp wound." Said witness was permitted to testify that plaintiff walked away from his office, and he saw him going down the street on the east side of the square, and did not notice anything wrong about his walking; that he afterwards saw him in court, and asked him how he was treated at the hospital, and plaintiff said, "All right." The court rightly refused to permit this physician, who attended the plaintiff professionally, to testify what he learned while treating him, since it was objected to as privileged. *Rev. St. 1899, § 4659; Gartside v. Insurance Co., 76 Mo. 446, 43 Am. Rep. 756; Streeter v. City of Breckenridge (K. C.) 23 Mo. App. 244; Corbett v. Railroad Co. (St. L.) 26 Mo. App. 621; Freel v. Railroad Co., 97 Cal. 40, 31 Pac. 730; Raymond v. Railroad Co., 65 Iowa, 152, 21 N. W. 495.*

This case was carefully and fully instructed, and no particular exception is urged save to the refusal to instruct absolutely in defendant's favor, the direction as to the measure of damages, and the refusal of three instructions which the defendant requested to the effect that no negligence could be found on account of the speed of the car, the number of men on it, or Bodkin's stopping the car too quickly, if Dyson ordered it stopped at the steel pile. We have already considered the propositions embodied in those charges. In our view of the case, they were properly refused, especially as the one last noticed was fairly covered by others given for the defendant. The jury were told in several instructions that, if they found the injury was caused solely by the negligence of Bodkin, their verdict should be for the defendant; and undoubtedly the law is that, if Dyson's negligence was a partial cause, the company is liable. The following instruction was given on the measure of damages: "If you find a verdict in favor of plaintiff, you will assess his damages at such sum as will reasonably compensate him for whatever injury you believe from the evidence he sustained from defendant's negligence, if you believe it to have been negligent, and in estimating such damages you will take into consideration: (1) The nature, character, and extent of such injuries, if any; (2)

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the pain of body and mind, if any, which he has suffered from said injury; (3) the pain of body and mind, if any, which plaintiff is reasonably certain to suffer in the future therefrom; (4) the amount and value of time, if any, lost by plaintiff in consequence of said injuries, but not to exceed \$300.00 therefor; (5) the impairment, if any, in his earning capacity, caused by such injuries. Your finding in the aggregate will not be over \$14,900.00." The foregoing charge sanctioned a finding by the jury of substantial damages in favor of plaintiff on account of the amount and value of his lost time for an amount not to exceed \$300. No testimony whatever was introduced as to the value of plaintiff's time, although he was a laborer, working for stipulated wages, and the proof could have been made by a bare question. We had occasion recently to go over the subject of recovery for lost time in personal injury cases, and ruled that where the nature of the employment was such that proof can be made, it must be, but where, from the character of the employment, it is impossible to prove definitely the value of a plaintiff's time, facts and circumstances which will aid in estimating its value may be shown, and will be sufficient to warrant an instruction to the jury to take into consideration the plaintiff's loss of time in estimating his damages. *Mabrey v. Road Co.* (No. 8, 292; Mo. App. St. L., not yet officially reported) 67 S. W. —. In that case, however, we explicitly said that no looseness of practice in making proof of the value of lost time was to be indulged, and, whenever it was susceptible of positive proof, that kind would be required. There can be no excuse for not introducing evidence to establish what the plaintiff's time was worth, and the omission of that proof likely escaped the attention of the able judge before whom the case was tried.

Nor was the foregoing instruction right in its general scope, for it was a direction to the jury to allow substantial damages for that one item up to \$300, and, if the defendant had endeavored to limit it by an instruction to the jury to return only nominal damages for plaintiff's loss of time, the two instructions would have been squarely in conflict. While the actual ground of the decision in the *Mabrey Case* was the impossibility of proving the exact value of *Mabrey's* time, as he was cropping on shares, the instruction in this case does not fall within the practice mentioned in that opinion, but not adopted as the rule of decision, that, if the charge on the measure of damages given in behalf of a plaintiff is right in its general scope and in the elements of damages referred to the consideration of the jury, the defendant must ask a limiting instruction as to any item for which he deems the plaintiff has only made out a case for nominal damages, if he would assign error on account of his recovering substantial damages on such item. The rule announced in *Murray v. Railroad Co.*, 101 Mo. 236, 3 S. W. 817, 20 Am. St. Rep. 601, that the value of the services of a common nurse could be recovered

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without particular proof, because their value is generally known, has been since overruled (*Cobb v. Railroad Co.*, 149 Mo. 609, 50 S. W. 894), and we do not think the wages of men working in railroad construction are so uniform or generally known that evidence of what they are is unnecessary. They probably vary in different localities, and should be proven like other earnings. *Slaughter v. Railroad Co.*, 116 Mo. 269, 23 S. W. 760; *Mammerberg v. Railroad Co.*, 62 Mo. App. 563; *O'Brien v. Loomis*, 43 Mo. App. 29.

On account of the error in the instruction on the measure of damages, the judgment would have to be reversed, and the cause remanded for another trial, but for the fact that the respondent has offered to remit the sum of \$300 from the judgment recovered below by a suggestion to that effect made since our opinion was handed down, and as that sum was the full amount which the jury could have allowed on account of loss of time, said offer to remit is accepted, and the judgment is affirmed for \$800; the costs of the appeal to be taxed against the respondent.

BLAND, P. J., and BARCLAY, J., concur.

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WELDON v. OMAHA, K. C. & E. RY. CO.

(*Court of Appeals of Kansas City, Mo., April 7, 1902.*)

[67 S. W. Rep. 698.]

**Riding on Defective Hand Car—Assumption of Risk by Employee.\***

Plaintiff, a railroad employee, was injured while riding on a defective hand car, by reason of its jumping the track. The boxing in the wheel was in bad condition, one being out, and the car being otherwise worn and hard to run. The defective boxing would not be observed except by special examination. Plaintiff knew that the car was not in proper condition, and with other employees had so notified defendant's foreman, who replied that all it needed was more effort on the part of those using it. Plaintiff stated that he never gave the car special examination, and thought he could use it by exercising ordinary care: *held*, that plaintiff's knowledge of the defect could not preclude recovery, the danger not being so obvious that an ordinarily prudent man would refuse to use the car.

**Same—Evidence of Condition of Car after the Accident.**

Testimony as to the condition of the car immediately after the accident was admissible, where it was such as tended to establish its condition prior thereto.

Appeal from circuit court, Sullivan county; Jno. P. Butler, Judge.

Action by J. W. Weldon against the Omaha, Kansas City & Eastern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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\*See note, 9 Am. & Eng. R. Cas., N. S., 347. See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

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Hall & Hall and J. G. Trimble, for appellant.  
Harber & Knight, for respondent.

ELLISON, J. This is an action for damages arising from personal injury received by plaintiff, an employee of defendant, while riding, with other employees, on one of defendant's hand cars. The judgment in the trial court was for plaintiff in the sum of \$4,000. The accident happened by reason of a defect in the car which caused it to "jump the track." Since the verdict was for plaintiff, we will state as facts what the evidence in plaintiff's behalf tends to prove them to be: Plaintiff and several other employees were engaged, under the immediate direction and control of a foreman named Bosely, and one Brown, who acted in Bosely's place during the latter's absence, and who was called by the men the "straw boss." The defect in the car consisted of the boxing in the wheel being in bad condition, one being out, and the car being otherwise worn. It was old and somewhat shaky and was hard to run. The defective boxing would not be observed except by a special examination. The foremen had each been notified by plaintiff and others that the car was not in proper condition. They replied that all it needed was more effort on the part of those propelling it. They took no steps to have the defects repaired, and permitted the men, including plaintiff, to continue its use. Plaintiff had heard the car complained of frequently by his fellow laborers. And in his deposition, taken by defendant before the trial, he stated that he had said to the foreman, in response to the latter's complaint of his being late getting in with it, that "the old car is no good." The foreman replied that the boys operating it were a "set of drones," and "if they would put a little elbow grease on, the car would be better; that the car would be all right if they would pump it." He frequently told the men that the car was "all right." Plaintiff further stated that he never gave the car any special examination, and that he thought he could continue to use it by exercising the usual care. The evidence in behalf of the defendant consisted (aside from the extent of the injury) in the deposition of plaintiff, taken at its instance, and a deposition of a fellow laborer of plaintiff's, taken by plaintiff, but not used by him at the trial. Neither the foreman nor the "straw boss" was introduced. Indeed there was no evidence to contradict the case made by plaintiff as to the defective condition of the car.

Taking the evidence in the cause, it undoubtedly made a case for the plaintiff. The law is that it is one of the master's duties to furnish the servant with reasonably safe machinery and appliances with which to work (in the present instance a hand car), and that the master must keep such machinery and appliances in repair. He cannot escape such duty by delegating it to some other servant. For when he delegates a duty of his own to a servant, the latter becomes his alter ego, and such servant's knowledge and neglect is the knowl-

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edge and neglect of the master. *Sellers v. Missouri Water Co.* (decided this term) 67 S. W.—; *Wendler v. Furnishing Co.* (not yet officially reported) 65 S. W. 737. In the present instance, the two foremen acting for the master are shown, not only to have known of the car being out of repair, but they directed its continued use, without any effort to remedy defects, or to have them remedied in the proper department. In such state of case, the only thing to prevent a liability to plaintiff would be his knowledge of the defect, and that the danger therefrom was so obvious and glaring that a reasonably prudent and careful person would refuse to use the car. The evidence was that it took an examination to note the principal defect, and that plaintiff thought he could continue to use it. While plaintiff stated fully matters going to show that he knew the car was out of condition, it is evident from what he said that he did not consider it in such condition that it could not be used without great peril. The master and servant are not on equal footing. The latter may rely on the superior knowledge of the former in regard to the safety of appliances. He need not quit the services rather than work with defective appliances, so long as the master knowingly furnishes them for his use, and their defective character does not render them so glaringly dangerous as that a man of ordinary prudence would not use them. *Blanton v. Dold*, 109 Mo. 75, 18 S. W. 1149; *Huhn v. Railway Co.*, 92 Mo. 447, 4 S. W. 937; *Soeder v. Railway Co.*, 100 Mo. 681, 13 S. W. 714, 18 Am. St. Rep. 724; *Settle v. Railway Co.*, 127 Mo. 339, 30 S. W. 125, 48 Am. St. Rep. 633; *Wendler v. Furnishing Co.* (not yet officially reported) 65 S. W. 737.

The objections to the instructions are without substantial merit. In point of fact there was no defense presented by the evidence, save that plaintiff knew the car was defective, and that the defects were so glaringly and obviously dangerous as should have caused him to refuse to use it. This issue was clearly and pointedly placed before the jury by the instructions for plaintiff, taken together. The jury could not possibly have misunderstood that phase of the case.

The objection that defendant's knowledge of the defects was assumed in instructions is not reversible error, since all the evidence shows it did know of them. There was no effort to contradict or controvert that point. In such instance it is not reversible error if an instruction assumes it. The instructions, taken as a whole, in the state of the evidence, properly covered the case.

The objection made to the testimony of witness Jeffries is not important or of substantial moment. It related to an admission by one of the foremen as to the defect in the car. This point was so overwhelmingly proven, and, being uncontroverted, the evidence, conceding it to be improper under ordinary circumstances, was not harmful, and its being received was not reversible error.

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The condition of the car as it was found immediately after the accident was shown by witness Furlong. His testimony was such that it tended to establish its condition before the accident, and it was therefore proper.

The authorities on the general subject of the law in relation to master and servant have been collected by the respective counsel, and will be found in their briefs. We have not discussed these in detail, for the reason that in the condition of the evidence it could serve no useful purpose.

The evidence as to the extent of plaintiff's injuries bears directly on the amount he should recover. If that offered by plaintiff is to be believed, he should be allowed a substantial sum. What that sum should be is a question solely for the jury, limited, of course, within reasonable bounds. If we were convinced that the amount allowed was so far beyond what the evidence justified as to show passion, hatred, or prejudice, we would not hesitate to direct a remittitur. But while we would have been better satisfied with a less sum, yet we do not feel that that condition of case is presented which would justify our interference with the jury, especially since the amount has received the sanction of the learned judge who presided at the trial. We will therefore affirm the judgment. All concur.

# GALVESTON, H. & S. A. RY. CO. v. JONES.

(Court of Civil Appeals of Texas, April 16, 1902.)

[68 S. W. Rep. 190.]

## Injury to Employees—Defective Hand Hold\*—Pleading—Evidence.

Where, in an action by a railway employee to recover for injury resulting from the giving way of a hand hold on the side of a car, the complaint alleged that the company had negligently allowed the hand hold to become defectively and insecurely fastened to the car, evidence was admissible that the wood in which the end of the hand hold was embedded was not sound.

## Same—Evidence.

In an action against a railway company for injury to an employee resulting from a defective hand hold, the testimony of a witness that he examined the car, and describing its condition, should not be

\*See note, 19 Am. & Eng. R. Cas., N. S., 431.

As to defective ladders, see 19 Am. & Eng. R. Cas., N. S., 434 et seq.

As to defective grab irons, see Jones v. New York, etc., R. Co. (R. I.), 11 Am. & Eng. R. Cas., N. S., 414.

As to liability of master for defects of which he has no notice, see Lincoln St. Ry. Co. v. Cox (Neb.), 4 Am. & Eng. R. Cas., N. S., 273.

As to defective cars, see Roberts v. Boston & M. R. Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 439.

As to defective couplings, see Thompson v. Missouri Pac. Ry. Co. (Neb.), 8 Am. & Eng. R. Cas., N. S., 762.

As to duty of master as to appliances generally, see Norfolk, etc., R. Co. v. Ampey (Va.), 5 Am. & Eng. R. Cas., N. S., 706; Bland v. Shreveport Belt Ry. Co. (La.), 4 Am. & Eng. R. Cas., N. S., 349. See also, generally, 5 Rap. & Mack's Dig. 67 et seq.



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excluded as hearsay because it was not shown how he learned the identity of the car, or because the witness was not present when the accident occurred.

**Same—Same—Inspection\*—Sufficiency of Evidence.**

Where, in an action against a railway company for injury to an employee resulting from a defective hand hold, the only evidence as to inspectors or inspection was the testimony of the car inspector that he had been inspecting cars for many years, that no other accident had occurred from a defect in a car inspected by him, that he and a helper inspected a freight train in 20 minutes, and that he inspected this car 4 or 5 hours before the accident, an instruction that the company was not liable if it appointed competent inspectors, who inspected the car before it left the yards, and the defect was one which could not be discovered by such inspection, was not objectionable, though submitting to the jury the question as to the competency of the inspector.

**Same—Measure of Damages—Instruction.**

In an action by an employee against a railway company for injury resulting from a defective hand hold, the court charged that if the jury found for the plaintiff, and that his injuries were permanent, they should allow him such sum as would compensate him, taking into consideration mental and physical pain suffered, consequent upon his injuries, and his diminished capacity to labor and earn money in the future: *held*, that such charge gave the true measure of damages, and did not allow double damages.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Thomas D. Jones against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Newton & Ward, for appellant.

Perry J. Lewis and H. C. Carter, for appellee.

FLY, J. This is a suit for damages alleged to have accrued through the negligence of the railway company in furnishing to appellee, its employee, a defective appliance with which to perform the labor incumbent upon him by virtue of his employment. A trial by jury resulted in a verdict and judgment for \$15,000 in favor of appellee.

From the statement of facts, we find that appellee, while climbing the side of a freight car to reach the top, where his duties as brakeman called him, was precipitated to the ground, and permanently and seriously injured, by the hand hold on the car pulling out. The hand hold was in such a defective condition as to cause the fall and consequent injuries of appellee, through the negligence of appellant. Appellee was 28 years of age when injured, was strong and healthy, and was earning from \$80 to \$90 a month as a brakeman.

The first assignment of error complains of the admission in evidence of the answer of M. L. Fitch to an interrogatory, on the ground that appellee only read a portion of the interroga-

\*See 5 Rap. & Mack's Dig. 104 et seq.

tory, and read the answer to the entire interrogatory, and because the answer was hearsay, and because the interrogatory presupposes that other questions had been answered in a certain way, and because there was no pleading authorizing testimony as to the condition of the wood to which the hand hold was attached. The petition alleged that appellant had negligently allowed and permitted the hand hold to become defectively and insecurely fastened to the car, and the allegation is directly responded to by evidence that "the wood in which the end of the hand hold which pulled out was embedded was not sound." If the wood on the car to which the hand hold was attached was so decayed that it would not hold screws put through the hand hold, this was evidence that the hand hold was defectively and insecurely fastened to the car. The first part of the interrogatory complained of was so framed that the witness was to answer provided the witness had answered previous interrogatories affirmatively. There is nothing to show that they were not so answered, but, in deference to appellant's objections, the first part of the interrogatory was omitted by appellee, and only the last portion was read. The witness, as a matter of course, answered the whole interrogatory, and the omission of a part of it could not cure any well-founded objection to it; but no objection to the interrogatory of any character is set forth in the bill of exceptions, unless it is held to be embodied in the objections to the answer, which are not tenable. The answer was not hearsay, although the witness may not have been present when the accident occurred. There was no question as to the identity of the car, and, however the witness learned its identity, it would not render his testimony as to the condition of the hand hold hearsay. He swore he saw it, and stated its condition. No attempt was made by appellant to contradict his statement. It is insisted by appellant that the answers to the interrogatories preceding the one of which complaint was made were different from what the person who propounded the interrogatories expected. We do not know what the preceding interrogatories were, but the answers of the witness show that he was a brakeman on the train, and in a position where he could have examined the car before taken from the vicinity where the accident occurred. How the witness knew the hand hold was the one that gave away when appellee caught hold of it does not appear, and, if appellant desired to know his source of knowledge, it might have been elicited on the cross-examination.

The court instructed the jury as follows: "You are further charged that even though you may find that said hand hold was insecurely fastened, and that plaintiff was injured by reason thereof, yet, if you further find that said defendant company appointed competent inspectors, who inspected said car before the same left the yards of the company at San Antonio, and that the defects in the fastening of said hand hold,

if any, were not apparent, and could not have been discovered by said inspectors by the exercise of ordinary care, then you are charged that the plaintiff, by reason of his employment, assumed the risk of said defect, if any, in the fastening of said hand hold, and you will find your verdict for the defendant." Aprellant objects to the charge because it submits the question of competency of the car inspector to the jury; it being the contention that the uncontroverted testimony proved that he was competent, and the court should have so informed the jury. It is true that the inspector swore that he had been inspecting cars for many years, and that no other accident had ever occurred from a defect in a car inspected by him; but the jury were not bound to accept his testimony as true, but had the right to weigh his testimony in the light of the character of inspections he swore he had given, and in the light of the fact that four or five hours after he said he had made the inspection a hand hold pulled off the car from the weight of an employee who was endeavoring to climb up by it. The inspector also swore that he made no particular inspection of the car in question on which the defective hand hold was found, and it appeared from his testimony that he had a helper, and together they inspected a freight train in 20 minutes. The inspector swore he did test the hand hold in question, and then said that he would not swear that he had pulled the hand hold of the particular car; and there was no evidence as to the efficiency of his assistant. It would have been error to have assumed the competency of the inspector and his assistant. No one except the inspector testified to any fact tending to show his competency.

The following charge was given by the court: "If you find for the plaintiff, and believe from the evidence that he was injured as alleged in his petition, you should allow him such sum as you believe from the evidence will compensate him for the injuries sustained, if any; and, in estimating his damages, you may take into consideration the mental and physical pain suffered, if any, consequent upon his injuries, if any; and if you believe from the evidence that his injuries, if any, are permanent, and will disable him to labor and earn money in the future, then you may allow him such sum, if paid now, as you believe from the evidence will be fair compensation for his diminished capacity, if any, to labor and earn money in the future." The third assignment of error attacks the charge, but is not a proposition in itself, nor followed by propositions. The reasons given in the assignment for the charge being erroneous are that it does not give the correct measure of damages, allows double damages, allows damages when none were proved, and that it does not allow the jury to consider ability to earn wages in other capacity than that of brakeman. Under the rules, it could be disregarded, because no ground on which the charge is erroneous is presented; the reasons given in an assignment being uniformly disregarded.

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*Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241. However, the assignment has been considered as though containing propositions, and we conclude that the charge is not open to the criticisms directed against it. In the charge the jury was given the rule that, in finding damages, compensation was the end to be attained; and then the instruction is given that, to arrive at such compensation, the jury might consider mental and physical pain, and permanent disability as affecting future capacity to earn money; the amount to be allowed being the present value of such damages. The charge gave the true measure of damages, did not allow double damages, and is broad enough in its terms to include ability to earn money in any capacity.

There was a direct and irreconcilable conflict between the testimony of the physicians who testified as to the character of the injuries inflicted upon appellee. Those for the appellant make out a case of pure deception and malingering upon the part of appellee, while those for appellee show the case of a man who has his spine injured in such a way as that it tends to produce paralysis, one of his legs partially paralyzed, and a considerable shrinkage or atrophy of its muscles, bladder partially paralyzed and in a chronic state of inflammation, and incontinency of the urine, with the opinion expressed that the injuries are progressive and permanent. The jury and the trial judge were face to face with the witnesses, are, no doubt, acquainted with them by reputation, if not personally and professionally, and it was their peculiar duty to weigh their testimony and pass upon their credibility. In such cases this court has no authority to interfere with the verdict of the jury, no matter what the conclusion as to the testimony might be. If appellee was injured as his testimony and that of his witnesses tends to show he was, the verdict cannot be held to be excessive.

The judgment is affirmed.

#### SOUTHERN INDIANA RY. CO. v. MOORE.

(*Appellate Court of Indiana, Division No. 2, May 1, 1902.*)

[63 N. E. Rep. 863.]

##### Assumption of Risks of Employment.\*

A servant assumes the risks incident to his employment, which, by the exercise of the diligence of an ordinarily prudent man under like circumstances, he would have discovered.

##### Duty to Furnish Safe Place to Work†—Degree of Care.

In an action for the death of a servant, an instruction that it is the

\*See note, 9 Am. & Eng. R. Cas., N. S., 347; *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and note at end of case. See also, generally, 5 Rap. & Mack's Dig., 126 et seq.

†See note, 12 Am. & Eng. R. Cas., N. S., 668; *Gaulden v. Kansas City S. Ry. Co.* (La.), 23 Am. & Eng. R. Cas., N. S., 909; *Norfolk*

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duty of the master not only to provide a safe place at which the servant shall work, but also to exercise diligence in the examination of the place; "as to enable him to know that it is safe, so far as human foresight can know," is erroneous; the master being required only to use the care of a reasonably prudent man.

Appeal from circuit court, Lawrence county; W. H. Martin, Judge.

Action by Mary Moore against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

F. M. Trissal, E. J. Brooks, and U. F. Brooks, for appellant.

East & East and McHenry Owen, for appellee.

COMSTOCK, C. J. Appellee brought this action against appellant, alleging the death of her son by the negligence of appellant. The complaint was in two paragraphs. They are substantially the same, and, in brief, alleged: That her son, Adolphus Moore, was on April 5, 1900, an infant of 19 years, in the employment of appellant in its stone quarry, which was operated by appellant for the purpose of getting rock for ballasting appellant's roadbed. Appellant, in getting out the stone, used dynamite to loosen the stone from the earth, which work was done under charge and control of Conner, superintendent, and Donovan, the boss, they having full charge of the work. That this dynamiting was done when the men were not at work. That the blasting was dangerous work, but that during the working hours small charges were used to clear out the holes, called "springing the holes," so that larger charges could be exploded in the holes. That the ledge where Moore worked was a steep bluff, 30 or 40 feet high, and he was required to perform his services at the bottom of the ledge. That said defendant had prepared several holes in the bluff for springing, and had warned Moore and others to move to a place of safety when the holes were sprung. Then said superintendent and boss directed Moore to return to work, which he did, and a short time thereafter several large stones that had been jarred from their position rolled down the bluff onto Moore, so injuring him that shortly after he died. That Moore could not see the condition of said stones, and that they had been jarred from their positions, and did not and could not know their unsafe condition. That the superintendent and boss were in a position to know the condition of the stones. That appellee was a widow, and dependent upon the deceased for support. The jury trying the cause

& W. Ry. Co. *v.* Cromer (Va.), 23 Am. & Eng. R. Cas., N. S., 720; Kent *v.* Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 332; 5 Rap. & Mack's Dig. 67 et seq.; note, 14 Am. & Eng. R. Cas., N. S., 768; foot-note, 16 Am. & Eng. R. Cas., N. S., 679; Doyle *v.* Toledo, S. & M. R. Co. (Mich.), 22 Am. & Eng. R. Cas., N. S., 294 et seq., and foot-note.

returned a verdict for appellee for \$1,750, and answers to interrogatories. Appellee remitted \$1,475 of the verdict, and judgment was rendered for \$275.

Appellant relies for a reversal of the judgment upon the fourth and fifth specifications of error; the fourth being the overruling of appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict; the fifth, the overruling of appellant's motion for a new trial.

The court, of its own motion, gave to the jury instruction No. 4. It is insisted by counsel for appellant that in this instruction the jury were told that the servant did not assume any risk as to the premises, "the unsafety of which he could have known by the exercise of ordinary diligence"; that it limits the obligation of the servant to guard only against danger of which he has absolute knowledge. It is the law that an employee must use his senses with the diligence of an ordinarily prudent person under like circumstances. The instruction relates to the duty of the servant, and while not as clear as might be desired, we incline to the opinion that its lack is supplied by other instructions which were given.

In instruction No. 5 given by the court of its own motion, the court said: "In the operation and management of a dangerous business, it is the duty of the master not only to provide a safe and suitable place at which servant shall work, and safe and suitable tools and machinery with which to work, but it is also the duty of the master to exercise care and diligence in the examination and inspection of such work, its places, tools, and machinery, as to enable him to know that it is safe, so far as human foresight can know." The instruction was lengthy, and we do not give it in its entirety. This was error. It is only the duty of the master to furnish a reasonably safe place for his employee; to use the care of a reasonably prudent person. He is not required to know that the working place "is safe, so far as human foresight can know." The giving of each of these instructions is made a reason for a new trial. The instruction is fatally defective. It could only be cured by being withdrawn. A correct instruction, while this instruction remained, would make contradiction, and would confuse the jury. If instructions are inconsistent, and calculated to mislead the jury, or leave them in doubt as to the law, it is cause for reversal. *Railroad Co. v. Noftger*, 148 Ind. 101, 47 N. E. 332. See, also, *State v. Sutton*, 99 Ind. 300; *Lower v. Franks*, 115 Ind. 334, 17 N. E. 630; *Wenning v. Teeple*, 144 Ind. 189, 41 N. E. 600. We do not lose sight of the rule that a judgment will not be reversed because of an erroneous instruction when it affirmatively appears that the verdict was right upon the evidence; but the rule is also recognized that, where there is a radically erroneous instruction, it must appear from the record, beyond doubt, that it did not prejudice the complaining party, or the

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judgment will be reversed. From the whole record, such facts do not appear. Elliott, App. Proc. 643, and cases cited.

We do not pass upon the action of the court in refusing to render judgment in favor of the appellant on the answers to the interrogatories. The ends of justice may be served with a new trial. Other questions discussed may not arise upon a second trial.

Judgment reversed, with instructions to sustain motion for a new trial.

## SOUTHERN PAC. CO. v. SCHOER.

(Circuit Court of Appeals, Eighth Circuit, March 24, 1902.)

[114 Fed. Rep. 466.]

**Master and Servant—Negligence—States May Regulate Liability for.**

The states have the right to regulate within reasonable limits the relations between employers and employees within their borders, and to fix by legislative enactments the liabilities of the former for the acts and negligence of the latter.

**Negligence of Superior Servants—Liability under Utah Statute.**

Sections 1342 and 1343 of the Revised Statutes of Utah make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

**Same—Acts Not Done While Exercising Superintendence.**

Those sections make the master liable for the negligence of superior servants committed in the discharge of their duties as employees, whether the negligence was committed while they were exercising their authority to command or superintend others or not.

**Evidence—Writings.**

A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant.

**Act of God Excusing Performance of Duty.**

Nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty, and such as could not have been foreseen by the exercise of reasonable prudence, or overcome by the exercise of reasonable care and diligence, constitutes an act of God which will excuse the discharge of a duty.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

Thomas T. Fauntleroy (Cornelius H. Fauntleroy, on the brief), for plaintiff in error.

W. L. Maginnis (A. J. Weber, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Between 1 and 2 o'clock on the dark and foggy morning of December 20, 1899, the second

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section of a passenger train of the Southern Pacific Company, upon which H. A. Schoer was a fireman, ran into the rear of the first section near the yard limits of the company at Terrace, in the state of Utah, threw this fireman against the boiler of the engine, and fastened him there under a mass of coal which was thrown from the tender by the shock of the collision, until he was so scalded by steam that escaped on account of the breaking of the water gauge that he died. C. Schoer, the administrator of his estate, brought an action against this company for alleged negligence causing his death, and obtained a verdict and judgment which this writ of error has been sued out to review.

The main complaint of the company is that the court below charged the jury that under the statutes of the state of Utah the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision was the negligence of the company. The sections of the statute of Utah which induced this instruction are:

"1342. All persons engaged in the service of any person, firm or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice-principals of such employer and are not fellow servants.

"1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

Rev. St. Utah, 1898.

It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was intrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence which caused the injury was committed while this engineer was discharging the primary duty of a servant, and was not engaged in performing one of



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the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman or to direct him in the performance of any of his duties.

The argument in support of the first contention is: Under the general law the master was not liable for the negligence of this engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal acts of negligence. The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms "vice principal" and "fellow servant," and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute the liability of a master for the negligence of his servant is a question of general law, upon which the decisions of the state courts are not controlling upon the federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employees, but, it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow servant, and when the master is liable or is exempt from liability for the injury caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But, if he is discharging one of the primary duties of the servants his employer is exempt from liability. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Conroy*, 175 U. S. 323, 327, 20 Sup. Ct. 85, 44 L. Ed. 181; *City of Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. C. A. 344; *Coal Co. v. Johnson*, 56 Fed. 810, 6 C. C. A. 148. The construction and maintenance of a railroad is the business of the master. Its operation is a business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the gen-

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eral law. *Railroad Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 58, 25 L. R. A. 833; *Railroad Co. v. Mase's Adm'x*, 63 Fed. 114, 115, 11 C. C. A. 63; *Brady v. Railway Co.* (C. C. A.) 114 Fed. 100. These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error.

But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the master, for whose acts and negligence the master is responsible. *City of Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. C. A. 344. The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been who were vice principals. Under the general law in the federal courts and in many of the state courts that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions the legislature of the state of Utah enacted the statute which has been quoted. It declares that employees who are intrusted by their employers with the authority to superintend other employees of the same master, or with the authority to direct any other employee in the discharge of any of his duties, are vice principals of such employer. This declaration is a plain departure from the general rule of law which we have been considering; an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it. It is too positive to be disregarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for the plaintiff in error that this clear and authoritative declaration of the relation of superior servants of their masters in the state of Utah did not modify or extend the liability of the master beyond that fixed by the general law would be to defeat the manifest object of the legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce; for the unquestioned rule is that the states have the right to regulate within

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reasonable limits the relations between employers and employees within their borders, and to fix by legislative enactments the liabilities of the former for the acts and the negligence of the latter. *Railroad Co. v. Baugh*, 149 U. S. 368, 378, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Hogan*, 63 Fed. 102, 105, 11 C. C. A. 51. Our conclusion is that sections 1342 and 1343 of the Revised Statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that when he committed the acts of negligence charged he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty of negligence while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position *Shaffers v. Navigation Co.*, 10 Q. B. Div. 356, 357; *Fitzgerald v. Railroad Co.*, 156 Mass. 293, 31 N. E. 7; *Brittain v. Railway Co.*, 168 Mass. 10, 46 N. E. 111, and *Dantzler v. Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361, have been cited, and these cases adopt and enforce the rule from which counsel contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into the statutes these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 & 44 Vict. c. 42) § 1, subsec. 2, which the opinion in the *Shaffers Case* was construing, charges the master with liability for injuries caused "by reason of the negligence of a person in the service of the defendant who had superintendence intrusted to him whilst in the exercise of such superintendence." The Alabama and Massachusetts statutes under which the cases from those states arose contains like limitation. *Dantzler v. Iron Co.*, 101 Ala. 318, 14 South. 10, 22 L. R. A. 361, St. Mass. 1887, c. 270, § 1, subsec. 2. The statute of Utah under which this case arose contains no such limitation, and no indication that the legislature intended to adopt any such restriction. On the other hand, it plainly declares that all persons intrusted by the master with the authority of superintendence of other persons in his employ are vice principals, and are not fellow servants. This is a declaration that they are vice principals not only when they are engaged in per-

forming acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel and found in the laws of England, Alabama, and Massachusetts would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms, and of the intention of the legislature which its words clearly disclose. It would be judicial legislation, which it is not the province of the courts to enact.

In their brief in reply counsel for the company suggest a third reason why, in their opinion, the Southern Pacific Company was not liable for the negligence of this engineer. It is that this company pleaded in its answer that the night was so dark and foggy that the proximity of the first section of the train could not be discovered by employees on the engine of the second section in time to stop the latter. But, if the night was so dark and foggy that this engineer could not discover the first section in time to stop his engine, reasonable care and prudence on his part demanded that he should either send forward his fireman as he approached the yard limits at Terrace to ascertain its location, or should run his engine so slowly and carefully that he could stop at any moment, and could surely avoid a collision. The complaint of the plaintiff did not stop him from a recovery for the negligence of this engineer which the evidence at the trial established. The result is that there was no error in the charge of the court that the engineer upon the second section of this train was the representative of the company, and that, if his negligence in operating his engine caused the injury, the company was liable to the plaintiff for the damages that resulted. *Dryburg v. Milling Co.*, 18 Utah, 410, 412, 55 Pac. 367; *Railway Co. v. Calvert* (Tex. Civ. App.) 32 S. W. 246, 247; *Railway Co. v. McDonald* (Tex. Civ. App.) 31 S. W. 72; *Railway Co. v. Wrenn* (Tex. Civ. App.) 50 S. W. 210.

It is assigned as error that the train sheet of the railroad company, which disclosed the times when the two sections of the train which collided left the various stations of Toana, Montello, Tacoma, Gartney, and Lucin before they arrived at Terrace, and which also disclosed the time of the collision at Terrace, was admitted in evidence over the objection of counsel for the company. An examination of the record, however, discloses the fact that the only objection to this train sheet was leveled at the entries thereon of the time when the two sections arrived at Terrace. No objection whatever was made to the introduction of the train sheet for the purpose of showing the movements of the sections of the train before they reached Terrace, or to the train sheet as a whole; and the train sheet disclosed the times when the sections left all the stations mentioned above before they arrived at Terrace.

It was tacitly conceded that for the purpose of showing everything which appeared upon this sheet except the time of the arrival of these sections at Terrace it was admissible evidence. Conceding, without deciding, that the entries upon the train sheet of the times of the arrival of the two sections at Terrace and of the time of the collision were not competent testimony of those facts, the train sheet was still admissible, and the objection of counsel was properly overruled. If the train sheet contained any evidence competent and material to the issue, it could not be lawfully rejected; and it was tacitly conceded that the entries of the times when the sections of the train left the preceding stations were competent evidence of those facts, for no objection was made to these entries, and no objection was interposed to the train sheet as a whole. Since a portion of the train sheet was competent evidence, the objection to its induction could not be sustained, and the proper remedy of counsel for the company was to request the court to instruct the jury at the time of its introduction or at the close of the case that it must not be considered as evidence of the time of the collision, or of the times of the arrival of the two sections at Terrace. No such request was made and there was no error in the ruling of the court upon this subject.

The next objection to the trial of this case is that the court refused to instruct the jury that, if the death of the deceased was proximately caused by a sudden and unusual fog, and without fault or negligence of the defendant, their verdict must be for the company. The court clearly and emphatically instructed the jury that there could be no recovery in this case, and that their verdict must be for the defendant, unless they were satisfied by a reasonable preponderance of the evidence that the death of the fireman was caused by its negligence. There was evidence at the trial that the night was dark and foggy, that it was difficult to distinguish objects at any considerable distance, and that the headlight of the second section of the train was not perceived until it was very near to the employees upon the first section. But there was nothing in all this, or in any of the evidence in the case, to warrant an instruction to the jury that they might find that this collision was caused by an act of God; and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of these trains. The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, "*Lex neminem cogit ad impossibilia.*" If, by the use of reasonable care, prudence, and diligence under the circumstances of a particular case, it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than such a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence,

care, and diligence constitutes an act of God which will excuse the discharge of the duty. The record discloses no such circumstances. The night was dark and foggy. This condition of the atmosphere imposed upon the operators greater watchfulness and care to prevent collisions and the duty of driving their engines with less speed and more caution. But there was nothing in the foggy air or in the darkness of the night which would have prevented them from safely operating their trains if they had exercised a care, watchfulness, and diligence proportionate to the situation and the circumstances in which they were placed. In other words, it was not impossible to operate these trains safely by the use of reasonable care; and in this state of the case there was no error in the refusal of the court to submit to the jury the question whether or not the death of the deceased was the act of God. It discharged its full duty when it told the jury that the defendant was not liable for his death unless it appeared by a fair preponderance of the testimony that the defendant was guilty of negligence which caused it.

Another complaint is that the court refused to instruct the jury that, if there was ample time for the flagman to go back and warn the second section of the train after the first section stopped, and no flagman went back a sufficient distance to give that warning, and if the failure or neglect to do so was the proximate cause of the death of the deceased, the verdict of the jury must be for the defendant. But the court instructed the jury in its general charge that there had been some evidence introduced tending to show negligence on the part of the employees of the first section of the train, and that, if there was any such negligence, the defendant was not in any way liable for it, because the employees of that section did not represent the company, but were fellow servants of the deceased. It further instructed them that the risk flowing from the negligence of these servants was a risk assumed by the fireman. This instruction, in view of the evidence in the case, sufficiently presented to the jury the principal of law stated in the request which was refused. That principal was that, if the proximate cause of the death was the negligence of the brakeman on the first section of the train, the plaintiff could not recover. A charge that the defendant was not liable if the proximate cause of the death was the negligence of any of the employees on the first section of the train clearly announced this rule, because the brakeman was one of those employees, and the whole is greater than any of its parts. Where a rule or principal of law is clearly declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of counsel. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C. A.) 114 Fed. 133; *Telegraph Co. v. Morris*, 105 Fed. 49, 53, 44 C. C. A. 350, 353; *Trumbull v. Erickson*, 97

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Fed. 891, 38 C. C. A. 536; Railroad Co. v. Jarvi, 53 Fed. 65, 3 C. C. A. 433.

One of the charges of negligence was the failure to use reasonable care to keep the coal gate of the engine in proper repair, and it is assigned as error that the court admitted the testimony of a witness that this gate was defective and weak 30 days before the accident. The only ground for this specification is that the time named by the witness was too remote from the date of the accident. But it is competent to prove defects in tools and machinery for a reasonable time before the accident which those defects are charged with inducing, and it cannot be said that 30 days is an unreasonable time within which to permit such testimony to range. There is at least a reasonable probability, in the absence of other evidence, that a defect existing 30 days before an accident was not remedied before the casualty occurred. There was no error in the admission of this evidence.

Finally, it is contended that the court erred because it permitted one witness to testify that a rule of the company which required trains to keep 10 minutes apart did not apply to any train in particular, and permitted another to state that the conductor upon the first section of this train had "full charge of the running of the train over all the employees on the train." The only grounds for these objections are that the rules are the best evidence of their contents, and that the testimony of the witness as to the power of the conductor was a conclusion of law. Conceding that the written rule was the best evidence of its terms, it was competent for the witness to testify whether or not this rule applied to all the trains of the company or only to a portion thereof, and conceding that the statement of the witness who testified to the authority of the conductor was a conclusion of law, the admission of that testimony was not prejudicial, because the legal presumption is, in the absence of evidence, that the conductor has exactly the power which this witness testified was vested in him (*Railroad Co. v. Ross*, 112 U. S. 377, 390, 5 Sup. Ct. 184, 28 L. Ed. 787; *Railroad Co. v. Baugh*, 149 U. S. 368, 381, 13 Sup. Ct. 914, 37 L. Ed. 772), and error without prejudice is no ground for reversal.

There was, therefore, no error in these rulings, and the judgment below must be affirmed. It is so ordered.

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REED v. MISSOURI, K. & T. RY. CO.

(Court of Appeals at Kansas City, Mo., May 5, 1902.)

[68 S. W. Rep. 364.]

**Injury to Employee Waiting to Be Assigned Work.**

Where plaintiff, a sectionman on a railroad, was directed by his superiors to assist a wrecking crew in clearing the track, and while so engaged was injured through the negligence of the foreman, the

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fact that at the time of the accident plaintiff had completed a particular part of the work assigned to him, and went, without orders, to the place where he was injured, to see if there was anything for him to do there, and at the time of the injury was not at work, did not deprive him of the right to recover, on the ground that he was merely a bystander.

**Injury to Section Hand Removing Wreck—Proximate Cause—Negligence in Fastening Derrick Chain.**

Where plaintiff, a sectionman on a railroad, while assisting in removing a wreck from the track by direction of his superiors, was injured by a flying fragment of a car,—the accident resulting from the derrick chain being fastened in an improper and negligent manner and place,—such negligent fastening was the proximate cause of the injury, and plaintiff should recover.

**Same—Negligence in Fastening Derrick Chain.**

Where a railway employee, assisting in moving wrecked cars, received an injury resulting from the negligent manner and place in which the derrick chain was fastened to a car, the fact that the business of clearing away wrecks is inherently dangerous, and that the usual method was pursued, would not prevent recovery for an injury resulting from the negligent manner of performing the details of the work.

**Same—Same—Vice Principals.**

Where a railway employee was injured while assisting in clearing away a wreck, the injury resulting from the negligent manner in which a derrick chain was fastened to a car, and the train master and road master were present, superintending the work, they, as vice principals, should be deemed responsible for such negligence, and not the men working under their orders, who were fellow servants of the injured employee.

**Same—Same—Trying to Avoid Danger.**

Where a railway employee was injured by a flying fragment from a wrecked car which he was assisting to remove from the track, the injury resulting from the negligent manner in which the derrick chain was fastened to the car, the fact that such employee would not have been injured had he stood still, but that in running to escape danger he reached the point where the fragment struck him, did not release the company from liability for its negligence on the ground that the injury resulted from a fortuitous accident.

Appeal from circuit court, Henry county.

Action by Van Reed against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George P. B. Jackson, for appellant.

Jno. H. Lucas, C. C. Dickinson, and James Parks & Son, for respondent.

**BROADDUS, J.** The plaintiff's action is for damages for an injury received while assisting in clearing defendant's railroad track of a wreck. He was a section foreman in defendant's employ, and was called upon by the agent of defendant, whose duty it was to superintend the clearing of its tracks, to assist in the work. The wreck had occurred near the city of Clinton, Mo. The particular work in which the "wrecking crew," as it was called, was engaged when the plaintiff received the injury, was in the removal of a certain freight car which was lying on the track, partly on its side. The method adopted for removing the wrecked car was to pass



an iron chain around some part of it; said chain being attached by a hook to a large rope, which latter passed through a pulley fastened to a derrick stationed on the wrecking car, and then attached to the locomotive engine which furnished the power. By this contrivance, when the locomotive moved from the wreck the strain was thrown upon the rope in such a way that it had the effect of tilting the car from the track. It is claimed by the plaintiff that in the instance when he was hurt the defendant's agents negligently hitched said chain to an insecure part of said car, in such manner that, when the strain came, said part broke loose from the main body, and a fragment thereof was thrown into the air, and fell upon him, causing his injuries. It is further claimed that the defendant's agents in charge failed to give the usual and necessary signal when the locomotive was started, and that because of such failure the employees were not given time to escape, or get beyond the reach of flying fragments likely to be thrown into the air by the force and violence exerted by said locomotive in throwing said wreck from the track. It is admitted upon both sides of this controversy that the business was somewhat dangerous, although the evidence went to show that accidents rarely ever happened in such work; some of the witnesses testifying that, while the employment was dangerous, yet this was the first time they had known of any one being hurt while so employed. The plaintiff was at the wreck, by order of his superior, to assist the superintendent of the wrecking train. A short time prior to his injury he had been engaged, with others of his gang, in manipulating the rope attached to the engine. This duty consisted in keeping the slack out of the way of the locomotive in each instance as it approached the wreck. Just prior to the accident, according to plaintiff's own evidence,—for the reason, he says, that he was not needed at the rope,—he went to the wreck, to see if there was anything for him to do there, and while standing about 15 feet away the engine was started without warning; that he thereupon retreated with the other employees, and when about 30 feet from the wreck, near a water tank, he was struck by a fragment which flew out when the attachment broke loose from the wreck. Notwithstanding the alleged failure of the defendant to give the necessary signal for starting, it seems that plaintiff was aware that the locomotive was about to move, and that he sought to avoid danger by retreat.

The defendant's counsel contends that the evidence does not show that the chain was fastened to an insecure part of the wreck, and on the trial introduced witnesses to prove that the car was of a different kind and make from that specified by plaintiff's witnesses, and that it did not have the upright on it to which it was claimed the chain was hitched. We have examined the evidence on both sides as to his fact, and find that the testimony of each was positive in its character, which

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leaves it a question for the jury alone, and not for the court, to determine. Every fact in the case which was not admitted was strenuously maintained or controverted by substantial evidence, which left the case wholly one for the jury, under proper instructions from the court.

The defendant makes the specific objection to plaintiff's right of recovery on the ground that he had left his work (manipulating the rope) without an order from his superior, and that, not being directed to assist at the place where the chain was being attached to the wreck, he was only a bystander, and not an employee. We think the objection is not well founded, for he was on the ground, upon the order of his superior, for the purpose of assisting in the work; and the fact that he was doing nothing at the time could make no difference, since he was present for service, by order of competent authority.

But the main contention of the defendant is that, under all the evidence, plaintiff is not entitled to recover, for the reason, amongst others, that the alleged negligence of the defendant was not the proximate cause of the injury. To support this contention, we are referred to the case of *Sira v. Railroad Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386, and a great many other cases. That was a case where a young and inexperienced woman, 16 years of age, while a passenger on defendant's train, was put off by the conductor at a station before she reached her destination. A male passenger, named Dusenberry, who was on the same train, got off at the same time the young woman did, decoyed her into a saloon, and committed a criminal assault upon her person. The court held that the injuries suffered by the plaintiff at the hands of Dusenberry, and the resulting damages, were not the direct and immediate consequence of the act of the conductor, requiring her to leave the train at the wrong station. In *Hicks v. Railway Co.*, 46 Mo. App. 304, it was held that liability does not follow every negligent act; the negligent act must be the proximate cause of the injury, which must also be the natural and probable result of the act. These two cases fairly illustrate the rule that the defendant seeks to have applied to this, but they do not apply. The plaintiff here was struck by a flying fragment from the wreck,—the result of defendant's negligence in making a hitch with the chain, that would not bear the strain required to accomplish the purpose intended. The act of negligence was the direct and proximate cause of the injury. There was no intervening agency. The question whether the act was negligent was submitted to the jury by proper instructions. The jury was told that, if it found "that the manner and place of fastening said chain for the purpose of removing said car was not a safe one (that is, such a place as an ordinarily prudent person would have attached said chain for said purpose under like circumstances), then you will find for the plaintiff."

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If the chain was attached to a part of the car which was evidently too weak to resist the strain that would necessarily have to be put upon it in order to throw the car from the track, the defendant was guilty of negligence. The jury found such to be the case, and, as there was ample testimony to support such finding, that question must be considered as settled, so far as this court is concerned.

It is further insisted that "the work of moving wrecked cars is necessarily dangerous, and the doing of such work in the usual way, although liable to cause injury to those engaged in or near it, was proper and justifiable," for which reason negligence cannot be predicated on the manner or place in which the hitch was made. It is held that "whatever is, according to the general, usual, and ordinary course, adopted by those in the same business, is reasonably safe, within the meaning of the law. The test is the general use." *Mason v. Mining Co.*, 82 Mo. App., loc. cit. 370; *O'Mellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Kane v. Falk Co.* (decided by this court, but not yet officially reported). The reason for the rule is the presumption that experience has resulted in causing persons engaged in such undertakings to adopt the safest and best method of doing the thing, but the law never presumes that a general use is founded upon negligence. And we have no hesitation in holding that, if the means in general use for removing railroad wrecks was characterized by negligence and a reckless disregard of the safety of the persons engaged in the work, the presumption would be overturned. The evidence in this case shows that the usual method of removing wrecks was adopted, but it further shows that in the execution of the details the defendant was guilty of negligence. The law therefore requires not only that the usual method should be adopted, but that the details should be conducted with care. The plaintiff, under the rule announced in *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, assumed all the risks incident to the business; but it is nowhere held that, notwithstanding the negligence of the master, he is not liable to the servant, because of the fact that the business in which he is engaged is of itself dangerous. The master is excused only for liability for risks incurred by the nature of the business, and not for his negligence. Such a contention involves the absurdity of asserting that where there is danger there can be no liability for negligence upon the part of the master. In *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763, the plaintiff was engaged in dangerous work, yet the master was held to the exercise of reasonable care to secure his safety while so engaged. And such is the holding of all the authorities.

It is also contended that due notice was given before the pull made on the wrecked car; that, against the positive evidence of defendant's witnesses that such notice was given, the negative evidence of plaintiff's witnesses that they did

not hear it given did not entitle plaintiff to go to the jury with his case; and that the presumption of law is that the defendant did its duty in that respect. The weakness of this contention is that there was positive evidence that the signal was not given for the employees to get out of the way of danger. The defendant makes the point in this court for the first time that the injury plaintiff complained of was received at the hands of his fellow workmen. However, the evidence stands uncontradicted that the work of removing the wreck was under the control and direction of the wrecking boss, Scow, train master, Davis, and road master Jameson; and, as such, they are to be held as vice principals, for, so far as the record goes, it shows that these persons were present, superintending the work, and that the men engaged were working under their orders.

At the close of plaintiff's case the defendant asked the court, upon the pleadings and evidence, to instruct the jury to find for the defendant, which the court refused to do; and the instruction was asked again at the conclusion of all the evidence on both sides, and again refused by the court. It is claimed that the evidence showed that the plaintiff was guilty of contributory negligence; that, according to plaintiff's own evidence, he had gone to the place without orders from his superior, and, being of the opinion that the hitch was being made in an unsafe manner, he remained standing in an exposed place without paying any attention, and without noticing when the preparations would be completed to make the pull on the car. As has been already stated, he was not negligent in being at the particular place at the time mentioned, and he had the right to rely upon the giving of the usual signal in such instances. The question of whether plaintiff was guilty of contributory negligence was fairly submitted to the jury by an instruction on behalf of the defendant.

It is also further contended that plaintiff's injury was a mere "casualty, a fortuitous accident, and in no wise the natural or supposable sequence either of the making of the hitch, or of the omission to give the warning," and, "if the plaintiff had not moved from where he was standing while the hitch was being made, he would not have been injured," and, "if he had not run in the particular direction to the particular place that he did, he would not have been injured," and, "if the water tank had not been there, he would not have been injured." This seems to be like reasoning in a circle. The contention amounts to this: That the result of every cause must be certain, or that, if a particular result may or may not happen, it is not to be attributed to any certain cause, notwithstanding it was the result of such cause.

We have examined the instructions, and find no error in any of those given, and that those refused were properly refused. The case was well tried, and is therefore affirmed. All concur.

**ZAHN v. MILWAUKEE & S. RY. CO.***(Supreme Court of Wisconsin, April 1, 1902.)*

[89 N. W. Rep. 889.]

**Injury to Brakeman—Coupling Cars—Assumption of Risk.\***

Plaintiff, a railway brakeman, was injured while coupling cars. The crew consisted of plaintiff, two other brakemen, and the fireman, the engineer being absent. One of the other brakemen signaled to the engineer to back to make a coupling, and two cars were coupled, one by such brakeman, and the other by plaintiff, who then ran to a third car to adjust the coupling, and the engine continued backing, and crushed plaintiff's fingers. It was the custom on defendant's road for the engine to continue backing in such case until signaled to stop, and plaintiff had been in defendant's employ for seven or eight years, and was familiar with its manner of operating trains. The fireman testified that he did not know that plaintiff was making a coupling: *held*, that plaintiff assumed the risk.

**Same—Evidence of Negligence.**

There was no evidence of negligence by the fireman.

Appeal from circuit court, Waukesha county; James J. Dick, Judge.

Action by Albert Zahn against the Milwaukee & Superior Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Action under section 1816, Rev. St. 1898, to recover damages for personal injuries claimed to have been sustained by plaintiff while in the discharge of his duties as brakeman for defendant. The accident occurred a little after noon on November 3, 1899. The plaintiff was engaged in coupling cars on a side track in the yard at North Lake station. The negligence alleged is that the fireman, who was in charge of the engine while the engineer was at dinner, backed the engine, with several cars attached, without any signal from plaintiff, and without any notice or signal to plaintiff, suddenly against a car that plaintiff was preparing with coupling links, and caught and crushed his hand. A motion for a nonsuit at the close of plaintiff's testimony was denied, as was also a motion to direct a verdict for defendant at the close of the testimony. Both rulings were duly excepted to. A special verdict was submitted, in which the jury found substantially as follows: (1) that plaintiff was injured while in defendant's employment; (2) that he was injured by having his right hand caught between the bumpers of the cars; (3) that the fireman was in charge of the engine; (4) that the engine and cars attached to it were pushed back against the car the plaintiff was preparing for coupling without any signal from plaintiff; (5) that the engine and cars were so pushed

\*Hannigan v. Lehigh & H. R. Ry. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 605, and note at end of case. See Bussey v. Charleston & W. C. Ry. Co. (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and note at end of case. See also, generally 5 Rap. & Mack's Dig. 126 et seq.

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back without any notice to plaintiff; (6) that they were pushed back without any knowledge on the part of plaintiff; (7) that plaintiff was engaged in the capacity of brakeman; (8) that plaintiff was not then employed in the capacity of conductor; (9) that the plaintiff had no knowledge of the absence of the engineer; (10) that plaintiff did not notify the fireman he was going between the cars; (11) that plaintiff did not see the approaching car in time to have removed his hand from between the two drawbars; (11½) that plaintiff did not hear the approaching engine and cars in time to have removed his hand; (12) that plaintiff was not injured in consequence of a movement of the cars in the usual and ordinary manner; (13) that the condition of the coupling apparatus was not the sole and proximate cause of plaintiff's injury; (14) that plaintiff was injured by the negligence of the fireman in charge of the engine; (14½) that a person of ordinary care, under the circumstances, should not have known that the engineer was absent from the engine; (15) that plaintiff was not guilty of any want of ordinary care which contributed directly to produce the injury; (16) that the defendant's employee was guilty of negligence which was the natural probable cause of the accident, and which accident ought to have been foreseen by a person of ordinary care and prudence; (17) damages, \$2,500. Defendant submitted a motion "for an order setting aside the answer to questions numbered, respectively, 12, 14, 14½, 15, and 16, in the special verdict rendered by the jury herein, for the reason that the same are unsupported by the evidence, and are against the uncontradicted evidence, and changing and perfecting the said special verdict in accordance with the uncontradicted evidence by answering question number twelve 'Yes,' question number fourteen 'No,' question number fourteen and one-half 'Yes,' question number fifteen 'Yes,' and question number sixteen 'No,' and granting judgment in favor of the defendant and against the plaintiff on the said special verdict as so changed and perfected, and upon the uncontradicted evidence." This motion was denied, and plaintiff's motion for judgment was granted. Defendant's appeal is from the judgment.

Spooner & Rosecrantz, for appellant.

Ryan, Merton & Newbury, for respondent.

BARDEEN, J. (after stating the facts).

(Question of appellate jurisdiction omitted.)

The points made by defendant are that the undisputed evidence shows that the engine was being operated in the usual and ordinary manner, and that the plaintiff was guilty of contributory negligence as a matter of law. The negligence upon which plaintiff's claim of recovery is based is that the engine and cars attached were pushed back against the car which plaintiff was preparing for coupling without a signal from or warning to the plaintiff. The evidence shows that

at the time of the injury the engine was in charge of plaintiff's brother, who was the fireman. The engineer had gone to his dinner, and the fireman was operating the engine. The train crew then consisted of the fireman, the plaintiff, and two other brakemen. There were several cars on the side track near the east end, which were not coupled together. The evidence is somewhat vague as to their exact location. The engine was backed in on the switch at the east end. The brakeman, Sykes, gave a signal to back up to make a coupling, and two cars were coupled, Sykes making one and the plaintiff the other. There was yet one car to be attached, about two car lengths distant. Plaintiff ran to the stationary car to adjust a link for the coupling. While so engaged, the engine, with the cars attached, continued backing west, and plaintiff's fingers were caught between the bumpers and crushed. The undisputed evidence shows that it was the custom on defendant's road that when a signal is given to the person operating the engine to move backward to make a coupling to continue backing until a signal to stop is given. The brakeman, Sykes, gave a signal to move backward, and two couplings were made. The engine continued moving slowly backward, without any signal to stop until after plaintiff was injured. This was in conformity to the usual custom of the road. The plaintiff had been in the employ of defendant seven or eight years, and had had charge of a train for a year or two before the accident. He was familiar with the manner of operating its trains, and must be presumed to have known of the custom mentioned. Moreover, it is to be noted that after the engine had been cut off from the cars on the main line the plaintiff had not been in touch with the acting engineer in any way whatever. The signal for the movement of the engine had been given by the brakeman, Sykes, and the couplings made were in obedience to his directions. The fireman testified that he did not know his brother was making a coupling. In view of this fact, it is difficult to see any basis for the plaintiff's recovery. The engine was being handled and moved strictly in accordance with the established custom of the road. The plaintiff certainly knew of such custom, and, knowing it, assumed the usual and ordinary risk incident thereto. It is also difficult to see any ground for saying the acting engineer was negligent. If he did not know the plaintiff was making a coupling, he was not bound to give him a warning or to make a signal as the cars were moving. No ground is apparent for saying that he ought to have known the plaintiff was between the cars. There is no room for conflicting inferences from the facts disclosed. They all point one way. The jury, by its twelfth finding, say that plaintiff was not injured in consequence of a movement of the cars in the usual and ordinary way. The only testimony on the subject given by plaintiff's brother and the superintendent of the road was directly contrary to this find-

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ing. By the fourteenth finding they say plaintiff was injured by the negligence of the fireman in charge of the engine. Assuming the engine was being run in the usual and ordinary manner, we look in vain for anything in the record to support this conclusion. Without some showing upon which the finding of negligence can rest, there is no foundation for the verdict, and the other findings become immaterial. We may say, in passing, that the finding against plaintiff's contributory negligence has very little in the record to warrant it. The court should have granted defendant's motion to direct a verdict. Not having done so, it was his duty to have corrected the answers of the jury in the special verdict, and to have rendered judgment for defendant. *Menominee River S. & D. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Conroy v. Railroad Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. 935; *Stafford v. Railroad Co.*, 110 Wis. 331, 85 N. W. 1036.

The judgment is reversed, and the cause is remanded, with directions to the circuit court to correct the verdict by changing the answer to the twelfth question from "No" to "Yes," and the answer to the fourteenth question from "Yes" to "No," and the answer to the sixteenth question from "Yes" to "No," to conform to the facts, and to render a judgment on the verdict as so corrected in favor of defendant for costs.

**STEBBINS v. CROOKED CREEK R. & COAL CO.**

(*Supreme Court of Iowa, May 13, 1902.*)

[90 N. W. Rep. 355.]

**Negligence of Fellow Servants\*—Liability of Master—Operation of Railroad.**

Under Code, § 2071, providing that railway companies shall be liable for all damages sustained by employees in consequence of the neglect of other employees when such wrongs are connected with the operation of any railway about which they are employed, an employee, who is injured by the negligent act of a co-employee while transferring rails from one car to another by use of a locomotive moving along the track and drawing the rails by means of an attached rope, may recover of the railway company for his injuries.

Appeal from district court, Hamilton county; J. R. Whitaker, Judge.

Action to recover for personal injuries received while in the employment of the defendant company, engaged in transferring railroad rails from one car to another. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

J. F. Duncombe and J. L. Kamrar, for appellant.

A. N. Boeye, for appellee.

\*See, generally, article "Fellow Servants," 12 Am. & Eng. Enc. Law 893. Also, see notes, 20 Am. & Eng. R. Cas., N. S., 296; 9 Am. & Eng. R. Cas., N. S., 9.



McCLAIN, J. Plaintiff was a fireman on an engine operated on defendant's road, but at the time of receiving the injury complained of he was engaged, under the direction of one Wilson, who was in control of the work, in transferring rails from a car standing on the side track to another car standing on the main track of the road. Two skids, consisting of short rails, had been laid between the two cars, and another rail had been set up at the further side of the car to which the rails were being transferred, and to this rail a pulley was attached. A rope connected with the engine, which stood on the main track near the car to which the rails were being transferred, but disconnected from such car, passed through this pulley, and was used in connection with the motion of the engine in drawing the rails over from the one car to the other. The method of operation was to put several rails on the skids, and attach a rope to the middle of them by means of a short chain and hook, and then, by moving the engine with which the rope was connected away from the car to which the rails were being transferred, to draw the rails on the skids across from the one car to the other. Plaintiff's business in this connection was to attach the rope to the middle of the rails and then to stand at one end of them, and, after the engineer was signaled to move the engine, to keep the rails straight on the skids while they were being drawn over. The evidence would support the finding by the jury that Wilson was superintending the operation; that the bunch of rails which was being transferred when the accident happened from which plaintiff received his injury struck on the skid at the end where plaintiff was standing; and while plaintiff was trying to pull the rails straight, so they would move over together on the skid, Wilson pushed them with his foot, and, instead of the rails moving on the skid, the skid itself slipped off the car, letting the ends of the rails down, so that they struck plaintiff and broke his leg; that the act of Wilson was negligent and brought about the injury to plaintiff; and that plaintiff was not negligent. It seems clear that in pushing the rails Wilson was not acting as vice principal, but as co-employee of plaintiff; for, as to the very thing which was being done, Wilson and plaintiff were acting in the same capacity. Each was assisting in the movement of the rails. The question we have before us is whether, assuming that the injury resulted from the negligent act of Wilson, and that Wilson was a co-employee of plaintiff, the latter can recover against defendant for injuries resulting from the negligence of such co-employee. Both of these men were in the general employment of the defendant; and if the business in which they were at the time immediately engaged was connected with the use and operation of defendant's railway, then plaintiff may recover from defendant for the injury resulting from the negligence of his co-employee Wilson, under the provisions of Code, § 2071, in which it is said that "every

corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, or in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." The mere fact that an employee is engaged in loading or unloading cars standing on the railway track does not bring him within the scope of the statute. *Schroeder v. Railroad Co.*, 41 Iowa, 344; *Smith v. Railroad Co.*, 59 Iowa, 73, 12 N. W. 763, 6 Am. & Eng. R. Cas., N. S., 78; *Luce v. Railway Co.*, 61 Iowa, 75, 24 N. W. 600. But here the loading was being accomplished by means of the use of a locomotive engine moving on the railway track, and the question is whether the use of the engine in drawing the rails from one car to another brings the case within the provision of the statute. It is argued by counsel for appellant that, inasmuch as this loading of the rails had no connection with the operation of any train, and might have been accomplished by means of power furnished by a stationary engine, or from any other source, as well as by the use of a locomotive engine on the track, the act was not so connected with the operation of a railroad as to be within the statute. But the statute is not limited in its application to those employees who are immediately connected with the operation of trains. *Pyne v. Railroad Co.*, 54 Iowa, 223, 6 N. W. 281, 37 Am. Rep. 198; *Larson v. Railway Co.*, 91 Iowa, 81, 58 N. W. 1076; *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. Rep. 129, 34 L. Ed. 747; *Akeson v. Railway Co. (Iowa)* 75 N. W. 676. The plaintiff in this case was engaged in transferring rails from one car to another by means of the detached locomotive engine moving on the main track. The engine was furnishing the motive power to draw the rails across from one car to the other, and we think this was a part of the hazardous business of operating a railroad. The danger was not necessarily the same as it would have been had the power used been a stationary engine or a horse. The operation involved the use of heavy machinery and the great power of a locomotive engine. A case quite analogous is that of *Nichols v. Railway Co.*, 60 Minn. 319, 62 N. W. 386, in which it was held that an employee injured by reason of the negligence of another employee in connection with the straightening out and stretching, by means of a locomotive engine, of a wire cable, to be subsequently used in the pulling of a plow on flat cars in the repair of the road, was within the contemplation of a statute of that state, similar in its provisions to the section of our Code above referred to. While, as indicated in *Akeson v. Railway Co.*, *supra*, the language of the Minnesota statute is broader in its terms than that of the

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Code section which we are construing, yet the courts of that state have limited the meaning of the language of their statute so that it includes only cases involving the hazardous business of railroading, and the decision is, we think, directly in point. It has been difficult, in many of the cases which have come before us, to determine on which side of the dividing line the acts in question should fall; but in the conclusion which we reach we are not running counter to any of the decisions already made in construing the statute, and we are carrying out its general policy.

Affirmed.

SPRINGS *v.* SOUTHERN RY. CO.

(*Supreme Court of North Carolina, April 15, 1902.*)

[41 S. E. Rep. 100.]

**Injury to Brakeman\*—Evidence.**

In an action by a brakeman for injuries alleged to have been caused by being compelled to ride on the pilot of a road engine, instead of a switch engine, while switching, evidence that plaintiff complained of the use of the road engine, and was promised a safer engine, was competent.

**Same—Knowledge of Rules—Evidence.**

Evidence that the engineer of the engine on which plaintiff so rode had a book of rules, one of which forbade plaintiff's stepping from a moving train, did not tend to prove that plaintiff had any knowledge of such rule.

Appeal from superior court, Mecklenburg county; Robinson, Judge.

Action by Henry Springs against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action for personal injury. The plaintiff, who was employed by the defendant as a switchman, had been working with a regular switch engine, supplied with foot-boards on each end, upon which he stood when the engine was in motion. About March 1st this engine, being out of order, was sent to the shop for repairs; and the defendant used road engines instead, for the purpose of switching its cars. About April 1st the plaintiff was ordered by one Warren Bull, who had the right to employ and discharge him, to ride on the pilots or cow-catchers of these road engines while they were switching. He had before that time been riding on the gangway behind the engineer, and sometimes behind the fireman, where he was comparatively safe. After receiving the

\**Huffman v. Mich. Cent. R. Co.* (Mich.), 5 Am. & Eng. R. Cas., N. S., 542. See also, 15 Am. & Eng. R. Cas. 180; 18 Am. & Eng. R. Cas. 22, 42; 53 Am. & Eng. R. Cas. 279; 5 Rap. & Mack's Dig. 159; *Pierce v. Camden, etc., R. Co.* (N. J.), 5 Am. & Eng. R. Cas., N. S., 548; *Lawhorn v. Miller, etc., R. Co.* (Ga.), 5 Am. & Eng. R. Cas., N. S., 551. See, also, extensive note, 11 Am. & Eng. R. Cas., N. S., 484 et seq.

order from Warren Bull, he continued to ride on the pilot of the engine for about 10 days, until he was hurt. There was evidence to the effect that the pilot was not as safe a place to ride as the footboard of the shifting engine. Switchmen had been in the habit of jumping from the engine while in motion, in order to do their work more rapidly, and no objection to this course had ever been made by the officers or agents of the defendants who saw it done. In fact, there was evidence tending to show that it was sometimes necessary to do so, in order to get the work done in time. On the 10th day of April, 1899, the plaintiff, in the performance of his duties attempted to jump from the pilot, as he had been in the habit of doing without objection, when his foot was caught between the ribs or slats of the pilot, and he was thrown to the ground. The engine ran over his legs, and crushed them so severely that they had to be amputated. The plaintiff testified that the engine was moving slowly when he attempted to get off, and that he would have alighted safely if his foot had not caught between the slats. The defendant attempted to have this cause removed into the circuit court of the United States, and caused a transcript of the record to be docketed in that court. It then moved in the court below to dismiss the action, but the court decided that the cause had not been properly removed, and proceeded with the trial. The jury found all the issues in favor of the plaintiff.

The defendant's assignments of error are as follows: "(1) The refusal of the court to dismiss the action because the same had been removed to the federal court, which is the subject of defendant's first exception. (2) The admission of the testimony of plaintiff as set out in defendant's second and third exceptions. (3) The refusal of the court to admit the testimony of Hillhouse, which is the subject of defendant's fourth exception. (4) The instruction numbered 3 prayed for by the plaintiff, given to the jury, which is the subject of the defendant's fifth exception. (5) The instruction numbered 5 prayed for by plaintiff, given to the jury, which is the subject of defendant's sixth exception. (6) The refusal of the court to give instructions prayed for by defendant, subject to defendant's exceptions 6, 7, 8, 9, 10, 11, 12, and 13. (7) The refusal of the court to grant a new trial, which is the subject of defendant's fourteenth exception."

Among other instructions, the court gave the following at the request of the defendant: "(1) That the plaintiff must show by preponderance of evidence that he was injured by the negligence of the defendant, as alleged in the complaint, before the jury can find the first issue in his favor. The burden is upon the plaintiff to show this. (2) That the plaintiff, in entering into the service of the defendant as a switchman, assumed the risk incident to the employment; and, before he undertook to use the engine furnished him, it was his duty to inform himself as to its fitness for the use to which it

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was put, and also as to its safety. (3) That the defendant owed to the plaintiff the duty of furnishing him with a suitable engine for the work he expected to perform, or one reasonably well adapted to the service to which it was to be applied, without exposing the plaintiff to peril not ordinarily incident to such service. But the defendant was not a guarantor of the safety of the plaintiff. (4) The plaintiff's duties correspond with those of the defendant. He was bound to a reasonable care and diligence in the discharge of his duties as a switchman, and to look to his own safety." "(12) If the jury find from the evidence that there were steps on the pilot, about four inches wide and twenty inches long, on which plaintiff could have ridden in safety, and stepped from without danger, and they should further find that, without looking to see whether or not engine No. 24 was equipped with these steps, he assumed voluntarily a more dangerous position, to wit, the position described, on top of the pilot, and this was the cause of the injury, the answer to the first issue should be 'No,' and to the second issue 'Yes.' (13) It was the duty of the plaintiff to examine and acquaint himself with the engine supplied to him by the defendant, and if the jury find from the evidence that he failed to do this, and that such failure was the proximate cause of his injury, the answer to the first issue should be 'No,' and the second issue 'Yes.' "

The following instructions, numbered 3 and 5, were given at the request of the plaintiff, and were excepted to by the defendant: "(3) If the jury find from the evidence that the plaintiff was employed by the defendant as a switchman, and as one of the crew that worked with one of its engines at Greenville, S. C., and they further find that plaintiff was subject to the control and authority of Warren Bull, the conductor of that engine, and captain of the crew, and that plaintiff was required to obey his orders, and was liable to be discharged for not doing so, and that Warren Bull ordered him to use the road engine while the switch engine was being repaired, and to ride on the leading end of the engine, or that end nearest the direction in which the engine was going, and they further find that Warren Bull represented to the plaintiff that the switch engine would soon be returned to the road, and that plaintiff, in obedience to the said orders and instructions, and believing that he would be discharged if he did not obey them, and, relying upon said representation that the switch engine would soon be returned to the road, the plaintiff did ride on the front end of the pilot of said road engine, and in doing so he acted as a man of ordinary prudence would have done under the same circumstances, and also exercised ordinary care and prudence for his own safety while engaged in performing the service under said orders and instructions (ordinary care being the care which an ordinarily prudent man would have exercised under the same circumstances), the jury will answer the

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second issue 'No,' as, under such facts and circumstances, the law will not impute negligence to the plaintiff, as the proximate cause of injury, but will rather refer the injury to the negligence of the defendant, as its proximate cause." "(5) That the plaintiff was not bound to observe the printed rules of the company unless they were brought to his attention, or in some way he had knowledge of their contents."

The part of the petition for removal which alleges the diverse citizenship is in the following words: "Your petitioner further states that in the above-mentioned civil action there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which was at the commencement of this action, and still is, a citizen of the state of Virginia, and the said Henry Springs, who, your petitioner avers, was at the commencement of this action, and still is, a citizen of the state of North Carolina, and of the Western district thereof, and that both the said Henry Springs and your petitioner are actually interested in said controversy." After the trial of this action in the superior court, and the rendition of judgment therein, the following words were inserted in the petition, under an order of amendment made in the circuit court of the United States, to wit: "That petitioner is a nonresident of the state of North Carolina, and is a corporation created under the laws of the state of Virginia." This averment does not appear in the pleadings.

Geo. F. Bason, for appellant.

Burwell, Walker & Cansler and Jas. A. Bell, for appellee.

DOUGLAS, J. (after stating the facts). The court below properly refused the motion of the defendant to dismiss this action on account of its attempted removal into the circuit court of the United States. In no event could the court below have dismissed the action, even if it had been properly removed. In the latter event it could only have stayed further proceedings, leaving the case upon the docket, to await future developments. Even if the state courts, superior and supreme, were to recognize the removal of an action, that would not necessarily end the question, as the right of removal is, in its ultimate determination, essentially a federal question. The circuit court has the power to remand any case, if, in its opinion, it is improperly removed; and such a disclaimer of jurisdiction would at once revert the state courts with all their original jurisdiction, or, rather, it would conclusively show that it had not been divested. We use the term "improperly removed" merely for convenience, as indicating those cases where the petition to remove is improperly allowed. The removal takes place, if at all, by operation of law, eo instanti upon a compliance with the federal statutes.

(Three paragraphs containing no railroad law omitted.)

The merits of the case have nearly been lost sight of in the

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dominating question of removal. In fact the recent cases of *Coley v. Railroad Co.*, 129 N. C. 407, 39 S. E. 43, 40 S. E. 195, *Thomas v. Railroad Co.*, 129 N. C. 392, 40 S. E. 201, and *Cogdell v. Railway Co.*, 129 N. C. 398, 40 S. E. 202, all decided since the case at bar was tried in the court below, practically answer the defendant's exceptions. We see no error in the admission or rejection of evidence. It was competent for the plaintiff to show that he had complained of the road engines, and had been promised a safer engine on which to work. On the other hand, to show that the engineer had a book of rules does not of itself tend to prove that the plaintiff had any knowledge of its contents. All the defendant's prayers for instructions that were not given were properly refused or modified, as they practically amounted to a direction of the verdict.

In the absence of error, the judgment of the court below is affirmed.

READ *v.* CITY & SUBURBAN RY. CO.

(*Supreme Court of Georgia, April 28, 1902.*)

[41 S. E. Rep. 629.]

**Trolley Wires\*—Inspection—Degree of Care.**

When a street railway company with reasonable promptness discovers the sagging of one of its trolley wires, which had been unexpectedly caused by the falling of a wire belonging to another, and immediately takes proper steps to prevent its wire from causing injury to travelers in the street over which the same is suspended, the company meets the legal requirements as to diligence under such circumstances.

**Notice to Employee Not Notice to Company.**

Notice to the servant of a corporation with respect to a matter over which he has no authority, and as to which he has no duty to perform, is not notice to the corporation.

**Self-Protection—Degree of Care.**

Every person must exercise ordinary diligence in protecting himself from danger, and, failing to do so, must take the consequences.

**Negligence of Employee Imputable to Master.**

The negligence of a servant in failing, while driving his master in a vehicle, to avoid danger, is imputable to the latter.

(Syllabus by the Court.)

\*As to care required of the company in the construction and operation of appliances for the use of electricity, see *McAdam v. Central Ry. & Electric Co.* (Conn.), 5 Am. & Eng. R. Cas., N. S., 7.

As to care to be exercised by an electric railway company to insulate their wires, see *Atlantic Consol. Street Ry. Co. v. Owings* (Ga.), 5 Am. & Eng. R. Cas., N. S., 1.

As to evidence of previous breakage of trolley wire, see *Railway Co. v. Rogers* (Va.), 3 Am. & Eng. R. Cas., N. S., 653.

As to liability for injuries by contact with wires, see *City Electric Ry. Co. v. Conery* (Ark.), 3 Am. & Eng. R. Cas., N. S., 365.

As to electric railway wires distinguished from telegraph wires, see note, 4 Am. & Eng. R. Cas., N. S., 401.

As to liability for personal injuries from hanging wire belonging to another company, see *Macon v. Paducah Street Ry. Co.* (Ky.), 22 Am. & Eng. R. Cas., N. S., 614.

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Error from city court of Savannah; T. M. Norwood, Judge.  
Action by J. B. Read against the City & Suburban Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

O'Connor, O'Byrne & Hartridge, for plaintiff in error.  
Osborne & Lawrence, for defendant in error.

LUMPKIN, P. J. At the October term, 1899, of this court, a judgment of the lower court granting a nonsuit in this case was reversed, and the case remanded to the court below for further proceedings. 110 Ga. 166, 35 S. E. 170. A trial was had therein at the July term, 1900, resulting in a verdict for the defendant, and Read, the plaintiff, is now here complaining of a judgment overruling his motion for a new trial. It appears that he was injured at the intersection of Congress and Whitaker streets, in the city of Savannah, by a sagging wire of the defendant company, with which he came in contact while being driven along the street first mentioned by his servant. The petition alleged that the company was negligent "in allowing said wire to hang too low, and in not keeping it in its proper place and in safe condition." By an amendment to the petition it was alleged that, through the negligence of the company, its trolley wire had been allowed to break in the neighborhood of St. Julian and Whitaker streets, "thus causing said overhead wire to sag at the corner of Congress and Whitaker streets," in which position it was a source of danger to travelers using Congress street; and, further, that the company negligently failed "to place or station a watchman or guard at said intersection of Congress and Whitaker streets for the purpose of warning pedestrians and travelers of the proximity of a dangerous instrument." The evidence was voluminous, and in many respects conflicting; that introduced in behalf of the plaintiff being, as was held when the case was here before, sufficient to warrant a verdict in his favor. On the other hand, the testimony upon which the company relied tended to show that the sagging of the wire was the result of a sudden and unexpected breaking of a trolley wire belonging to another company; that the defendant was duly diligent in discovering the condition of its wire across Congress street; that its employees gave warning to the plaintiff and his driver, as they were approaching this wire, of the danger they were about to encounter, and that this warning was wholly disregarded. There are many grounds in the motion for a new trial, but the only material points thereby presented are those dealt with below. In discussing these, such additional facts as it may be necessary to mention will be stated.

1. Complaint is made of several charges of the court to the effect that, if the sagging of the defendant's wire was caused by the giving way of a wire belonging to another company, and the occurrence was one of unusual nature, not ordinarily



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and reasonably to have been expected, and the defendant, immediately upon discovering that its wire was sagging, sent an employee to place it in proper position, and the plaintiff was injured before the defendant had a reasonable time within which to make the necessary repairs or to take precautions to warn travelers passing along Congress street, the company would not be liable. As is apparent, these instructions were in accord with well-settled rules of law governing cases of this character.

2. The court, among other things, charged the jury as follows: "If you find that the duties of the motorman and conductor were confined to the running of their car and the reporting of accidents, then notice to them of the sagging of the wire was not notice to the company; and if you further find that the accident was due to an uncommon or unusual cause, and that before its officer had a reasonable opportunity to give instructions the motorman and conductor went to the Congress street crossing to guard the crossing, then, whether they did what they should have done in the way of warning Dr. Read and his driver or not, the plaintiff cannot recover, and it will be your duty to find for the defendant, because, under such circumstances, what they did was of their own accord, and if there was any default upon their part it cannot be charged to the defendant; for, if the accident occurred from an unusual and uncommon cause, the occurrence of which might not reasonably have been expected, no duty arose upon the part of the defendant until those of its officers and agents in authority had notice of the accident and reasonable time thereafter to take precautions against any resulting danger." Exception was also taken to another charge to the same effect. There was no complaint that these instructions were not warranted by the evidence, but the contention of plaintiff's counsel is that, as matter of law, without regard to the duties which, as between the company and the motorman and conductor, they were required to perform, notice to them of the sagging of the wire would be notice to the company. In this view we cannot concur. Indeed, the principle of law applied in the case of *City of Columbus v. Ogletree*, 96 Ga. 177, 22 S. E. 709, is controlling here, as will appear from an examination of a number of the authorities cited in support of the decision then announced. It was in that case held that: "It not having been shown that the duty of looking after and reporting the condition of the streets and sidewalks of the city devolved upon its policemen, it was error to charge that notice to 'the police' of the defective condition of a particular street or sidewalk would be notice to the municipal corporation." So, in the present case, if it was not within the scope of the duties of the motorman and conductor to immediately take steps to guard the public from the danger created by the sagging of the company's trolley wire, it would not be proper, in determining whether, after the

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defendant became informed of the emergency to be met, it acted with reasonable diligence in taking proper steps to protect travelers passing along the street, to regard notice to the motorman and conductor as notice to the company itself, and thus place upon it the unreasonable requirement of taking action in the premises before any of its officers or agents who were authorized to act in its behalf had received information of the necessity to do so.

3. 4. There was evidence to show that as the plaintiff's vehicle was approaching the sagging wire employees of the company gave to him and to his driver repeated and vociferous warnings of the danger ahead, which were either unheard or ignored, and that these warnings were such as to have necessarily attracted the attention of an ordinarily prudent man. In this connection the court charged that, if due warnings were given, which the plaintiff or his servant ought, in the exercise of ordinary care and prudence, to have heard and heeded, the plaintiff would be precluded from recovering. The court further instructed the jury that if, in the exercise of ordinary diligence, the driver could, by turning to the right or left, have avoided coming in contact with the wire, the plaintiff could not recover. We do not care to discuss these instructions at length, for it is obvious that the court correctly stated the time-honored doctrine of contributory negligence, and its application to a case like this, and the further ancient rule of law that, under such circumstances as those stated, the negligence of the servant is imputable to his master.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

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MISSOURI, K. & T. RY. CO. OF TEXAS v. REASOR.

(*Court of Civil Appeals of Texas, Feb. 22, 1902.*)

[68 S. W. Rep. 332.]

**Injury to One Acting Both as Express Messenger and Baggage-man—Pleading—Care Due from Company.**

In an action against a railroad for injuries received by plaintiff while working on one of defendant's trains as an express messenger, and also as baggage-man for defendant, the petition alleged that plaintiff was an employee of the express company and of defendant, jointly and severally, or was employed by the express company and required to handle baggage: *held*, that the petition was sufficient to justify a charge that, even though plaintiff was on the train as express messenger, if he, during the time he acted as messenger, also served the defendant as baggage-man on such train, and if he did so with the knowledge and approval of the defendant, it owed to him duty to use ordinary care to avoid injuring him.

**Same—Contract of Employment.**

An express contract was not necessary to create the relation of master and servant. The relation existed if the plaintiff, with the knowledge, consent, and approval of the defendant, acted as bag-

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gageman, and in that capacity performed duties which defendant owed to the public.

## Same—Same—Evidence.

Where, in an action against a railroad for injuries sustained by plaintiff while acting as an express messenger, and also as baggageman for defendant, it was in issue whether plaintiff was employed by the railroad, it was proper to admit evidence that the express company deducted from the wages of the plaintiff and of all other employees who acted both as messengers and baggagemen the sum of 50 cents per month as hospital fees for the defendant's hospital; the fees not being deducted where the employee acted only as messenger.

## Personal Injuries—Damages—Medical Services.\*

In an action against a railroad for injuries, plaintiff testified, relative to his expenses for medicines, merely that he had paid and became indebted for about a certain sum, and that he did not know what his doctor's bill was: *held*, that the evidence did not show the expenses reasonable and necessary, so as to justify a charge that he was entitled to recover his reasonable expenses for medicine and treatment.

## Same—Same.

In an action for injuries, plaintiff cannot recover for expenses incurred for medicine, but not paid, where the petition only sets up a claim for sums expended.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by J. C. Reasor against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Modified.

T. S. Miller and Head & Dellard, for appellant.

Randell & Wood, for appellee.

TEMPLETON, J. The appellee, J. C. Reasor, was engaged in working as messenger of the American Express Company, and as baggageman of the appellant, the Missouri, Kansas & Texas Railway Company of Texas; the work being done on appellant's trains running between Denison and Sherman. A train on which appellee was at work collided with another train, and he received injuries, on account of which he brought suit against appellant, and recovered judgment. It was shown that appellee, by the terms of the contract between appellant and the express company, and of his contract with the express company, assumed all risks of accidents which he might meet with or sustain in the course of his employment as messenger, and the jury was instructed to find for appellant on that issue. No question concerning the correctness of this charge is presented.

\*See *Louisville & N. R. Co. v. McEwan* (Ky.), 2 Am. & Eng. R. Cas., N. S., 438; *Wilson v. Sou. Pac. R. Co.* (Utah), 4 Am. & Eng. R. Cas., N. S., 40; *Houston & T. C. R. Co. v. Rowell* (Tex.), 11 Am. & Eng. R. Cas., N. S., 597, and note at end of case; note collecting authorities, 12 Am. & Eng. R. Cas., N. S., 195; *Cobb v. St. Louis & H. Ry. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., 632, and foot-note; *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188; *Knopf v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 172.

The court charged the jury, in substance, that it was the duty of the defendant to accept and transport on its trains the baggage of passengers, and, even though the plaintiff was on the train in question as express messenger, still, if he, during the time he acted as messenger, also served the defendant as baggageman on such trains, and if he did so with the knowledge, consent, and approval of the defendant, then the defendant owed to him the duty to use ordinary care to avoid injuring him. And the jury was instructed to find for the plaintiff if he was so acting as baggageman, and was injured as a result of the negligence of the defendant. These charges are objected to on the ground that the plaintiff's pleadings did not raise such issue. The petition contained the following averment: "That heretofore, to wit, on November 12, 1900, and for a long time prior thereto, plaintiff was an employee of the American Express Company and of the defendant, the Missouri, Kansas & Texas Railway Company of Texas, and of each of them, jointly and severally, or was employed by said express company, and was required to handle express and baggage transported on said railway company's (defendant's) passenger trains; that it was his duty, in the course of his employment, with the knowledge, consent, and procurement of defendant, to travel on the passenger train of the defendant company between the cities of Sherman and Denison, in said Grayson county, Texas, to carry, control, manage, receive, and discharge freight, baggage and parcels transported by said American Express Company and by the defendant, the Missouri, Kansas & Texas Railway Company of Texas, as a carrier of passengers between said two cities of Sherman and Denison, and over the line of railway and in the cars of said defendant company, for said American Express Company and said defendant railway company, and both and each of them, jointly and severally, as aforesaid." We think the plea fairly raised the issue submitted in the charge. It is distinctly alleged that the plaintiff was acting as baggageman of the defendant, and was not working solely in the capacity of messenger of the express company. The plea was sufficient to notify the defendant that the plaintiff would attempt to prove, and would rely upon, his service as baggageman of the defendant as a basis for a recovery. The plea was good on general demurrer, and we are not called upon to consider whether the allegations were sufficient, had the same been questioned by special exception.

The court instructed the jury that the evidence was not sufficient to warrant the conclusion that there was such express contractual relation between the plaintiff and the defendant as to constitute the relation of master and servant; and appellant contends that, such being the case, a peremptory instruction to find for the defendant should have been given. The contention cannot be sustained. An express contract was not necessary to create the relation of master and serv-

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ant. The relation existed if the plaintiff, with the knowledge, consent, and approval of the defendant, acted as baggageman, and in that capacity performed duties which it owed to the public. In such case he would be as much the servant of the company as if he had been working under an express contract of employment.

The plaintiff was permitted to prove, over the objections of defendant, that the express company deducted from the wages of the plaintiff, and of all other employees who acted both as messengers and baggagemen, the sum of 50 cents per month as hospital fees, for the defendant's hospital; the fees not being deducted where the employee acted only as messenger. We are of opinion that the evidence was admissible as a circumstance tending to show the existence between the defendant and the plaintiff of the relation of master and servant. While it was not directly shown that the railway company required the fees to be collected of such employees for its hospital, it is inconceivable that this should be done without its knowledge, or except in compliance with a demand by it to that effect. If the railway company had these fees collected from express messengers who served it as baggagemen, the fact tended to show upon what terms the services were rendered, and threw light upon the relations existing between the parties.

The court instructed the jury, in case they found for the plaintiff, to allow him compensation for "the reasonable expenses, if any, he has incurred for medicines and medical treatment, if any, on account of such injuries." The first objection to this charges that there was no evidence as to the reasonableness of the expenses incurred for medicines. The plaintiff testified as follows: "I have not kept account of expenditures for medicines since I was hurt, and could not make an estimate of it. I have not yet paid any of the bills. My bill for medicine for the first month was fourteen dollars and some cents, and I paid some cash besides. I paid cash for about as much medicine as I bought on a credit that month, and ever since I have paid cash all the time. I have gotten medicine about twice a week, and at an expenditure of from one to two dollars each time. I also had to employ Dr. W. B. Markham, my family physician. I don't know what his bill is." This testimony is not sufficient to show that the expenses incurred for medicines were either necessary or reasonable. The plaintiff was not entitled to recover sums which he paid and contracted to pay for medicines, without proof that such expenditures were reasonable and necessary. *Wheeler v. Railway Co.*, 91 Tex. 356, 43 S. W. 876; *Railway Co. v. Rowell*, 92 Tex. 147, 46 S. W. 630. There being no evidence as to the necessity and reasonableness of the expenses incurred for medicines, the court should not have authorized a recovery for any part of such expenses. The charge is further objected to on the ground that the plaintiff,

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in his petition, set up a claim only for the sums expended for medicines and medical treatment, and did not seek a recovery for expenses incurred but not paid, while the charge authorized the jury to allow him all the expenses incurred, regardless of whether or not the same had been paid. The objection appears to be well taken. The plaintiff, by his pleadings, limited his claim for expenses on account of medicines and medical treatment to the sums expended (that is, to the amounts paid out), and could not recover for the liabilities incurred on such account (that is, for debts owing by him for medicines and medical treatment).

The appellee has offered, in case we reached the conclusions above stated, to remit whatever amount we find may have been included in the verdict as a result of the jury having taken these items into consideration. Under the evidence, the jury may have allowed the sum of \$150 for medical treatment, no part of which bill has been paid. The first month's bill for medicines, as shown by the plaintiff's testimony, was \$28. It further appears that after the first month he got medicines twice a week, paying each time therefor from \$1 to \$2. He was injured on November 12, 1900, and the case was tried on May 29, 1901. Excluding the first month, it was 168 days, or 24 weeks, from the date of the accident to the time of the trial. The jury may have allowed him \$4 per week for medicines, making a total of \$96. This sum, added to the sum expended or incurred during the first month, makes, in all, the sum of \$124 which may have been allowed on that account. It is possible that the jury awarded the plaintiff, to cover expenses for medicines and medical treatment, the sum of \$274. If the appellee remits the said sum of \$274 within 10 days from this date, the judgment will be affirmed; otherwise the judgment will be reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. *v.* HADEN *et ux.**(Court Civil of Appeals of Texas, April 5, 1902.)*

[68 S. W. Rep. 530.]

**Injury to Employee—Defect in Machine\*—Pleading.†**

In an action for personal injuries to an employee, the petition alleged that the machine was defective, out of repair, and unsafe for use; that it was designed to be thrown out of gear by means of shifting a belting, but that on account of the attachments being defective, out of repair, loose, or improperly hung, the belting was suddenly shifted and the machine thrown in motion while the employee was changing the gear, without any action on his part, and

\*See notes, 12 Am. & Eng. R. Cas., N. S., 744; 19 Am. & Eng. R. Cas., N. S., 428; 16 Am. & Eng. R. Cas., N. S., 570; 12 Am. & Eng. R. Cas., N. S., 668. See also, *Clare v. New York & N. E. R. Co. (Mass.)*, 6 Am. & Eng. R. Cas., N. S., 76.

†See *Broslin v. Kansas City, M. & B. R. Co. (Ala.)*, 9 Am. & Eng. R. Cas., N. S., 99.

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that he was injured thereby; that the employer was negligent in furnishing a defective machine; and that its specific defects were unknown to plaintiff: *held*, that the alleged defects in the machine and its appliances were averred with sufficient particularity; the machine being in the possession of the defendant.

**Same—Same—Negligence—Evidence.**

In an action for personal injuries to an employee on account of the negligence of his employer in furnishing a defective machine, the evidence showed that, when properly constructed, the machine could be thrown out of gear by the operator, and that it would remain stationary until started by some one; that by the use of ordinary care it could be kept in good condition; that when the employee was injured he had properly stopped the machine; and that it was not started in motion by his act, or failure to use due care, or the act of any other person: *held*, that the evidence sustained a finding that the injury was caused by the negligence of the employer.

**Same—Same—Inspection.**

Evidence that an inspector had daily looked over a machine while it was in operation, and discovered no defects therein, but that he did not make a minute inspection of the shafts, pulleys, belts, and other appliances, as regarded the starting and stopping of the machine, warranted the finding that the owner by the use of ordinary care could have discovered a defect in the appliances for the starting and stopping of the machine.

**Same—Same—Assumption of Risk.\***

Evidence that a machine and its appliances were open to the operator; that an employee, who had worked at the machine about seven weeks, and understood its operation, did not know of any defects therein; and that the inspector did not discover the defect, which was of such character as required an inspection,—justified a finding that the employee did not know of the defect, and never assumed the risk.

**Knowledge of Defects.†**

A witness testified that an employee, who was subsequently killed in operating a machine, had told him that the machine was defective, and that he (the employee) had asked the inspector to have it fixed. The inspector testified that the employee had never made such complaint: *held*, that the question of knowledge of the defect by the employee was properly left to the jury.

Appeal from district court, Dallas county; T. F. Nash, Judge.

Action by John F. Haden and wife against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. Terry and Alexander & Thompson, for appellant.  
Finley, Etheridge & Knight, for appellees.

TEMPLETON, J. Finley Haden, a young man 24 years of age, was an employee of the Gulf, Colorado & Santa Fe

\*See *Bussey v. Charleston & W. C. Ry. Co. (S. Car.)*, 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

†See *Atchison, T. & S. F. R. Co. v. Tindall (Kan.)*, 6 Am. & Eng. R. Cas., N. S., 557; *Ladd v. Brockton Street Ry. Co. (Mass.)*, 1 R. R. 342, 24 Am. & Eng. R. Cas., N. S., 342; *Lindsay v. N. Y., N. H. & H. R. Co. (C. C. A.)*, 1 R. R. R. 378, 24 Am. & Eng. R. Cas., N. S., 378; *Hurst v. Kansas City, P. & G. R. Co. (Mo.)*, 21 Am. & Eng. R. Cas., N. S., 899; *Durand v. New York & L. B. R. Co. (N. J.)*, 21 Am. & Eng. R. Cas., N. S., 208.

Railway Company, and worked in its machine shops at Cleburne. He was operator of a lathe machine, and was a skillful and experienced workman. The power to run the machine came from the main shaft, overhead, and was transmitted by means of a belt. The belt encircled the main shaft and a smaller shaft attached to the machine. There were two pulleys on one of the shafts; one of them being loose, and the other tight. When the belt was on the tight pulley the machine was in operation. When it was on the loose pulley the machine was at a standstill. A shifter was provided, by means of which the operator could, at his pleasure, shift the belt onto either pulley, and thus control the operation of the machine. On September 19, 1899, Haden was at work, and found it necessary to change the gearing of the machine. For that purpose he shifted the belt onto the loose pulley, and thereby brought the machine to a standstill. While engaged in changing the gearing, the belt somehow got back onto the tight pulley, and started up the machine. Haden's left hand was caught in the machine and badly mangled. He died on October 9, 1899, from the effect of the injuries so received. The appellees, who are his father and mother, brought this suit to recover the damages sustained by them on account of his death. They obtained judgment, and the railway company has appealed.

Appellant excepted to the petition on the ground that the same does not aver with sufficient certainty what defect, if any, existed in the appliances provided by the defendant, but the allegations appear to involve a conclusion of the pleader as distinguished from the facts, and the allegations are insufficient to apprise defendant as to what defect was relied upon. The petition contained the following averments: "Plaintiffs charge that the said lathe machine, its attachments, apparatus, etc., affecting and controlling its operation, were defective, insufficient, out of repair, improperly constructed, and otherwise unsuited and unsafe for the purposes for which they were designed; that it was designed that when said machine was brought to a standstill, and its motion and operation ceased, by means of the attachments and apparatus provided therefor, the same would remain out of motion and at a standstill until it should be put in motion by intelligent design, and by means of shifting the belting from the loose to the tight or immovable pulley as aforesaid, but plaintiffs charge that by reason of the fact that some of these attachments were defective and out of repair, improperly hung, or loose in some parts thereof, that the belting, after it had been removed by the said Richard Finley Haden from the tight pulley onto the loose pulley, and while he was engaged in changing the gearing of said lathe machine, by means of some defect in the attachments and apparatus of the machine as aforesaid, was shifted, and said machine suddenly started in operation, unexpectedly to the said Richard Finley Haden,



without any act on his part putting said machine in motion, and without any act on the part of any other person putting said machine in motion, and that the said machine starting into motion under said circumstances was the result of defects in the apparatus and appliances, and that the defendant company was guilty of negligence in furnishing to said Richard Finley Haden machinery so defective, and which was dangerous, and subjected him to unnecessary peril in the faithful and careful discharge of his duties as employee of the said defendant; that the specific defects in said machinery are unknown to plaintiffs, and for this reason they cannot more particularly allege such defects in the machinery." We are of opinion that the alleged defects in the machine and its appliances were averred with all the particularity which ought to be required in this case. The situation of plaintiffs precluded them from making more specific allegations, and those made were sufficient to inform the defendant, with reasonable certainty, of the facts which were relied on to show negligence. The allegations concerning the manner in which the accident occurred, and the principle upon which the machinery was constructed and operated, showed that the accident was attributable to some defect in the machine or its appliances which was unknown to Haden, and which the plaintiffs could not ascertain more definitely than was stated in their petition. The machinery was in the possession and under the control of the defendant. The demurrer was properly overruled. *Railroad Co. v. Brinker*, 68 Tex. 500, 3 S. W. 99.

Appellant contends that the evidence is not sufficient to show that the machine or its appliances was defective, or, if defective, that it was chargeable with negligence on account of the machinery being in such condition. The evidence shows, that when such machine was properly constructed and in proper repair, the operator thereof could, when he desired to do so, bring the same to a standstill by shifting the belt onto the loose pulley; that, when a machine so constructed and in good repair was properly stopped by the operator, it would remain at a standstill until started by some one; that by the use of ordinary care such machine and its appliances could be kept in good condition. The evidence warrants the further conclusion that, on the occasion of the accident, Haden properly shifted the belt, and that the machine was not started in motion by any act of his, or by a failure on his part to use due care in stopping the machine, or in working with it after it was stopped. The machine was not started by the act of any other person. It could have been started in motion by only two causes: (1) The failure of Haden to properly shift the belt; and (2) some defect in the machine or its appliances. The verdict of the jury, which is sustained by the evidence, excludes the theory that it was started in motion by reason of Haden's want of care in shifting the belt,

and it inevitably follows that the moving cause was some defect in the machinery. The evidence warrants the finding that the injury to Haden was caused by the negligence of appellant. *Railway Co. v. Lauricella*, 87 Tex. 279, 28 S. W. 277, 47 Am. St. Rep. 103; *McCray v. Railway Co.*, 89 Tex. 170, 34 S. W. 95; *Railroad Co. v. Wood* (Tex. Civ. App.) 63 S. W. 164; *Railroad Co. v. Johnson* (Tex. Civ. App.) 65 S. W. 388; *Thiel v. Kennedy* (Minn.) 84 N. W. 657; *Howser v. Railway Co.* (Md.) 30 Atl. 907, 27 L. R. A. 154, 45 Am. St. Rep. 332; *Railway Co. v. Cooper* (N. J. Err. & App.) 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592. To the same effect are the cases of *Railway Co. v. Bailey*, 68 S. W. —, and *Railway Co. v. Broadhurst*, Id. —, recently decided by this court, and not yet officially reported.

Appellant introduced evidence tending to show that it had used due care to keep the machinery in good repair. The inspector testified that he had continually looked over it, and discovered no defects therein. It is significant, however, that he did not make a minute special inspection of it. He appears to have daily looked at the machine when it was in operation, and, observing no defect, concluded that it was in good condition. An examination of the shafts, pulleys, belt, and shifter, with a view of ascertaining whether the same were in proper condition and repair, as regarded the starting and stopping of the machine, appears not to have been made. The evidence warrants the conclusion that appellant, by the exercise of ordinary care, could have discovered the defect and remedied same in time to have avoided the accident.

Appellant contends that, under the uncontradicted evidence, it ought to be held, as a matter of law, that Haden assumed the risk which occasioned his injury. The evidence shows that the machine and its appliances were open to the view of the operator thereof, and that Haden had worked as operator about seven weeks. He understood the operation of the machine, and did not know of any defect therein. The company's inspector, who should have known more than any one else of the condition of the machinery, did not discover the defect. It seems that the defect was of such a character as required an inspection, made for the purpose of ascertaining the condition of the machinery, to disclose its existence. The duty of inspection rested upon the company, and not upon Haden. The jury was justified in finding that Haden did not know of the defect, and never assumed the risk, and that the company ought to have discovered the defect, and was guilty of negligence in not doing so, and in failing to repair the machinery. Appellant owed to Haden the duty to use ordinary care to have the machinery with which he was required to work in a reasonably safe condition, and he had the right to assume that the duty had been performed.

The appellees took and used the deposition of John Hogg. On cross-examination he stated that Haden told him before

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the accident that the machine would start up occasionally, and that he (Haden) had asked Strehorn, the inspector and foreman of the shops, to have it fixed. Appellant insists that this evidence was not controverted, and shows conclusively that Haden knew of the defect, and therefore assumed the risk. Strehorn testified that Haden never made any such complaint to him. This testimony tended strongly to impeach the credibility, or at least the recollection, of the witness Hogg. If Haden made the statement attributed to him by Hogg, and Strehorn is to be believed, then part of Haden's statement was gratuitously untrue. Such conduct on his part would be inconsistent with his character and actions. It was impossible for the appellees to prove by direct evidence that Haden did not make the statement to Hogg, as Haden was dead, and there appears to have been no witnesses to the conversation, except the parties to it. The only part of the statement which it was possible to contradict was that relating to the complaint made to Strehorn, and the fact that no such complaint was made was shown. None of the circumstances attending the making of the alleged statement to Hogg were proven. Evidence of the making of such statement under the conditions shown will be received with great caution. We think the trial court properly left the question to the jury for decision, and that the finding of the jury against the contention of appellant is conclusive.

The charge of the court fully and correctly submitted to the jury all the issues raised by the pleadings and evidence. We find no error in the judgment, and it is affirmed. Affirmed.

## FT. WORTH &amp; D. C. RY. CO. v. GARY.

(*Court of Civil Appeals of Texas, April 19, 1902.*)

[68 S. W. Rep. 200.]

## Injury to Employee—Instructions—Assumption of Risk.\*

While plaintiff, as an employee of defendant, was assisting in loading cattle into a car, he stood outside the chute, with his shins resting against the top plank, when it gave way and threw him into the chute. The defense was contributory negligence and assumed risk, and the evidence was conflicting as to whether he knew of the insecure condition of the plank. The court instructed that if the giving way of the plank was caused by defendant's negligence, and plaintiff was injured thereby, he could recover, if not guilty of contributory negligence; and, after instructing as to such negligence on his part, added that if he knew of the dangerous condition of the plank his right to recover was not thereby affected, if he was otherwise entitled to recover under the evidence and charge: *held* error, in withdrawing from the jury the question of assumption of risk.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

\*See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

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Action by John B. Gary against the Ft. Worth and Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Stanley, Spoons & Thompson, for appellant.

S. J. Osborne, for appellee.

STEPHENS, J. About May 1, 1901, at Estelline, Tex., appellee sustained personal injuries while engaged in loading cattle for appellant, on account of which a recovery for \$500 was had, from which this appeal was prosecuted. He was standing on the outside of the chute, with his shins resting against the top plank, prodding the cattle into the car, when this plank gave way and threw him head first into the pen or chute, thereby inflicting the injuries for which he recovered. The main defense was that of assumed risk, and the evidence was conflicting as to whether appellee was aware of the condition of this plank, and of the consequent danger of leaning against it. The defense of contributory negligence was also an issue in the case. The charge of the court correctly stated in general terms the law of contributory negligence, and also of the risks assumed by railway employees, but in applying the law to the facts of this case the court charged the jury as follows:

"Now, if you believe from the testimony that the plaintiff, in the performance of his duty as stock loader for defendant, fell from the chute on defendant's stock pen, and that he was thereby injured, and that you find that the fall was caused by a plank on said chute giving way, and you find that the giving way of the plank was caused by negligence, as hereinbefore defined, on the part of the defendant or its servants to secure said plank, then the defendant would be liable to plaintiff for the injuries so sustained, if he was not himself guilty of contributory negligence, under the further instruction of the court."

"But if you find the plank that gave way was defectively and insecurely fastened to the post, and that the plaintiff knew that fact, or had been so informed before he attempted to use it, or that he had been informed that said plank was loose or unsafe, and you find that in thereafter leaning against the plank the plaintiff himself was guilty of negligence which contributed to his injury, then he cannot recover, although the railway may have been first guilty of negligence in maintaining said chute. If plaintiff did know of the dangerous condition, if any, of said plank, then his right to recover will not thereby be affected if he is otherwise entitled to recover under the evidence and charge of the court."

Error has been assigned to these paragraphs of the charge upon several grounds, but mainly, and justly we think, because the defense of assumed risk and contributory negligence were thereby confused. In the first paragraph quoted the jury were instructed that the negligence of appellant would

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render it liable to appellee, "if he was not himself guilty of contributory negligence under the further instruction of the court," and in this further instruction the jury were required to find, in order to defeat liability, not only that appellee knew or "had been informed that said plank was loose or unsafe," but also that appellee "himself was guilty of negligence which contributed to his injuries." This question has been so often considered by this and other appellate courts in Texas that we need only refer to the opinion of Chief Justice Conner in *Railway Co. v. Gray*, 63 S. W. 927, and the numerous cases there cited. The defense of assumed risk, apart from contributory negligence, was thus in effect withdrawn from the jury. It is urged, however, in behalf of appellee, that these paragraphs of the court's charge but embodied the special instructions requested by appellant, and that the error therefore, if any, was invited; but we do not so read these special charges. The first of them, for instance, requested the submission of the defense of assumed risk as a distinct and complete defense, without reference to the issue of contributory negligence, and so far as we can see the instruction was correct, and applicable to the facts. The only wonder is that no error has been assigned to the court's refusal to give it.

For the error pointed out the judgment is reversed, and the cause remanded for a new trial.

HUNTER, J., not sitting.

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ST. LOUIS S. W. RY. CO. OF TEXAS v. SIBLEY.

(*Court of Civil Appeals of Texas, May 14, 1902.*)

[68 S. W. Rep. 516.]

**Master and Servant—Injuries—Action—Instruction on Weight of Evidence.**

In an action by a servant against a railroad for injuries received while in the latter's employ, the court instructed that, if defendant's servants in charge of its locomotive knew, or could have known, that plaintiff was in the car to which coupling was made, and of his perilous condition and surroundings therein, and they negligently propelled defendant's locomotive against the car with greater force than necessary, causing the car door to fall on plaintiff, and that plaintiff, in remaining in the car, exercised ordinary care, they should find for the plaintiff: *held*, that the instruction was error, in that it assumed plaintiff was in a perilous position, and was a charge on the weight of the evidence, which is prohibited by statute.

Appeal from Hunt county court; R. D. Thompson, Judge.

Action by E. S. Sibley against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

E. B. Perkins and Perkins & Gilbert, for appellant.

KEY, J. Among other things, the trial court instructed the jury as follows: "If the jury believe from the evidence that

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defendant's servants in charge of its locomotive knew, or by the exercise of ordinary care could have known, that plaintiff was in the car to which coupling was made, and of his perilous condition and surroundings therein; and if you believe that said servants negligently propelled defendant's locomotive against said car in which plaintiff was at work with greater force that was necessary, thereby causing said car door to fall upon and injure plaintiff; and if you further believe that plaintiff, in taking the position and remaining therein in said car, exercised such care as a person of ordinary care would have exercised under the same or similar circumstances,—then you will find for the plaintiff." One objection made to this instruction is that, in effect, it assumed a controverted fact, and told the jury that under the conditions existing at the time the plaintiff was in a perilous position. This objection is well taken, and requires a reversal of the judgment. To say the least, the charge assumed that the plaintiff was in a perilous position at the time of the accident, and, as framed, it was equivalent to a comment upon the weight of testimony by the judge, which is prohibited by statute. On the other points we rule against appellant.

Judgment reversed, and cause remanded.

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GORMAN v. MINNEAPOLIS & ST. L. RY. CO.

(*Supreme Court of Iowa, April 12, 1902.*)

[90 N. W. Rep. 79.]

**Injury to Brakeman—Coupling Cars—Assumption of Risk.\***

Where a brakeman was told to uncouple a train of moving cars from the engine, and given directions as to how the work was to be done, and how best to avoid the danger incident to the transaction, he assumed the risk.

**Same—Same—Negligence.**

That the practice of cutting off the engine while the train was in motion was unusual on other roads did not show negligence on the part of the railroad company.

**Same—Same—Assumption of Risk.\***

That the directions and warning were given by the engineer, and not the conductor, did not affect the question of assumption of risk.

Appeal from district court, Kossuth county; F. H. Helsell, Judge.

After the hearing on the former appeal (78 Iowa, 509, 43 N. W. 303), the administrator, Robert Gorman, died, and his wife, Bridget Gorman, was appointed administratrix in his stead. Verdict and judgment against defendant, and it appeals. Reversed.

R. M. Wright, for appellant.

Geo. E. Clark, for appellee.

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\*See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

Gorman v. Minneapolis & St. L. Ry. Co

LADD, C. J. On the 23d day of December, 1885, the deceased was a brakeman on defendant's train which arrived at Luverne at about 6 o'clock in the afternoon. The crossing of the Chicago & Northwestern Railroad was about one-half mile to the northeast of the depot, and the water tank about the same distance beyond. To that the road was down grade; but after leaving it, up grade. When the switching had been done, and the train fairly started, moving at the rate of about four miles an hour, the deceased, under direction of the conductor, through another brakeman, in undertaking to "cut off the engine and stop the train for the crossing," pulled the coupling pin, and immediately, or shortly after the engine moved away, fell in front of the detached cars, and was killed. The object in cutting off the engine was to allow it to run on to the tank and take water, and then return to the train, which was to be stopped at the crossing. By this plan, instead of taking the entire train, with the engine, to the water tank, enough momentum could be acquired in the down grade from the crossing to that point to enable the engine to carry the cars up the grade beyond. But one ground of negligence was submitted to the jury, and the averment with respect to that was, in the words of the first instruction, "that the giving of said order by the conductor, under the circumstances as stated, was unnecessary and unusual, and constituted negligence, in requiring deceased to uncouple the train at said time, when said train was in motion." The circumstances referred to are those stated, together with the inexperience of the deceased, and the claim that the night was dark and cold. It is to be observed that the petition did not allege that the order was unusual, and the only evidence, in addition to that introduced at the former trial, was with respect to the method pursued being unusual and dangerous. As to whether it was usual to uncouple an engine from the train when in motion, pulling out of the station, the testimony was in conflict; but to do so in the yards, while switching, appears to have been common practice. The evidence established conclusively that the method pursued was that customarily followed by the defendant at that place. Though inexperienced, deceased was advised of this custom, and fully informed of what was expected of him by the engineer, within a few minutes before the work was undertaken. That this was by the engineer, instead of the conductor, can make no difference. *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Truntle v. Mills Co.* (Minn.) 58 N. W. 832; *Shearm. & R. Neg.* § 203. It was enough that he knew precisely what was to be done, and was fully instructed exactly how to do it. And as the work was to be performed in connection with that of the engineer, with whom signals were to be exchanged, it was appropriate that the explanation should come from him. It is idle to say he was not advised of the danger. To any intelligent person that was obvious, and was indicated

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in the instructions of the engineer, which, in part, may be set out: "I told him how to pull the pin. I told him that, on starting, not to try to pull the pin until I told him I was ready. I explained to him that he could not pull it until he got slack, or until I was ready for him to pull it. I says, 'Be prepared, and, when I was ready, pull the pin, and be careful and not halloo or give the signal to go until you are ready and safely secured on the car;' and I told him to take hold of the handle at the end of the car, and be sure he had a firm foothold of the handle on the end of the car before giving me the signal that he had the pin pulled." Regardless of whether the practice of cutting off the engine when about to leave the station was unusual on other roads, it was followed by defendant at this station; and, as said, the deceased knew precisely what was to be undertaken, and, though inexperienced, had been explicitly informed of the method to be pursued. Warned to be careful, instructed particularly how to do the work, and appreciating the danger, as he must have done if possessed of ordinary intelligence, as is to be presumed, he must be held to have assumed the risk, unless the doctrine of assumption of risk is to be entirely abandoned. The record does not differ materially from that presented on the former appeal. That the practice may have been unusual on other roads can make no difference. Unusual acts are constantly occurring. All progress involves undertaking something not tried before, and he who attempts it has cause of complaint only when not advised of the methods necessary for his protection, and the danger to be avoided. What was said in the opinion of the court on the former appeal, filed October 6, 1889, though the personnel of the court has entirely changed, must be regarded as decisive of the case. See *Gorman v. Railway Co.*, 78 Iowa, 509, 43 N. W. 303. This view renders it unnecessary to pass on the errors assigned in the rulings on the admissibility of evidence or the charge of the court.

Reversed.

BENCE *v.* NEW YORK, N. H. & H. R. R.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 3, 1902.*)

[63 N. E. Rep. 417.]

Injury to Employee—Car Left Too Near Switch.

Plaintiff, who was employed in the defendant railroad company's yard, while climbing up the side of a moving car was struck by another car left too near a switch. Plaintiff testified that he had never before seen the cars in the yard placed as they were when the accident occurred; that he had seen the yard master, who had authority over the yard employees, once or twice a week, in different parts of the yard, directing the placing of cars, but that many moves were made which he did not direct; that he would direct the placing of cars when he wanted them in particular places, but otherwise the men would place them on the tracks specified by the conductors, but without any special direction as to where to leave them on such tracks. It further appeared that, by the laws of the state where the



*Bence v. New York, N. H. & H. R. R*

accident occurred, defendant would be liable for the acts of employees exercising authority over others, but it did not appear what particular employee had left the car near the switch: *held*, that the evidence was insufficient to show that the misplacing of the car was due to the negligence of any one whose negligence was chargeable to defendant.

**Same—Same—Duty to Warn.**

Where an experienced railroad employee, thoroughly familiar with the yard in which he was working, was injured while climbing up the side of a moving car by being struck by another car left too near a switch, the fact that the company had not warned him of dangers of this kind did not charge it with negligence; there being no duty to warn him of what he already knew.

**Same—Same—Assumption of Risk.\***

An experienced railroad employee, who is thoroughly familiar with the yard in which he works, and knows that such yard is unusually overcrowded with cars, and that such condition is permanent, by continuing in the service, assumes the risk of dangers incident to the congested condition of the yard.

Exceptions from superior court, Suffolk county; **Franklin G. Fessenden, Judge.**

Action by one Bence against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

John W. Corcoran and W. B. Sullivan, for plaintiff.

Chas. F. Choate, for defendant.

**LATHROP, J.** This is an action of tort by a person who is described in the writ as of New London, in the state of Connecticut, against a Connecticut corporation, having a usual place of business in this commonwealth, for an injury sustained by him in Connecticut. We assume, for the purposes of the case, that the court has jurisdiction, and that the plaintiff is entitled to recover if he could have recovered in Connecticut. *Walsh v. Railroad Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514. We further assume that the plaintiff was in the exercise of due care.

The accident occurred in the defendant's freight yard at New London at 4 o'clock in the morning of November 6, 1895. In this yard were two main tracks, and east of them were three side tracks, numbered, respectively, 5, 6, and 7. There were also four other side tracks. Tracks 6 and 7 united at a switch and frog, and further along joined 5, and then ran into one of the main tracks. The plaintiff had been in the employ of the defendant for four years. During this time he had worked all around this yard and another one across the river. He was familiar with both yards, and was the most experienced man in the crew to which he belonged, except the conductor. For three years before the accident his work was at night. During the time he was at work in the yard there had been no change in the position of the tracks,

\*See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

although for the last two years before the injury all of the tracks had been very crowded, and there had been two switching crews at work night and day. The train on which the plaintiff was the rear man had backed down on track 7 to couple onto one or more cars. The conductor and the plaintiff were on the ground. The signal was given to start ahead. There was a ladder on the end of the last car, and grab handles on the side, and also a step. The conductor got on first. Then the plaintiff swung onto the step, and reached around and took hold of the ladder. While in this position we assume (although this is not very clear on the evidence) that he was struck by a car which had been left standing on track 6, too near the junction of the two tracks. The first count of the plaintiff's declaration goes upon the ground that the defendant was negligent in so leaving the car on track 6. At the trial the contention was that one Dunn, the yard master who had general charge of the yard, was the person thus guilty of negligence; and, to take the case out of the rule of fellow servants, it was contended that in Connecticut a servant who had control and direction over other servants was regarded as a vice principal, for whose negligence the general employer would be responsible. To prove the Connecticut law on this subject, the plaintiff put in evidence the cases of *Wilson v. Linen Co.*, 50 Conn. 433, 47 Am. Rep. 653; *Darrigan v. Railroad Co.*, 52 Conn. 285, 52 Am. Rep. 590; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Gerrish v. Ice Co.*, 63 Conn. 9, 27 Atl. 235; and the testimony of Mr. Waller, an attorney at law practicing in Connecticut. We do not think that Mr. Waller's testimony adds anything to what appeared in the cases put in evidence, for he testified: "I think that the law on this point is completely stated in those four cases. I think those four cases are the cases that constitute the Connecticut authority on this point." Nor do we deem it necessary to consider these cases at length. It is enough to say that they show that, while the rule of fellow servants prevails in Connecticut, one who exercises control over another is not regarded as a fellow servant, but as a vice principal. The question remains whether there was negligence on the part of Dunn. An examination of the evidence fails to disclose any. There is no evidence in the case to show who put the car that did the injury so near the switch that the plaintiff could not pass in safety, nor how long it had remained there. Nor does it appear that it was not placed there by one who in Connecticut would be regarded as a fellow servant. The plaintiff testified that, while the crowded condition of the yards existed, he never saw any cars the way they were then. So that it was not a customary thing to place cars on a side track so near another track that they would do injury. The plaintiff further testified: "He had seen Dunn once or twice a week in the different yards, giving directions about where

cars were to be moved. Of course, they were moving cars every day, and making a great many moves every day, and there were a great many moves of cars that Dunn did not direct at all. A great deal of the time the switching gang would place cars as the conductor said, or as the men left them. What Mr. Dunn did was, if he wanted particular cars placed in particular places, he would say so, or, if he wanted particular cars, he would say so. Other than these particular instances, the men would go about their work, doing it in the ordinary way they were accustomed to,—pulling cars in and pushing them out, making up trains, and moving cars about. In such a case as this, for instance, if the last car was cut off, and the plaintiff had ridden it down, he would have got some general direction from the conductor on what track it was going, and he would ride it down, and leave it in such place as he thought proper. That was the way the work was ordinarily done." On this evidence, we do not see how any negligence can be imputed to Dunn, and the plaintiff has failed to sustain his proposition that the placing of the car on track 6 was the direct result of the exercise of authority, and was not the act of a fellow servant. It is suggested that the case of *Dacey v. Railroad Co.*, 153 Mass. 112, 26 N. E. 437, governs this case. In that case it was said that from the testimony it might be inferred by the jury that the car which was left too near the junction of the two tracks, and which did the injury, was left there by some one in authority. In the case before us the evidence leaves it entirely uncertain whether the car was left too near the junction by one who was strictly a fellow servant, or by one in authority.

The second count charges the defendant with negligently and carelessly furnishing and providing a freight yard insufficient and inadequate in capacity, in allowing cars to stand too near the junction of intersecting tracks, and in not warning the plaintiff of the danger from such proximity of cars. Taking up the last two allegations first, there was no evidence that cars were allowed to stand too near the junction of intersecting tracks. The only evidence was that on this particular night a car was found so left. The plaintiff was an experienced man, and did not need to be told that if a car should be left too near the junction of the two tracks, and he should be on the outside of his car, he might be hurt. He knew this as well as any one. The first allegation of this count remains to be considered. Mr. Waller testified that the law of Connecticut required the company to furnish a safe place for an employee to work, and that in this respect he understood the law to be general in other states. This view of the law finds support in remarks made in some of the cases put in evidence, but we do not understand what is said as laying down any rule of law peculiar to Connecticut. The same rule has been stated here. It would seem however, that there is nothing in the evidence to warrant the jury in finding that

there was any peculiar danger in the permanent condition of the yard, or that the yard was laid out differently from other freight yards with main tracks and side tracks. While the cars were crowded, there was room left near the junction. Thus Loomis, a witness for the plaintiff, testified that, when he said that the tracks were "jam full all the time," he meant that they got them as full as they could possibly be; and he added: "They do that everywhere. They did it in this yard just as they did everywhere else, and handled cars in the same way." We have already noticed the plaintiff's testimony to show that the crowding of cars on track 6 was exceptional that night. If, however, we assume that there was some evidence of danger in the permanent condition of the yard, this condition had remained the same during all the time that the plaintiff worked there, and was known to him. If he chose to work there, knowing the permanent condition to be dangerous, he assumed the risk. In *Randall v. Railroad Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, it is said by Mr. Justice Gray: "A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things." This is the well-settled law in this commonwealth. *Combs v. Railroad Co.*, 156 Mass. 200, 30 N. E. 1140, and cases cited; *Fisk v. Railroad Co.*, 158 Mass. 238, 33 N. E. 510; *Goldthwait v. Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Thain v. Railroad Co.*, 161 Mass. 353, 37 N. E. 309; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500; *Austin v. Railroad*, 164 Mass. 282, 41 N. E. 288; *Content v. Railroad Co.*, 165 Mass. 267, 43 N. E. 94; *Vining v. Railroad Co.*, 167 Mass. 539, 46 N. E. 117; *Bell v. Railroad Co.*, 168 Mass. 443, 47 N. E. 118; *Dacey v. Railroad Co.*, 168 Mass. 479, 47 N. E. 418; *Ryan v. Railroad Co.*, 169 Mass. 267, 47 N. E. 877; *Whelton v. Street Ry. Co.*, 172 Mass. 555, 52 N. E. 1072. We find nothing to the contrary in the Connecticut cases; and, in the absence of evidence, the common law of that state must be considered the same as ours. This view of the case renders immaterial the offer of proof by the plaintiff, which was excluded, that the vice president of the defendant said at a hearing before the railroad commissioners, three months after the accident, when he asked for a right to condemn land, that the freight yard was, and had been for a long time, inadequate for the business of the railroad, and that the yard was dangerous, and had been in that condition for three years.

Exceptions overruled.

**BOWERS v. STAR LOGGING & LUMBER CO.***(Supreme Court of Oregon, April 14, 1902.)*

[68 Pac. Rep. 516.]

**Injury to Employee\*—Evidence.**

In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train, evidence that the brake had sometimes loosened up because of the dog's flying out of the ratchet while logs were being loaded on the cars, was admissible as tending to support plaintiff's contention that the dog failed to hold, permitting the brake to loosen, so as to knock him off his balance.

**Same—Instructions—Contributory Negligence.**

In an action to recover for injuries sustained by plaintiff while attempting to set a brake on defendant's logging train through the dog failing to hold, permitting the brake to loosen, so as to knock him off his balance, a requested instruction that if plaintiff, while attempting to set the brake, slipped and fell, defendant was not liable, was properly modified by adding, "unless such slipping was caused by the defective brake."

**Same—Failure to Instruct Servant.**

Plaintiff, while attempting to set a brake on defendant's logging train, lost his balance, and was run over and injured. Defendant's servants did not instruct him as to how he should do the work, nor were any of the dangers pointed out. He was about 18 years of age, and inexperienced. He set the brake once or twice while the cars were being loaded. When the train was coming to a downgrade, a servant of defendant ordered him to set the brake on the car. Plaintiff claimed that the dog failed to hold, permitting the brake to loosen, and knock him off his balance, causing him to fall under the train. Another servant of defendant testified that plaintiff seemed excited, and as he was backing along on the ties he tripped, and fell against the car, and the sand board caught him on the right arm, and rolled him over: *held*, that the evidence was sufficient to sustain a finding that defendant was negligent for having failed to properly instruct and warn plaintiff.

**Assumption of Risk.**

The evidence was sufficient to sustain a finding that plaintiff had not assumed the risk incident to the employment, the jury being warranted in finding that the dangers were not obvious to a person of his age and experience.

Appeal from circuit court, Columbia county; T. A. McBride, Judge.

Action by Curtis Bowers, an infant, by Daniel C. Bowers, his guardian, against the Star Logging & Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for a personal injury. The defendant is a corporation engaged in the logging business, and as a part of its appliances owns and operates a logging steam railroad. The cars or logging trucks are about 8 feet square, and consist of a solid frame supported by four wheels. On the top and center of the frame is a beam or bolster 10 inches square, which extends out about 2 feet from

\*On assumption of risk, see *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case. See also, generally, 5 Rap. & Mack's Dig. 126 et seq.

the frame on either side, and upon which one end of the logs rests; the other end resting on a similar car or truck. Each pair of wheels has a brake, similar in construction to that in use on street and ordinary railroad cars, operated by a chain attached to a perpendicular rod, which extends, at the corner of the car, about 6 or 8 inches above the frame, and is 5 or 6 inches below the top of the bolster. The brake is set by a horizontal crank or lever 18 inches long on the top of the brake rod, and is held in place by a ratchet and dog on the frame of the car. It is so arranged that it cannot be operated from the car, or by one riding thereon, but the operator is required to walk along the side of the moving train, reaching in with one hand to operate the brake lever, and with the other to adjust the ratchet and dog. On March 6, 1899, the plaintiff, who was about 18 years of age, and who had been working for the defendant a week or 10 days, was assigned to work on the train; and the next morning, while attempting to set the brake, fell or was thrown in front of the car, and his arm crushed so that it had to be amputated. The negligence charged is: (1) That the defendant, with knowledge that plaintiff was inexperienced, and unfamiliar with the duties of a brakeman on a logging train, or the dangers attending such work, negligently and carelessly directed him to act as one of the brakemen thereof, without giving him any notice of the danger, or cautioning him concerning the same; (2) that the brake which the plaintiff attempted to set at the time of the accident was defective and dangerous, in that the teeth of the ratchet and dog thereof were worn and out of repair, so that they would not hold the brake. The plaintiff had a verdict and judgment, and the defendant appeals, assigning as error the admission of certain testimony, the modification by the trial court of an instruction requested by it, and the overruling of its motion for a nonsuit.

Wirt Minor, for appellant.

T. J. Cleeton and A. B. Clark, for respondent.

BEAN, C. J. (after stating the facts). Thomas Day, the manager of the defendant corporation at the time of the accident, was called as a witness for the plaintiff, and after describing the use, construction, and operation of the cars used by the defendant on its logging road, and particularly the brakes and their attachments, testified that, as a general thing, the brakes were set when the cars were being loaded. He was thereupon asked to state whether he had ever seen the dog fly out of the ratchet, and the brake unwind, when logs were being loaded on the cars, and was permitted, over defendant's objection and exception, to answer: "In some two or three instances I have, in case of a big log, sudden jar of the car; when the big log happened to be the first log, the bar would cause the dog to go off. I have seen the dog go off, and the brake loosen up. This was in cases where the rolling

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could not see how he did the work, and was given no instructions by any one as to how to set the brake; that the evening before the accident the train was loaded, and the next morning started to the landing, and when it came to the grade, a short distance from the camp, Coleman told the witness to get down from the engine, where he was riding, and set the brake on the car next to the engine; and further stated that: "The brakes are fixed like they are on a street car, only they are straight, kind of right angle. And sometimes you have to take this dog and throw it in there. Sometimes it catches, but generally doesn't. The brake has a kind of ratchet, and I was winding this up, leaning over, walking pretty fast, as I had to, and I had wound it up about as tight as I could get it. I reached over to put the dog in to hold it there, and then the train, or the locomotive, was about going over the hill, and I saw they were going a little faster all the time, and I tried to put the dog in the ratchet to hold it, and I had it in, and when I let loose of it,—I thought it was about time for me to get out of there,—and I was leaning over the rail, and as I let loose of it, it went off of the catch, and as I started to jump the bunk or the end of the logs caught me in the back and threw me, and I fell over on the track and the pin caught me. \* \* \* I had set the catch in the ratchet, and it flew out and grazed my arm, and knocked me off my balance, and the end of the logs on the car caught me in the back and threw me." Mr. Coleman, who was in charge of the logging train at the time of the accident, stated, as a witness for defendant, that: "When we came to the place where we set the brakes, he [plaintiff] was supposed to set the brake there, and he said, 'All right,' and he jumped off to set the brakes. I told the engineer, 'This is a new man, and a green hand,' and to be careful and watch him, and he says, 'All right'; and he jumped off the engine, and went to set the brake. And I took particular notice of him, as this was the first time he set the brakes, and he seemed to be kind of excited, and he was backing along on the ties, and tripped himself, and fell against the car, and when he fell against the car he doubled himself up, and as he doubled himself up the sand board caught him on the right arm and rolled him over, and just as it caught him I hollered to the engineer to stop, and I jumped off the engine and ran, and just as I got there he was lying about three feet from the track."

Upon this testimony two principal questions are involved: (1) Whether there is evidence tending to show that the defendant is liable on the ground that it had not sufficiently explained to an inexperienced employee the ordinary dangers of the employment; and (2) whether, under the facts as disclosed by the testimony, the plaintiff assumed the ordinary risks of the service when he voluntarily entered upon the duties of a brakeman on the logging train. The law upon these questions is practically elementary, and the only difficulty is in

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applying it to the facts. The plaintiff was not necessarily negligent in obeying the orders or directions of the foreman, Day, nor did he necessarily assume the risks of the service because he accepted the employment. *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187. As a general rule, one who seeks employment in any particular line of business, or voluntarily enters the service of another in a particular employment, assumes the ordinary risks incident to such employment, and he cannot charge the master with the consequences of his own want of knowledge or skill, for the master may ordinarily assume that he is competent, and apprehends the danger of the service. 2 *Bailey*, Pers. Inj. 2710, 2721b; *Wood, Mast. & Serv.* § 326; *Kuhns v. Railway Co.*, 70 Iowa, 561, 31 N. W. 868; *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Hathaway v. Railroad Co.*, 51 Mich. 253, 16 N. W. 634, 47 Am. Rep. 569, 19 Am. & Eng. R. Cas., N. S., 714. But the application of this doctrine is subject to certain qualifications and limitations. It is the duty of the master not to expose an inexperienced servant, and one unfamiliar with the employment and risks attendant thereon to a dangerous service, without giving him warning of the danger, and instructions how to avoid it, unless both the danger and the means of avoiding it while he is performing the service required are apparent to the servant; and particularly is this true when the servant is ordered or directed to perform some service not contemplated in his original contract of employment. 2 *Bailey*, Pers. Inj. § 2264; *Wood Mast. & Serv.* § 350; *Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Rummel v. Dilworth*, *Porter & Co.*, 131 Pa. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827. Although this case, upon its facts, is very near to the border line, we are of the opinion that under all the circumstances it was the duty of the jury to apply these settled principles of law to the facts proven, and to determine whether the plaintiff knew or apprehended the danger of the service which he was directed to perform, and whether the defendant had sufficiently warned and instructed him about the danger of the business, and how to avoid it, or had done all that was reasonably necessary to protect him from injury. If the danger to which he was exposed was such an open and obvious one as that, considering his age, intelligence, and experience, he ought, in the exercise of reasonable care, to have known and appreciated it, then he assumed the risk by entering the service, and would not be entitled to recover for an injury received on account thereof. On the other hand, if the danger was not open and obvious to a person of his age, experience, and intelligence, then he did not assume the risk, unless he had been sufficiently informed of the danger. All these questions are so much involved in doubt that they were for the jury to decide, and could not be determined by the court as a matter of law. *Davis v. Railway*, 53 Ark. 117, 13



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S. W. 801, 7 L. R. A. 283; *Hughes v. Railway Co.* (Wis.) 48 N. W. 259; *Chopin v. Paper Co.*, 83 Wis. 192, 53 N. W. 452; *Wolski v. Knapp-Stout & Co. Company*, 90 Wis. 178, 63 N. W. 87. The testimony certainly tended to show that the position of brakeman on the logging train was a very dangerous employment, and had elements of danger that were not open and obvious to inexperienced persons. It at least required some experience to do the work safely. The plaintiff was a boy, inexperienced in that kind of work, and there is evidence tending to show that he was not adequately warned of its dangers.

The judgment must therefore be affirmed.

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MEXICAN CENT. RY. CO., Limited, *v.* TOWNSEND.

(*Circuit Court of Appeals, Fifth Circuit, April 22, 1902.*)

[114 Fed. Rep. 737.]

Injury of Brakeman—Negligence—Defective Car\*—Direction of Verdict.

Where, in an action by a brakeman to recover for injuries resulting from a fall from the top of a car, caused by the breaking of a running board, the evidence was conflicting as to whether the board was rotten or sound, and it appeared that the brace which supported the end of the board was loose, and hanging down, after the accident, but the evidence did not conclusively show that it was in that condition when the car was last inspected, or when it should have been inspected, it was error to direct a verdict for plaintiff, as the question of defendant's negligence should have been left to the jury.

In Error to the Circuit Court of the United States for the Western District of Texas.

The plaintiff (defendant in error here) was employed as a brakeman by the defendant (plaintiff in error). On the 9th or 10th of February, 1901, while so engaged in the service of the defendant company, the plaintiff, in the performance of his duties, was required to be on top of the defendant's train, and to go from one car to another. The running board on one of the cars on which the plaintiff was walking suddenly broke and gave way, and the plaintiff was thrown from the top of the car to the ground, and as he fell his left hand, arm, and wrist were caught under the wheels of the cars, and so mangled and bruised that it became necessary to amputate his hand about the wrist. D. S. McCurdy, a witness for the plaintiff, describes the condition of the car as he found it immediately after the accident: "We found the running board on one of the cars with about five or six feet broken off. Only one of the planks was broken. We examined this plank, and found it was dry rot and cross-grain board. We also found

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\**Pennsylvania R. Co. v. Snyder* (Ohio), 7 Am. & Eng. R. Cas., N. S., 769; *Yerkes v. Northern Pac. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 642; *Chicago & A. R. Co. v. Harrington* (Ill.), 23 Am. & Eng. R. Cas., N. S., 429.

that the brace was not attached to the end of the car and the end of the running board, but was hanging downward, and pushed to one side towards the right. The running board is composed of three pieces of plank nailed on the top of the car, and projects over the ends of the car. All of these pieces of plank compose the running board, and extend over the end of the car about eight inches. These boards are nailed on top of the car, and have a brace underneath the ends of the running board, which is fastened with a bracket to the side of the car and the projecting ends of the running board. When we examined this brace, we found it hanging downward to the right. This brace was detached from the end of the car and the end of the running board. We examined the end of the running board that was broken. It was broken or split off with the grain of the board for about six inches. I also examined the running board to see whether it was nailed or not. I only examined at the rear end. This end was nailed. The rear end was nailed. That would be about the center of the car. We also examined the drawheads between these two cars, and found the drawheads all right. \* \* \* The car was No. 1,423. \* \* \* The running board was broken off, and was dry rot, wind-shaken, or dry rot cross-grain. I mean by 'wind-shaken' the same as dry rot. I cannot explain dry rot except that it is dry rot. This was a dry rot board and also cross-grain. The grain went cross the board instead of straight. The plank did not have a hole rotted through it, but was just wind-shaken all through. It was dry rot all of the way through. You can see by looking at the end of the board. I found a dry rot through the end of the board that was left. The bracket was hanging down about six inches, and pushed to the right, and was loose on one end. The bracket was not on top of the car, but was on the end. It was loose from the end where the brace had come loose. There was nothing the matter with it except it was loose. I cannot tell exactly how many minutes it was after the accident until we examined this car. It was just as quick as we could get plaintiff into the caboose, and I could notify the engineer and fireman, when we made this examination." The condition of the car after the accident as described by this witness is confirmed by the evidence of Herman Baker and the plaintiff. Baker said: "I made a very careful examination of this piece of plank, because I wanted to see what caused it to break. The piece that was broken off was between four and six feet long, and at the place where it was broken it was somewhat decayed and rotten, and also seemed to be very old, and the end was freshly broken. I also looked at the top of the car, and saw where this piece of plank had been broken off. I think the running board was made of two or three boards laid together, but only one of the boards on the outside was broken. I think the car on which this board was broken was C. M. No. 1,423."

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Plaintiff, testifying himself, described the particulars of the accident and the condition of the car as he found it after the accident, and also testified to facts tending to show his suffering, the extent of his injuries, and the extent of his damages. C. E. Meyer, a witness for the defendant, testified as follows: "My business is car inspector for the Mexican Central at Torreon. I am acquainted with car No. 1,423, Mexican Central. It is a beer car. I do not know anything about when the car was overhauled. There is that board (pointing to the board on floor) that has been on it. I had something to do with the taking of that board from the car. That board came off of the left side of the car. There was no more of the board of the left-hand side of the running board than that. There are two lengths of boarding on the car. There are three boards on the car of that size. This is the one on the outside. That is the full length of it. I sawed that board in two. Complete, it would measure sixteen feet. The board is about eight foot six inches long. There is about seven feet six inches gone. I got that board about a month or five weeks ago. The car was at Torreon at that time, in cold storage, to be overhauled. (Witness examined board.) This board is not rotten. This is where it was turned up, so as to be exposed to the weather (indicating). This is the bottom. That is put on cleats. This part (indicating upper part) is turned towards the sun. There were three boards there when I took this off. The cleats of this board are just about two feet apart. Cleats are the pieces where the nails go. They were still there, and in good condition. Three boards still remained on the car. A board is five inches wide. Five inches width of board was still there when I took this off." Cross-examination: "I saw this car No. 1,423, just as I said, five or six weeks ago. It was about the 24th of July when I took that board off. I didn't see the car from the time of the accident until I took this board off, and didn't pay any attention to it. I took this board off at Torreon. It was taken back there. I believe that the company permitted this broken running board to be on the car from the 10th day of February until the 24th day of July, 1901. If Mr. McCurdy, the conductor, and Mr. Townsend, the brakeman, say that there were three running boards on there, they are mistaken. I do not claim to know this was the car Townsend was hurt on. I do not know whether I took that board from the car on which Townsend was hurt on or not. Mr. Cox told me to take it off. I do not know what position he occupies with the Mexican Central. I know that he is an official of that road. I cannot say exactly just what official he is. I do not know just exactly whether I had any orders to obey his request in taking that off or not. He came and asked me to take it off, and I took it off. Had you (to Patterson) asked me to take it off, I would have done so. I do not know who you are. This was a beer car, white painted on the sides,

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and the ends and roof were red. The running board was of the color red. I mean by 'cleats' the cleats under the running board. I mean the cleats were pieces that ran across the car, and this rested on it. The nails hold up the balance, but I took them off. The balance of the nail holes are the same now as when I took it off the car. The cleat was in the bottom, and these boards were then just like I took them off the cleat. (The boards are shown to the jury). I have been in the railway service since 1881. I have had considerable experience with cars. It is the only thing I have had to do since that time. About seven and a half feet were gone from this. It extended over the end of the car six inches. If there was a high car, and a man would jump down on it, it might split. A couple of jumps might crack it, and it might open a little. A brace under the end would have a good effect. It would have a good effect for a man to jump here as on there (indicating with reference to table). If a cleat had been there, and a man stepped on it there, it would have been solid. It could not have been broken there. The effect the nails would have on the solidity of the board would be its strengthening. It might not be broken if it was properly nailed down. Stepping on the end wouldn't break it. If I tried to make a pretty good jump, it might strike it, and break it. If I were over on this car, and jumped over, it would not break it. Jumping there (indicating) might break it. If the brace were off, it would not interfere much with the board; at the same time, it might break the board." Redirect examination: "The last cleat is about two inches from the end. There is four feet between the bracket and the end of the car. There are four feet between these brackets." Recross: "I am car inspector. On the Mexican Central it is the duty of the car inspector to inspect the box cars. Q. If this running board came over six inches— Had this been taken out on top, and this cleat braced under it, could a Mexican Central car inspector have seen it? A. Yes, sir. He is there to look at it. That car laid up there about two weeks or ten days. If I didn't find anything the matter with the car, I made no record of it. I did not inspect it from the day before the accident until the 24th of July. That is something I did not do. I did not say the 24th day of July was the day upon which I first saw it. I said I took the board off on that day. I had inspected it before. Those beer cars came there every ten days or two weeks. I have been inspecting this car on and off for the last year. I could not say how many times I inspected it from the 9th of February until I took this off. I inspected that car between the day of accident and 24th of July, and reported it in good order. There are a whole lot of these cars. Anything is safe to run when there is no danger of getting hurt. Anything unsafe to run we report. I considered that running board just as safe as if a new running board was on there, when I took

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it off. Between February and the time I inspected it, I saw this running board, but didn't notice it before. The chances are I noticed it, and did not. Had I noticed it, I would have considered it safe to run. I didn't see it from the time of the accident until I took it off. The chances are I might have looked over it. If there are two side tracks, I go on one train and look at other. If there was a cleat, and that was the end of the car, or the end of the board, and this was two or three inches higher than the car (indicating), and it was even, I would consider it safe. The end would be about two inches higher than top of the car. The inside would not be quite so much. Saying this (indicating) is the top of the car, this (indicating) would be two inches higher than the top of the car. That is considered as good pine. Now, if a man jumped from one car to the other, although braced, it would crack. It would break at the rotten or weak place, if properly nailed down. So far as I could see, the board was well nailed. Some inspector might have taken the nails out. I might have taken them out myself. A nail sticking out as this was would be safe. It would be safe two inches above the top of the board. The whole board is about two inches higher than the top of the car. I have been caught lots of times. I either drive them down or pull them out. You will find that the widths of most of the running boards are from 12 to 14 and 16, and 18 and 20, some of them. A good many are not wider than 12. When the strips remained, the running board at that place was fifteen inches." The court instructed the jury to find a verdict for the plaintiff for such damages as he sustained by reason of the injuries which he suffered, to which charge the defendant duly excepted. The jury found a verdict for the plaintiff for \$13,800, and a judgment was thereon rendered.

T. A. Falvey and Waters Davis, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the facts, delivered the opinion of the court.

In determining the question whether it was proper to give peremptory instructions in favor of the plaintiff, we must look at the case as it appears from that part of the evidence which is most favorable to the defendant; for we must concede to the defendant anything which it could fairly claim from the evidence. It had the right to ask the jury to believe the evidence that was favorable to it. When a party asks for peremptory instructions in his favor, he must concede all that his opponent may fairly claim from the evidence presented. When a passenger sues the carrier, proof of an accident carries with it a presumption of negligence on the part of the carrier. But a different rule prevails

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in a suit by an employee against the employer. The accident in the latter case carries with it no such presumption. The employee is required to prove the negligence of the employer. *Patton v. Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. The evidence unquestionably shows that immediately after the accident the brace that was intended to support the end of the running board was down. The evidence on the part of the plaintiff also shows that the board which was broken was wind-shaken, cross-grained, and rotten. The evidence on the part of the defendant tended to show that the board broken was sound. There is no conflict, however, in the evidence that the brace or support at the end of the board was loose, and hanging down, when the car was examined after the accident. It appears to us that from the condition of the car either one of two conflicting inferences might have been drawn: The jury might infer that the brace became loose and came down since the last inspection of the car, and at or about the time of the accident; or they might infer that it was for some time—probably a few days—in this condition, with the brace misplaced as described by the witnesses who saw it immediately after the accident. If it was in such condition at the time when the car was or should have been inspected, it would clearly have been negligence in the inspector not to discover and report the defect. On the other hand, other inferences might be made if the car was inspected the day before or shortly before the accident, and the brace was in place, and the part of the running board which broke was sound, and sufficient for the purposes for which it was used; or, if unsound and weather-shaken, it was covered with paint, and the defect hidden, so that it was not perceptible or discoverable by proper inspection. From the fact that the brace was hanging down and misplaced when the accident occurred, the jury might infer that it was in that condition at the time when an inspection was or should have been made. But this inference seems to us, from the facts, not compulsory. A contrary inference is not irrational. The evidence tends to show that an inspection was made before the accident,—probably the day before the accident. Although the witness was examined, cross-examined, and re-examined, he is not asked in what condition he found the car. He does say though, in reference to a later inspection, "Anything unsafe to run we report;" and, as we understand the evidence, this car was not reported. A piece of board was in evidence before the jury. The evidence of the witness producing it tended to show that it was a part of the board which had been broken at the time of the accident; not the part broken off, but the part left on the car at that time. The witness producing it testified that it was sound; that it was not wind-shaken or rotten. If unsound, whether it was so painted as to cover the defects from sight or inspection is left uncertain. It appears, however, to have been painted, but it is left to inference

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whether it was in such condition that on the day before the accident a proper inspection would have discovered the defects in it, conceding it had defects. It might have been inferred that the defect was perceptible and long-existing; but, to sustain the instruction given the jury, that alone is not sufficient. It must also appear that no other inference was reasonable; that is, to sustain the instruction given, the evidence must be such that no other inference but that of negligence of the defendant could be reasonably drawn from the facts in evidence. The evidence altogether, as presented in the bill of exceptions, is amply sufficient to authorize a jury to make such inferences as would justify a verdict for the plaintiff, yet we are constrained to say that it is not such as to justify us in saying as matter of law that no reasonable inference could be drawn from it except that of the negligence of the defendant. The evidence in the record tends strongly to sustain the inferences drawn from it by the learned trial judge, but we cannot hold that the jury could have made no rational inference to the contrary, and we are therefore constrained to decide that the case, on proper instruction, should have been submitted to the jury.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

## BIRMINGHAM SOUTHERN R. CO. v. CUZZART.

(*Supreme Court of Alabama, April 23, 1902.*)

[31 So. Rep. 979.]

## Injury to Employee—Pleading.

Code, § 1749, subd. 2, gives an employee an action for damages for injury from negligence of an employee who has superintendence intrusted to him, and subdivision 5 gives such action for the negligence of an employee who has charge or control of an engine: *held*, that a complaint alleging that an employee "who was in charge and control and superintendence of defendant's engine" negligently moved it, injuring plaintiff, clearly alleged charge of an engine, and was not demurrable as indefinite, and as attempting to join the two causes of action.

## Same—Pleading—Evidence.

Where a complaint against a master alleged that "a coupling pin was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted on plaintiff, his right eye being permanently impaired, disfigured, and injured, and from which plaintiff has suffered great mental and physical pain and anguish," the clause "and from which plaintiff has suffered," etc., referred back to the averment as to the pin striking him; and plaintiff's testimony that from this blow he suffered pain was competent.

## Same—Disease\*—Judicial Notice.

In an action for personal injuries, one alleged result of which was weak and inflamed eyes, it was not error to exclude questions asked plaintiff on cross examination, as to whether members of his family

\**Texas & P. R. Co. v. Bowlin* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 387.

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did not have weak eyes, as the court could not take judicial notice that the disease might be inherited, but evidence to that effect should have been offered.

**Same—Same—Cause of Injury—Instructions.**

Where, in an action for personal injuries, a physician testified that the inflamed and weak condition of plaintiff's eyes was not the result of the blow received by him, but resulted from granulation of the lids, but plaintiff testified that it resulted from the blow, it was not error to refuse to instruct that if the jury believed that plaintiff's trouble consisted of a granulation of the lids they could not find for him.

**Same—Earning Capacity\*—Instructions.**

In an action for personal injuries it was not error to refuse to instruct that plaintiff had been able since his injury to earn approximately as much as before, even if the evidence was without conflict to that effect.

**Same—Damages—Instructions.**

An instruction that "the jury, in considering the evidence as to the extent of plaintiff's injuries, can consider, along with all the balance of the evidence, the fact, if it be a fact, that plaintiff went to work three days after the accident, and continued to work till last Saturday. This must be considered by the jury along with all the other evidence,"—was properly refused, as the instruction gave undue prominence to a single fact.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by James P. Cuzzart against the Birmingham Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action brought by the appellee, James P. Cuzzart, against the Birmingham Southern Railroad Company, to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. In the complaint the plaintiff claimed \$8,000 damages, and it was averred that at the time of the accident complained of the plaintiff was in the employ of the defendant as a switchman, it being his duty, under such employment, to couple cars together and couple defendant's locomotive to cars. The complaint then averred as follows: "That while plaintiff was so engaged in the performance of his duty, and standing upon the footboard of defendant's engine, ready to couple a car thereto, when said car should be reached, defendant's engineer, one Ike Veitch, who was in charge and control and superintendence of said engine, negligently moved the said engine at a very high, extraordinary, and dangerous rate of speed up to and against a car on the track of defendant,

\*Goodhart v. Pennsylvania R. Co. (Pa.), 5 Am. & Eng. R. Cas., N. S., 364; Storrs v. Los Angeles Traction Co. (Cal.), 22 Am. & Eng. R. Cas., N. S., 704; Central of Georgia Ry. Co. v. Perkerson (Ga.), 12 Am. & Eng. R. Cas., N. S., 63; note, 12 Am. & Eng. R. Cas., N. S., 292; Louisville & N. R. Co. v. Woods (Ala.), 11 Am. & Eng. R. Cas., N. S., 872, and note appended; Wimber v. Iowa Cent. Ry. Co. (Iowa), 23 Am. & Eng. R. Cas., N. S., 476; Chicago, etc., Ry. Co. v. Hoover (Ind. Ter.), 23 Am. & Eng. R. Cas., N. S., 73; Jeffries v. Seaboard Air Line Ry. Co. (N. Car.), 23 Am. & Eng. R. Cas., N. S., 339.



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whereby a coupling pin in or on said car was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted upon plaintiff, his right eye being permanently impaired, disfigured, and injured, and from which plaintiff has suffered great mental and physical pain and anguish." The defendant demurred to the complaint upon the following grounds: "(1) For that there is a misjoinder of actions, in this: that plaintiff seeks to join in the same count actions under subdivisions 2 and 5 of section 1749 of the Code; (2) for that said complaint is uncertain and indefinite, in that it does not allege or show whether the plaintiff relies on an action under subdivision 2 or subdivision 5 of section 1749 of the Code; (3) for that said complaint alleges that the accident complained of resulted proximately from the negligence of one who had superintendence intrusted to him, but it does not allege or show that the act or negligence complained of was committed whilst in the exercise of such superintendence." This demurrer was overruled, and the defendant duly excepted. Thereupon the defendant pleaded the general issue and a special plea, setting up the contributory negligence of the plaintiff. The undisputed evidence showed that at the time of the accident the plaintiff was in the employment of the defendant as a switchman, and it was his duty to assist in switching the cars and to couple and uncouple the cars to one another and to the engine; that he was riding on an engine that was moving towards a car for the purpose of making a coupling with it, which coupling was to be made by the plaintiff; that when the engine and car came together, the coupling pin flew out and up and struck the plaintiff on the frontal bone, just over his right eye. The plaintiff, as a witness in his own behalf, testified that the result of the accident was the practical loss of his right eye from this lick. The other evidence for the plaintiff tended to show that the engine was running at an unusual rate of speed, and struck the car with which the coupling was to be made very hard, and with a great deal of force, and that this blow was the cause of the coupling pin flying up and hitting the plaintiff. It was also shown by the undisputed evidence that the plaintiff returned to work for the defendant three days after the accident, and worked for the defendant about 2 months thereafter at the same wages; that after leaving the employment of the defendant he worked with other companies, and had been continuously employed up to a few days before the trial, and that the plaintiff had earned approximately the same wages after the accident as before it. Dr. S. L. Ledbetter, as a specialist in diseases of the eye, testified that he had examined the plaintiff, and that the condition of the plaintiff's eye was not caused by the blow received from the coupling pin; that the plaintiff's eyes were diseased, but that the disease was caused from granulation of the lids. Dr. J. C. Berry, a practicing physician, testified

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that he dressed the wound of the plaintiff when he was hurt in the accident for which the suit was brought; that the wound was a small laceration above the eye in the edge of the eyebrow; but that the eye was hurt in no way by the blow received. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe all the evidence in this case, they must find a verdict for the defendant." (4) "The court charges the jury that, under the evidence in this case, they cannot find a verdict for plaintiff for any alleged injury to his eye." (6) "If the jury believe from the evidence that the trouble to plaintiff's eye consists of granulation of the lids and a flattening of the eye, and a cloudiness of the cornea of the eye, then they cannot find a verdict for plaintiff on account of any alleged injury to his eye." (7) "The court charges the jury that in this case the evidence shows that the plaintiff, since the accident happened to him, has been able to earn approximately as much money, by his work, as he did before the accident." (8) "The court charges the jury that even if they should find a verdict for the plaintiff, they cannot allow him any damages on account of any inability on his part to earn as much money now or in future, as he was able to earn before the accident." (9) "The court charges the jury that in this case the evidence shows that plaintiff is able to earn as much money now as he was earning before the happening of the accident." (10) "The court charges the jury that, in considering the evidence in this case as to the extent of the injuries received by the plaintiff, they can consider, along with all the balance of the evidence in the case, the fact, if it be a fact, that plaintiff went to work three days after the accident, and continued to work till last Saturday. This must be considered by the jury along with all the other evidence in the case." There were verdict and judgment for the plaintiff, assessing his damages at \$750. The defendant moved the court for a new trial, upon the ground that the verdict of the jury was excessive; that the verdict was contrary to the evidence; and that the evidence in the case was not sufficient to support the verdict. This motion was overruled. To this ruling the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Smith & Weatherly and E. D. Smith, for appellant.

Arthur L. Brown and Sumter Lea, for appellee.

McCLELLAN, C. J. There is no merit in the demurrer to the complaint. An averment that A. "was in charge and control and superintendence of said engine," is no more than to aver that he was in charge of the engine; and the aver-

ment is supported by evidence that A. was the engineer operating the engine at the time in question. There was such evidence here. The court was, therefore, not in error, either in overruling the demurrer or in refusing the general charge request by defendant on the theory that the complaint averred one thing and the evidence went to prove another in this connection. The complaint alleges that, by reason of certain stated negligence of the engineer, "a coupling pin was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted upon plaintiff, his right eye being permanently impaired, disfigured, and injured, and from which plaintiff has suffered great mental and physical pain and anguish." The clause "and from which plaintiff has suffered," etc., naturally refers back to the averment as to the pin striking him with great force near the eyes. Plaintiff's testimony that from this stroke of the pin he had suffered pain in having headache a great deal, and in having had pains darting through his head in the region of the eyes, was relevant to the case so presented by the complaint, and was properly received.

The plaintiff testified that since the hurt described in the complaint his eyes, or one of them, had, in consequence, been inflamed and weak. The theory of defendant was that this condition had existed before the injury was received. On cross-examination of the plaintiff, counsel for defendant propounded these questions to him: "State whether your father or mother, or some of your brothers and sisters, have got weak eyes?" and, "State whether your father has not got eyes that are inflamed and weak?" The court sustained an objection to each of these questions. Very high authority,—none other, indeed, than the Good Book itself,—is cited by counsel for appellant in support of his exceptions to these rulings of the court. They say: "There is no truer saying in the Bible than that the sins of the fathers shall be visited upon the children unto the third and fourth generations. This is a law of heredity, promulgated by the Almighty, and is known of all men." We have acquaintance with this sacred text; but we are not prepared to admit its application in the premises here. We do not know that inflamed or weak eyes is a sin within its terms, nor are we prepared to say that these infirmities have customarily such a descendible quality as that proof of them in the sire accounts for their existence in the son. The matter lies beyond our judicial ken. If the fact be as counsel insist it is in this connection, there should have been evidence of it. We do not judicially know it to be a fact. We do not think the city court erred in its rulings on the questions.

The sixth charge requested by the defendant proceed on the assumption of the absolute truth of the testimony of Dr. Ledbetter and the absolute correctness of his opinion as to the causes of the condition of plaintiff's eyes. There was other evidence,—that of the plaintiff himself,—in conflict with his

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as to the causes of the condition in question, and the giving of this charge would have denied the jury's undoubted right to find in line with such other evidence.

Charges 7, 8, and 9 were properly refused to the defendant. The court was under no duty to tell the jury that the plaintiff has been able since his injury to earn approximately as much money as he did before, even if the evidence was without conflict to that effect. And there was evidence tending to show that he could not now earn as much as he did before the injury.

Charge 10, refused to the defendant, is bad for singling out and giving undue prominence to a particular fact of which there was evidence, and the infirmity is not relieved by the direction for this fact to be considered "along with all the balance of the evidence in the case."

We are not prepared to say that the verdict of the jury is so plainly against the weight of the evidence or unsupported by the evidence that a new trial should have been granted by the city court.

Affirmed.

#### DAVIS v. ATLANTA & C. A. L. RY. CO.

(*Supreme Court of South Carolina, April 8, 1902.*)

[41 S. E. Rep. 468.]

#### Accident at Crossing—Injury to Employee Off Duty.\*

Where a fireman in the employ of a railway company is excused from his duties by his superior officer, and while attempting to cross a track at a public crossing is injured, he occupies the relation of one of the public, and persons in control of the train owe him the same duty as that owing to one of the public.

#### Same—Same—Question for Jury.

Whether a railroad fireman was at the time of an accident at a public crossing in the active employ of the company, or a member of the public, is a question for the jury.

#### Evidence.

Where a witness knows the width of a street, he may testify as to that fact without the introduction of the town map.

#### Accident at Crossing—Liability for Negligence of Lessee.

Where a railroad is sued for injuries at a public crossing, evidence that it was at the time of the accident operated by another as lessee, and that the person injured was in the employ of the lessee, and not of defendant, is inadmissible.

#### Same—Width of Crossing.

It is proper, in an action for injuries at a railroad crossing, to submit to the jury the question as to the width of the crossing or traveled place.

#### Same—Signals†—Negligence Per Se.

Under Rev. St. § 1692, providing that if a person is injured at a

\*See generally, 3 Rap. & Mack's Dig. 459 et seq.

†As to failure to obey statutory requirements as to signals, see *Georgia Railroad & B. Co. v. Clary* (Ga.), 11 Am. & Eng. R. Cas., N. S., 856, and note at end of case collecting authorities for and against the proposition that it constitutes negligence per se. See also, *Tessmer v. New York, N. H. & H. R. Co.* (Conn.), 15 Am. & Eng. R. Cas., N. S., 164; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 42; note, 15 Am. & Eng. R. Cas., N. S., 173; note, 10 Am. & Eng. R. Cas., N. S., 518.

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railroad crossing, and the railroad company fails to give the statutory signals, it shall be liable, unless the person injured was guilty of willful negligence contributing to the injury, failure to ring the bell or blow the whistle when approaching a crossing is negligence per se.

**Gross Negligence.**

An instruction that gross negligence implies the utter want of caution or care, amounting to recklessness, and a complete disregard of the care a man owes himself, is not misleading.

**Same.**

In an action against a railroad company, it is not a charge on the facts to say, "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation."

Appeal from general sessions circuit court of Greenville county; Buchanan and Benet, Judges.

Action by Lula M. Davis, administratrix of Joseph D. Davis, against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cothran & Cothran, for appellant.

Haynesworth, Parker & Patterson, for appellee.

POPE, J. This action came on for trial before his honor Judge Benet and a jury. Verdict for the plaintiff. After entry of judgment, defendant appealed to this court. The grounds of such appeal may be thus classified: First, alleged error of Judge Buchanan in overruling certain grounds of defendant's demurrer to the original complaint; second, alleged erroneous rulings of Judge Benet in refusing to allow the admission of certain testimony offered at the hearing before him by the defendant; third, alleged errors in the charge of Judge Benet to the jury. We will consider these groups of grounds of appeal in their order.

1. Did Judge Buchanan err in refusing to sustain the defendant's demurrer to the original complaint on two grounds, while he sustained it on the second ground? The first and third grounds of demurrer were as follows: "(1) That the deceased intestate was employed as a fireman upon the train which ran over him. His duty was upon the engine, and the employees operating said train did not owe him the duty of giving the statutory signals before moving said train, as alleged. (3) That the deceased was employed as a fireman upon said train. He was one of the crew, and the employees operating said train did not owe him the duty of keeping an outlook upon said backing train." These can scarcely be called vital questions, for leave to amend the complaint was granted when the second ground of demurrer was sustained. As to whether a fireman should necessarily remain on the engine, or immediately about it, was not the question of this cause. A fireman or other servant can be excused from immediate duty for a short time, or until he is needed about his business as fireman, by his superior officer. It was not alleged in the complaint that the intestate was run over by

defendant's train while he was on his engine, or immediately about it, but that he was run over by the train of defendant at a public crossing, without giving the signals required by the statute. As soon as the order requiring the amendment to the complaint was made, and acquiesced in by the defendant, the plaintiff's cause of action was clear-cut. It became an issue as to a traveled place and the absence of statutory signals. With the amendment allowed to be made in the complaint, and that, too, upon defendant's demurrer, these grounds of appeal lost all their vitality. They are overruled.

2. (a) Was it reversible error when the circuit judge allowed the witness W. H. McClure to answer plaintiff's question as to the width of the street where the accident occurred? Defendant insists the map of the town was the best evidence. No map of the town of Westminster had been offered in evidence. The practical judgment of this witness as to the width of the street was evidence for what it should be considered worth by the jury. This exception is overruled.

(b) Was it reversible error in the circuit judge when he refused to allow the witness for defendant, W. A. Vaughan, to testify as to what company owned and controlled that local freight train, No. 63,—the one which is alleged to have struck Mr. Davis, the intestate? The complaint alleged and the answer admitted that the defendant was a corporation created under the laws of this state and that it is the owner of the railroad described in the complaint. What relevancy was there in the question presented to the issues raised by the pleadings by the parties to the litigation? None whatever. If the defendant was incorporated under the laws of this state, and was the owner of its railroad, the corporation known as the Southern Railway Company could only occupy the tracks of said Atlanta & Charlotte Railway Company as lessee, or by defendant's consent, and what benefit to the latter would result from the lease of its roadbed to the Southern Railway Company? Under the decision of the supreme court of South Carolina in the cases of *National Bank of Chester v. Atlanta & C. A. L. Ry. Co.*, 25 S. C. 222; *Harmon v. Railroad Co.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686; *Parr v. Railroad Co.*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826, re-enforced by the decision of the United States supreme court in the case of *Railroad Co. v. Brown*, 17 Wall. 450, 21 L. Ed. 675, it is established law that: "When a railroad or other corporation receives its charter from the state, conferring certain franchises, rights, and privileges, it is upon the consideration that such corporation shall perform the duties and fulfill the obligations which it at the same time incurs. The fact that the corporation chooses to perform those duties and fulfill its obligations to the community through another, whether by lessee or otherwise, cannot release it from the obligations it has assumed by the acceptance of its charter." Such being the law, the testi-

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mony sought to be introduced was irrelevant, and was properly excluded. This exception is overruled.

(c) So, also, when the defendant sought to have its witness W. A. Vaughan answer the question, "Did the Atlanta & Charlotte Air Line Railway Company own, operate, or control the train which is alleged to have struck Mr. Davis?" the circuit judge properly refused to allow such testimony to be given, under the very law we have set forth in subdivision "b." This exception is overruled.

(d) Also when the defendant sought to have its witness W. A. Vaughan to answer the following question: "Did the Atlanta & Charlotte Air Line Railway on the 17th January, 1900 [the date of the intestate's injury], operate local freight train No. 63, which is alleged to have struck Mr. Davis?" Again: "At that time was Mr. J. D. Davis [the intestate] an employee of the Atlanta & Charlotte Air Line Railway Company?" Again: "At that time was Mr. J. D. Davis employed as a fireman by the Atlanta & Charlotte Air Line Railway Company?" The circuit judge committed no error, for the reasons hereinbefore given. These several exceptions are overruled.

(e) Was it error for the circuit judge to rule as follows: "The court rules out all testimony intended to show that the train of cars which committed the alleged injury was not owned or operated by the defendant company, but by some other corporation. Also all evidence tending to show that at the time of the alleged injury the Atlanta & Charlotte Air Line Railway Company was operated by some other corporation. Also all evidence tending to show that the deceased was not an employee of the Atlanta & Charlotte Air Line Railway Company at the time that he (J. D. Davis) is alleged to have been killed." The grounds of exception being set forth above, as "a," "b," and "c," under exception 4, subdivision 2. We think the views we have hereinbefore expressed fully sustain the rulings of his honor the circuit judge, and hence we overrule this exception.

(f) It is alleged that the circuit judge erred in ruling out the pay checks issued; such checks having been issued to the intestate, J. D. Davis, in his lifetime, and one after his death to his widow, the plaintiff, by the Southern Railway Company. Under the views we have hereinbefore announced, such testimony was very properly ruled out.

(g) We will consider now under this subdivision (g) what we ought to have noticed at the beginning, namely, the motion for a nonsuit. Certainly it is now the established law in this state that, when there is any relevant testimony tending to establish plaintiff's cause of action, it is error for the circuit judge to withdraw the trial of the case from the jury. We agree with the circuit judge that there was some legal testimony offered by the plaintiff before she closed her case,

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and, that being so, it was not error in the circuit judge to decline to grant the nonsuit asked for by the defendant.

3. We will now consider the alleged errors of the circuit judge in his charge to the jury. The appellant alleges the grounds of such errors as follows:

"The presiding judge erred in charging the jury as follows: 'You have heard the testimony as to the width of the traveled place on each side of the railroad track, and you are to say what is the width of the traveled place crossing the railroad track.' The error consisting in this: It was a violation of article 5, § 26, Const. 1895, to state that there was testimony as to the width of the traveled place.

"(2) The presiding judge erred in charging the jury that they could consider the width of the street or traveled place on both sides of the railroad, in determining the width of the crossing. The question to be decided was what was the width of the crossing as actually used.

"(3) The presiding judge erred in charging the jury that the deceased may have been off of the portion of the crossing actually used, and yet be entitled to the protection and benefits of the statute, if he was within the imaginary lines crossing the railroad, projected from the side lines of the street or traveled place; it being submitted that the crossing referred to in the statute means only the portion of the railroad bed actually used for traveling.

"(4) The presiding judge erred in charging the jury as follows: 'The form of the complaint shows that the plaintiff is suing on the ground that Davis was about to cross the railroad track as any other private individual, and not as a railroad employee. Not that he, as a fireman, in the discharge of his duty as a fireman, was killed, but that he, as a private individual, was crossing the railroad track, and that he was entitled to the protection of the railroad law just as much as any one else.' The error consisting in this: The complaint is based upon the theory that, while Davis was employed as a fireman, he had occasion to go upon and cross the track; that while he was so employed he was entitled to the protection of the signaling statute. It nowhere claims that he was acting as a private individual, and, as such, entitled to the protection of the statute.

"(5) The presiding judge erred in charging the jury as follows: 'Now, was Davis killed at a railroad crossing, and was the freight train at a standstill within 100 rods from the crossing, and did the railway company fail to ring the bell or sound the whistle for thirty seconds before moving, and that they failed to ring the bell or sound the whistle until after it passed the crossing, and after the injury was caused by that neglect? Now, if all these matters have been proven, and nothing else appears, then the railway is clearly liable.' The error consisting in this: (a) It holds the defendant liable upon proof that Davis was killed at a railroad crossing, and that the



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defendant failed to give the statutory signals, whereas it is not liable unless Davis is shown to have been upon the crossing and using it for the purpose of crossing from one side to the other; and it must further appear by the evidence that the failure to give the signals contributed to the disaster. (b) The action being under the statute which creates an exceptional liability, all the essential incidents referred to in the statute must appear. There can be no presumption that the failure to give the signals caused or contributed to the disaster, upon proof simply that no signals were given, and that the collision occurred.

“(6) The presiding judge erred in charging the jury as follows: ‘But when you come to speak of gross negligence, that implies the utter want of caution or care, amounting to recklessness and a complete disregard of the care a man owes himself.’ The error consisting in this: (a) ‘Gross negligence’ does not imply the absence of all care. (b) ‘Gross negligence’ is not the equivalent of recklessness. The terms are essentially different, and it was error to confuse them. (c) It was error to cast upon defendant the burden of showing the gross negligence of the deceased to a degree amounting to recklessness.

“(7) The presiding judge erred in charging the jury as follows: ‘I feel confident that you will not be influenced by the fact that the railroad company is a rich corporation.’ The error consisting in this: (1) There is no evidence that the defendant is a rich corporation. (2) It was a charge upon the facts, in violation of article 5, § 26, Const. 1895.

“(8) The presiding judge erred in charging the jury as follows: ‘If you come to the conclusion that he (Davis) was not there as fireman, not working around his train as a fireman, but as a representative of the public, intending to cross, or about to cross, that railroad at the crossing, that is a question of fact for you. You will have to determine whether he was acting as a fireman at the time, or whether he was acting as a private individual,—as any other private individual.’ The error consisting in this: The jury were limited to the alternative that Davis was either acting as fireman at the time, or was a member of the public. The charge fails to recognize the fact that he might have sustained the relation of employee without being engaged actively in the duties of fireman, and, if so, he was not entitled to the benefit of the statute.

“(9) The presiding judge erred in modifying the defendant's seventh request to charge. The request was as follows: ‘An engineer and fireman are, while employed in the ordinary duties of their respective positions, fellow servants; and, if upon the same engine or train, the railroad company employing them is not liable in damages for injuries resulting to either from the negligence of the other. If, therefore, the jury believe from the evidence that the deceased was a fireman, and was injured by reason of the negligence of the engi-

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neer of the train upon which he was working, they must find a verdict for the defendant.' The modification was as follows: 'That would be the law if the evidence satisfies you that the deceased was killed while he was working about the train as a fireman,—as a fellow servant; but if he was off duty, as a private individual, intending or attempting to cross, then this statute would not apply.' The error being the same as in the preceding exception (8).

"(10) The presiding judge erred in charging the jury as follows: 'So, gentlemen, what are the questions of fact which you are to decide in this case? First, was the railroad company guilty of negligence in failing to give the signals as required by law when Davis was killed? If so, is the railroad company liable for damages? If so, it would be liable if Davis was himself not guilty of negligence. It would be liable, then, if Davis was guilty of ordinary negligence.' Thus assuming one of the most essential questions in the case,—whether Davis was in a position to claim the benefit of the statute."

We have long since announced that, when we come to consider the charge of a circuit judge, we but deem it fair that he should be judged by all that he has said, and not by fragments thereof; hence we will reproduce the entire charge, which is as follows:

"The trial of this case commenced on Wednesday forenoon, and this is now Saturday morning, and it may seem that the case has taken considerable time to develop the testimony and hear the arguments; but a case of this kind necessarily requires the consumption of a good deal of time, and we congratulate you, gentlemen, on the patience and attention you have paid to the trial. I ask you now to give close attention to the charge. I have no doubt you have been greatly aided by argument of counsel.

"You will remember that the trial began by the reading of the complaint and the answer, and those pleadings show you the points involved in the trial. It may be well to refresh your memory as to what are the real issues involved. The plaintiff, Lula M. Davis, brings this action as administratrix of the estate of her deceased husband, J. D. Davis, suing the Atlanta & Charlotte Air Line Company for \$20,000 damages, which she says the company is liable for in negligently causing the death of her husband. She sues for herself and her young daughter, Ruby. The complaint shows that it is brought under our railroad law, spoken of as the 'Signaling Law,' which I will read to you. [Read section 1685, Rev. St.] I have read you only that part of the section which peculiarly applies to this case. Now, section 1692, Rev. St., provides: [Read.] Those are the portions of the signaling statutes on which this complaint is brought. The complaint charges that the deceased was upon the highway, on the railroad crossing, or was in the act of passing from one side

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of the railroad track to the other, and while doing so the freight train of the defendant company was backed towards the crossing, and that the railroad company failed to ring the bell or sound the whistle as required by law before moving the train or after moving the train, and that on account of such negligence, no warning being given,—no signal being given,—the deceased, while on the railroad crossing, on the highway, for the purpose of passing from one side of the railroad track to the other, was bruised and mangled, and that the injury resulted in his death. The railroad company answers all of the allegations in the plaintiff's complaint, and alleges that, under the circumstances attending the death of Davis, he (Davis) was guilty of gross negligence, and that such gross negligence contributed to the injury complained of. So, gentlemen, you are to determine now, after having heard all of the testimony and the argument, whether the allegations have been made good by the proof, or whether there is a failure of proof sufficient to justify a verdict for the plaintiff, notwithstanding the negligence of the railroad company,—whether the deceased was guilty of contributory negligence. If he was guilty of contributory negligence, she could not recover, even though the railroad company had been negligent. I am glad that this case has been remarkably free from any abuse of railroad corporations. There is no doubt that railway corporations have great powers and privileges conferred upon them by the state, and it is also a fact that they have great duties and responsibilities to the public devolving upon them, not only as passengers traveling on the railroad trains, but the public on the highways, which cross their track; and among the duties which they owe to the public is the very important duty to observe the signaling law,—to give the signals; to ring the bell after a moving train is moving, and about to approach that crossing. There is no doubt that these two sections that I have read make it more difficult for the railroad company to make out its defense than if it was brought at common law for negligence. The statutes make it more easy for a plaintiff to make out a case, yet I am bound to charge you that this is a very important law, and the people of the country have the right to move backwards and forwards in vehicles, or on horses, or on foot, and perhaps these highways are as important, or more so, than the railroads. In the construction of railroads, fields and crops may be run over, upon sufficient compensation given; yet in exercising that great power they have to observe the law, and give the proper signals in crossing railroad crossings. Even with statutes upon our books, people are killed at railroad crossings, and property injured, such as cattle, horses, etc. The basis of this action is that the railroad company failed to comply with the signaling statute. That is the basis of the plaintiff's action. That Davis was killed, and that he was a fireman. The form of the complaint shows that the plaintiff is suing on the ground that

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Davis was about to cross the railroad track as any other private individual, and not as a railroad employee. Not that he, as a fireman in the discharge of his duty as a fireman, was killed, but that he, as a private individual, was crossing the railroad track, and that he was entitled to the protection of the railroad law just as much as any one else. If you come to the conclusion that he was not there as a fireman, not working around his train as a fireman, but as a representative of the public, intending to cross or about to cross that railroad at the crossing, that is a question of fact for you. You will have to determine whether he was acting as a fireman at the time, or whether he was acting as a private individual,—as any other private individual. You will have to determine whether he had the right to be off duty or not,—whether he was there by permission of his superior or not. You will have to determine from the testimony whether he was there as a fireman or as a private individual.

"There is one allegation in the complaint that that train backed without any outlook on the back of the train. If there is any evidence on that point before you in that case that there was no outlook on the engine or on the train, you will not regard that testimony. Such allegation I regard as surplusage, and not to be considered. The action is brought on the statute as to signaling. Now, the complainant must make out her case, before she can recover anything, by a preponderance of the evidence,—the greater weight of the evidence. And when the railroad company puts up the defense that his death was caused by contributory negligence, the railroad company is to make that out by the preponderance of the proof. So far as the negligence is concerned, the statute explains (that which I have read to you) that the whistle shall be sounded or the bell rung for thirty seconds before the standing train moves, and kept on sounding until the engine or cars have passed at that place. If you are satisfied by the preponderance of the testimony that that train was standing still within 100 rods of the crossing, and that it moved towards the crossing without the sounding of the whistle or the ringing of the bell for thirty seconds before moving, and that it came to that crossing without ringing the bell or blowing the whistle, then the negligence charged, if that has been proven to you, has been made out negligence per se. That would be negligence in itself. But if the deceased was guilty of negligence, that requires more explanation. Negligence is the want of due care, ordinary negligence is the want of ordinary care. Negligence may be shown by acts done, or by leaving undone which should have been done. The doing that which should not have been done by a man of ordinary prudence and intelligence and caution would be negligence. So, also, leaving undone by a man of ordinary prudence and intelligence and caution that which should be done would be negligence. There is no fixed rule,—no hard, fast rule of neg-

ligence. Each case must furnish its own. But when you come to speak of gross negligence, that implies the utter want of caution or care, amounting to recklessness, and a complete disregard of the care a man owes himself,—as where a man recklessly exposes himself to danger; such conduct as will amount to gross or willful negligence, showing an utter disregard to a duty to himself to take care of himself; and if you are satisfied by the preponderance of the evidence that Davis was guilty of gross negligence, even if the railroad company failed to ring its bell or blow its whistle as the statute required, the plaintiff could not recover, and you would have to find for the defendant company. The railroad company claims that the deceased contributed to his own death. That is for you to say.

“So, gentlemen, what are the questions of fact which you are to decide in this case? First. Was the railroad company guilty of negligence in failing to give the signals as required by law when Davis was killed? If so, is the railroad company liable for damages. If so, it would be liable if Davis was himself guilty of negligence. It would be liable, then, if Davis was guilty of ordinary negligence,—a mere lack of the want of ordinary care; but it would not be liable if Davis was guilty of gross negligence. When there is sufficient proof that the railroad company has neglected to ring the bell or sound the whistle as required by law, and some person is injured at a highway, street, or traveled place, or crossing, and a person is injured by negligence on the part of the railroad company, the railroad company would be liable; but that may be overcome by proof that the person so injured was guilty of gross negligence. Now, was Davis killed at a railroad crossing, and was the freight train at a standstill within 100 rods from the crossing, and did the railway company fail to ring the bell or sound the whistle for thirty seconds before moving, and that they failed to ring the bell or sound the whistle until after it passed the crossing, and after the injury was caused by that neglect? Now, if all these matters have been proven, and nothing else appears, then the railway is clearly liable. But, as the statute says, unless it be shown that he was guilty of gross or willful negligence, it would not be liable. As to the railroad crossing, the allegation being that he was killed at the crossing (upon the crossing) while attempting to cross from one side of the railway track to the other: It is hard to give a definition of a ‘railway crossing,’ but it is sufficient to say that it may or it may not be limited to any plank or wood work that would be placed there. It depends upon the testimony in the case,—in this case, what the width of that railway was. You have heard the testimony as to the width of the traveled place on each side of the railroad track, and you are to say what is the width of the traveled place crossing the railroad track. There is no law limiting the crossing to any planking that may be there on the railway track, but it

depends upon the testimony in the case as to what it is. If there was evidence in this case that this was a highway, street, or traveled place, then you will ask, what was the width of that well-traveled street or traveled place there at that railway crossing? Then you will say whether or not, when Davis was struck and killed, he was or was not on the railroad crossing. That is for you to say from the testimony. The language of the statute is 'at the crossing.' That does not mean near the crossing or near by, but upon the crossing; but what the crossing is in this case, you must determine from the testimony. It is left for you entirely to say whether the crossing in this place was all covered with plank, or partly covered with plank, and the width of the crossing. You are to say from the testimony which you have heard. The complaint alleges that Davis was upon the highway at the crossing for the purpose of passing across the railroad track, from one side of the railroad track to the other, on the highway, or traveled place or street, upon the railroad track. With regard to the question as to who are entitled to the protection of those signals, it has been held that the law does not intend it for the protection of bystanders, or people about there not intending to cross, but for persons intending or attempting to cross at the crossing, and upon the crossing at the time he was struck. All of that is for you to say from the testimony, and you will say whether or not Davis was a bystander at the time he was struck, not intending to cross, or whether or not he was intending or attempting to cross.

"I will now take up the requests to charge of the defendant. The first six having been withdrawn, and also from No. 16 to the last, I will begin by reading to you No. 7: '(7) An engineer and fireman are, while employed in the ordinary duties of their respective positions, fellow servants, and, if upon the same engine or train, the railroad company employing them is not liable in damages for injuries resulting to either from the negligence of the other. If, therefore, the jury believe from the evidence that the deceased was a fireman, and was injured by reason of the negligence of the engineer of the train upon which he was working, they must find a verdict for the defendant.' The Court: That would be the law if the evidence satisfies you that the deceased was killed while he was working about the train as a fireman,—as a fellow servant; but if he was off duty, as a private individual, intending or attempting to cross, then this statute would not apply. '(8) This action is brought under sections 1685 and 1692 of the Revised Statutes. The requirements of the statute relate only to ringing the bell or sounding the whistle. The statute does not require a lookout upon a backing train.' The Court: That is the law. '(9) The action cannot be maintained except upon proof of failure to ring the bell or sound the whistle as required by the statute. The plaintiff cannot recover upon proof of any other act of negligence. She can-

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not recover upon proof of failure to keep a lookout upon a backing train.' The Court: I have charged you that already, and charge you that as the law. '(10) The object of the statute requiring such signals to be given is to prevent collisions which might occur between persons attempting to cross the track of a railroad and the locomotive or cars approaching the crossing at the same moment. The provisions of the statute do not include, nor was the statute intended to include, injuries inflicted upon bystanders not intending to cross, and not upon the crossing, or using it to pass from one side of the track to the other.' The Court: I charge you that. '(11) It is incumbent upon the plaintiff to establish by the preponderance of the evidence that the deceased was actually in the street upon the railroad crossing at the time he received the injuries complained of, and attempting to use the crossing for the purpose of passing from one side of the track to the other.' The Court: I so charge you. '(12) If the jury believe from the evidence that the deceased was not in the street upon the railroad crossing at the time he was first struck by the train, they must find for the defendant.' The Court: I so charge you. '(13) If the jury believe from the evidence that the deceased was in the street and upon the railroad at the time he was injured, but that he was not attempting to pass thereon from one side of the track to the other, they must find for the defendant.' The Court: I so charge you, because, if a person happens to be standing upon a railroad crossing, —just standing there,—then the statute does not apply to him. The statute is intended to apply to those who are intending or attempting to cross, but not to bystanders not intending or attempting to cross from one side of the track to another. '(14) If the jury believe from the evidence that the deceased was guilty of gross negligence, and that such gross negligence contributed to the disaster, in the sense of having some share or agency in bringing it about, they must find for the defendant.' The Court: I so charge you. '(15) The gross negligence of the deceased, to relieve the defendant from liability, need not be the proximate or efficient cause of the disaster. It will be sufficient to relieve the defendant if it contributed to the accident, in the sense of having some share or agency in bringing it about.' The Court: That is the law. It means that if the gross negligence on the part of Davis was not the proximate cause of his death, but if it had a share in bringing it about, then that would relieve the company of liability.

"Now, as to the damages: The amount demanded is \$20,000, and you are to say from the testimony as to whether or not, if entitled to damages, she is entitled to no more than that. In considering the case, you are not limited to pecuniary loss,—money loss,—but you are to give such damages as you think appropriate, with the loss of the life of Mr. Davis to his wife and child. If you come to the conclusion

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that the plaintiff is entitled to a verdict, you may give any amount, not more than \$20,000, which you may think—judging from the testimony—which you may think she and her daughter have sustained, in proportion to the loss of the husband and father. You may ask how much loss the widow has sustained, if any, and how much loss the daughter has sustained, if any. Then you will say how much. Nothing in the nature of punitive or vindictive damages can be considered. They do not enter into the case at all.

"Now, gentlemen, there is the law of the case. The evidence which you have here is for you, and the law as given you by the presiding judge must control you in applying the evidence to the law, and in considering the law in the case. The law is for the court, and the evidence is entirely for you. Your verdict will be based upon the truth you have found in the testimony which you have here. If you come to the conclusion that Mrs. Lula Davis is entitled to a verdict, I feel confident that you will not be influenced by the fact that the railroad company is a rich corporation, but you will try this case, and find your verdict just as though you were trying a case between A. and B., and your verdict will be based upon the facts in the case. Now, you will see upon the back of the complaint a former verdict for the plaintiff in the sum of \$10,000, but that was set aside by the presiding judge. I know not, and you know not, why the judge set that verdict aside. You will not let that verdict influence your decision in this case at all, but you are to find your verdict according to the evidence in the case here now on trial. If you believe that the plaintiff has made out her case, that the railroad company was negligent, and that that negligence consisted in not observing the requirements of the statute, you will find for the plaintiff. But if Mr. Davis was guilty of contributory negligence, you will then find for the defendant. If he contributed to that extent by his own gross negligence, then you will find for the defendant. If you find for the plaintiff, say, 'We find for the plaintiff' so much damages; writing your verdict out in words, and not in figures. If you find for the defendant, say, 'We find for the defendant.' "

The first three exceptions relate to what the charge of the judge was on that subject. What the judge did say was this: "It is hard to give a definition of a 'railway crossing,' but it is sufficient to say that it may or may not be limited to any plank or wood work that would be placed there. It depends upon the testimony in the case,—in this case, what the width of that railway was. You have heard the testimony as to the width of the traveled place on each side of the railroad track, and you are to say what is the width of the traveled place crossing the railroad track. There is no law limiting the crossing to any planking that may be there on the railroad track, but it depends upon the testimony in the case as to what it is. If there was any evidence in this case that this



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was a highway, street, or traveled place, then you will ask what was the width of that well-traveled street or traveled place. \* \* \* The language of the statute is 'at the crossing,' \* \* \* but what the crossing is in the case, you must determine from the testimony. \* \* \* It is left for you entirely to say whether the crossing in this place was all covered with plank, or partly covered with plank, and the width of the crossing. You are to say from the testimony which you have heard." Thus it is manifest that the circuit judge left it to the jury to determine, under the testimony, what were the dimensions of this crossing on which or near which the deceased lost his life. Defendant's counsel, in the case for appeal, said: "I admit it is a street crossing, but I do not admit that it is an extension of a sixty-foot street; and, if they want to establish a sixty-foot street at that point,—at that crossing,—they must show it in the regular way." The circuit judge and jury heard this admission made by appellant's counsel. It is patent, therefore, that there was a question as to the width of the traveled place; that is, the width of the crossing. Hence, there could have been no impugning of the mandate of the constitution forbidding circuit judges to charge upon the facts, thus far, certainly. These grounds of appeal are overruled.

We will now consider the fourth ground of appeal. In effect, it complains that the circuit judge, in his general charge, pointed out that the action of the plaintiff was intended to be brought as a private citizen, as distinguished from as a fireman. Unless the circuit judge had explained to the jury, in the construction of the pleadings, that such was the action in the case at bar, their minds would have been confused as to the doctrines of the law as to fellow servants, or, in other words, the breach of the obligation between master and servant. It is true, the plaintiff's complaint had laid stress upon the fact that the intestate was upon board of the engine as a fireman, yet it did not allege that, when the collision occurred on the crossing, the intestate was there in the performance of his duties as a fireman. It is more likely that the allegation of the complaint referring to J. D. Davis as a fireman on the train which subsequently took his life was intended to negative the idea of his being a bystander or an idle spectator. Undeniably, the issue was presented by plaintiff, and accepted by defendant, that the intestate lost his life on a crossing while not in the performance of his actual duties as fireman. It was not contended that, under the orders of the master, the servant, as such, was attempting to cross the railroad at a traveled place or street crossing. On the contrary, the duties required by the master of this servant were as a fireman on the engine which carried that local freight train. Hence, how could this language affect the issue injuriously to the defendant? Not at all. It seems to us that the language of the circuit judge was intended to bring the

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issue to the view of the jury clearly and distinctly. This exception is overruled.

The next question is the fifth exception. The appellant does not press this part of its exception: "It holds the defendant liable upon proof that Davis was killed at a railroad crossing, and that the defendant failed to give the statutory signals, when it is not liable unless Davis is shown to have been upon the crossing, and using it for the purpose of crossing from one side to the other." But appellant presses with all his might the proposition "that, the action being under a statute which creates an exceptional liability, all the essential incidents referred to in the statute must appear. There can be no presumption that the failure to give the signals caused or contributed to the disaster, upon proof simply that no signals were given, and that the collision occurred." We have examined with great care the argument of appellant intended to establish this proposition. In it the appellant admits that it is in direct opposition to the principle announced in *Strother v. Railroad Co.*, 47 S. C. 381, 25 S. E. 273, to wit: "When the defendant violates the requirements of the statute as to ringing the bell or sounding the whistle, and a person is injured by its locomotive while crossing a highway, street, or traveled place, it will be presumed that such negligence caused the injury, unless the testimony shows that the injury was caused in some other manner." The language of section 1692 of our Revised Statutes of 1893 is as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this article, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." The question as to the liability of the railway corporation when it neglects to give the statutory signals, either by sounding the whistle or ringing the bell, before reaching a crossing, and a collision thereafter occurs between the engine or cars of a railway corporation and a person on such crossing, has been before this court in several cases, viz.: *Hankinson v. Railroad Co.*, 41 S. E. 1, 19 S. C. 206; *Strother v. Railroad Co.*, 47 S. C. 381, 25 S. E. 272; *Wragge v. Railroad Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870. And in each one of these cases it has been held that, the moment it is established by the testimony that the railroad corporation neglected to give the statutory signals before reaching a crossing on which a person was injured, negligence per se was established against the railway corporation. Such

corporation, then, had devolved upon it the duty, in order to relieve itself of the consequences of its neglect, to show that the person injured, in addition to the mere want of ordinary care, was guilty of gross or willful negligence, or was guilty of an unlawful act which contributed to the injury. When critically examined, it will appear that the decisions just cited are bottomed upon the language of the statute itself. The statute law of our state has thus pointed out to railway corporations the effect of their negligence to observe the signal laws of the state. It may be said that the laws of evidence in this state have been changed so as to meet the exigencies of the disregard of law by railway corporations. Therefore, however ingenious the argument of appellant in opposition to this view may seem, it is opposed to several of our decided cases. As was remarked by Chief Justice McIver in the case of *Hankinson v. Railroad Co.*, at page 19, 41 S. C., and page 214, 19 S. E.: "The rule, as we understand it, is that the province of the judge is to give the jury a definition of the term 'negligence,' or 'gross negligence.' \* \* \* Of course, exceptions to this general rule may be, and have been, established by statute,—as, for example, that the failure of a railroad company to ring the bell or blow the whistle within a prescribed distance before the train reaches the crossing of any public highway, etc., shall of itself constitute sufficient proof of negligence." So in *Wragge v. Railroad Co.*, *supra*, the chief justice carefully pointed out that the meaning to be attached to the word "contributed" was to convey the idea as to such act of the railway company in not blowing its whistle or ringing its bell, when such act had some share or agency in producing such result. The fact that some other courts or text writers may take a different view of the phraseology employed by our legislature in providing this section 1692 may be regretted, but such a difference cannot control this court. We must adhere to the previous rulings of our court on this subject, and, inasmuch as Judge Benet was governed by our decisions, he is upheld. Let this exception be overruled.

The next question is presented by the sixth exception viz., that the circuit judge erred when he charged the jury: "But when you come to speak of gross negligence, that implies the utter want of caution or care, amounting to recklessness and a complete disregard of the care a man owes himself." When the language of the circuit judge is carefully considered, keeping in mind that he is addressing his remark to a clear-headed, honest-hearted, and practical-minded set of jurors, no fear need be felt that his words were misapprehended by the jury. We can imagine words which might have been used by the circuit judge that would better express his meaning. Still, taking his charge as a whole, the jury was not misled as here complained of. This exception is overruled.

We will now consider the seventh exception. Here it is alleged that the circuit judge erred when he said: "I feel confident that you will not be influenced by the fact that the

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railroad company is a rich corporation." The motive of the circuit judge in the use of this language was to lead the jury to the utmost fairness in the trial of the cause. Sometimes a few words, fitly chosen, in the presence of the jury, are very effective in causing them not to be governed by passion or prejudice or hasty judgment,—to give every litigant his rights under the law. We cannot view with disfavor the words of the judge. The exception is overruled. If there was no testimony, it certainly was not a charge upon the facts.

The eighth exception relates to the charge of the circuit judge as set out in the exception. It is complained that he narrowed the employment of the intestate by the railroad to that of fireman. There certainly was no contention that he was aught else than a fireman or a private individual. The charge must be practical. It was this, for it certainly pointed out the limits to the inquiry by the jury. We see no error here. The circuit judge left it to the jury to say, under the testimony, what the status of the intestate was at that crossing. This exception is overruled.

The last inquiry but one is, was it error in the circuit judge to modify defendant's request? which was: "An engineer and fireman are, while employed in the ordinary duties of their respective positions, fellow servants, and, if upon the same engine or train, the railroad company employing them is not liable in damages for injuries resulting to either of them from the negligence of the other. If, therefore, the jury believe from the evidence that the deceased was a fireman, and was injured by reason of the negligence of the engineer of the train upon which he was working, they must find a verdict for the defendant." His honor said: "That would be the law if the evidence satisfies you that the deceased was killed while he was working about the train as a fireman,—as a fellow servant; but if he was off duty, as a private individual intending or attempting to cross, then this statute would not apply. It is claimed that the error committed by the judge is as pointed out in exception 8, viz., that the circuit judge narrowed the employment of the deceased by the railroad to that of fireman. Certainly, as we remarked in passing upon exception 8, the deceased was only charged with being a fireman. The very language of the request places the deceased in the position of a fireman on the train. This exception is overruled.

The last inquiry is involved in the tenth exception. The language complained of is set out in the exception itself. The whole charge is reproduced. It appears that the judge covered the whole case in his charge. This language is only a small part of the charge, and could not have prejudiced the defendant.

It is the judgment of this court that the judgment of the circuit court is affirmed.

GARY, A. J., concurs in the result.

TEXAS & P. RY. CO. *v.* RUTHERFORD.*(Court of Civil Appeals of Texas, March 22, 1902.)*

[68 S. W. Rep. 825.]

**Fires Set by Locomotives—Evidence of Other Fires.\***

Where an action against a railroad company for setting a fire is tried to the court, the admission of evidence of another fire at a different place is not reversible error, as it will be assumed that the court discriminated between legal and illegal evidence.

**Same—Same.**

In an action against a railroad company for setting a fire, evidence that there was a fire on its side track, just north of the place in question, about a month before, is admissible as showing want of care in failing to keep the track free from combustible materials, and in failing to use proper appliances to prevent the escape of fire.

**Same—Combustibles on Right of Way.**

In an action against a railroad company for setting a fire, where several witnesses testified that corn shucks and Spanish nettles were scattered over its right of way, a finding that the shucks and nettles were allowed to accumulate and remain thereon was sustained.

**Same—Same.**

Where the evidence shows and the court finds, in an action against a railroad company for setting a fire, that the company allowed corn shucks and Spanish nettles to accumulate and remain on its right of way, it is immaterial whether the evidence sustains a finding that the nettles caught and held the shucks.

**Same—Same—Sufficiency of Evidence.**

In an action against a railroad company for fire set, evidence that the engineer "seemed to pull it [the engine] wide open," and that it appeared to be using all the steam it had, was puffing continuously, and running faster than usual,—about 25 to 30 miles an hour,—and that cinders were falling near the place where the fire started, was sufficient to support a finding that the engine was negligently managed.

**Same—Contributory Negligence—Storing in Barn.**

The owner of a barn adjoining a railroad right of way, on which the company has allowed combustible materials to accumulate, is not guilty of contributory negligence in storing hay in the barn.

Appeal from district court, Lamar county; Ben. H. Denton, Judge.

Action by J. C. Rutherford against the Texas & Pacific Railway Company for damages caused by a fire alleged to have been set by defendant's engines. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman and Head & Dillard, for appellant.

W. F. Moore and Sturgeon & Stone, for appellee.

BOOKHOUT, J. On August, 25, 1899, appellee's hay barn, worth \$300, with 125 tons of hay therein, worth \$750, were burned, and on February 27, 1900, he instituted this suit against appellant, alleging that it negligently caused the fire which did the burning. A trial before the court on October 8, 1901, resulted in a judgment in favor of appellee for \$1,183.52½, from which this appeal is prosecuted, appellant

\*See notes at end of case.

having given notice of appeal, filed supersedeas bond, and assigned errors in compliance with our statutes and rules of court.

#### Conclusions of Fact.

On and prior to August 25, 1899, the appellant owned and operated a line of railroad through the town of Petty, in Lamar county, said road running about east and west. Just south of appellant's main line it maintained a switch, and south of this switch appellee owned  $1\frac{1}{2}$  acres of land, upon which he had erected a barn, in which were stored 125 tons of hay; the barn itself being worth \$300. Upon its right of way appellant had permitted corn shucks and Spanish nettles to accumulate and remain. Said shucks and nettles were dry, and very combustible. On said 25th day of August, 1899, a freight train operated by defendant's agents and servants passed the town of Petty at an unusual and unsafe rate of speed, which caused sparks to escape from its engine, setting fire to the shucks and nettles upon its right of way, and said fire was communicated to appellee's barn, which, with its contents, was totally destroyed, whereby he sustained damages in the amount found by the judgment. Appellant was guilty of negligence in permitting combustible material to gather and remain on its right of way and in operating its engine at a negligent rate of speed, which negligence was the proximate cause of the fire and injury. In deference to the finding of the trial court we find that the engine was not equipped with the proper appliances for arresting sparks.

#### Opinion.

Complaint is made of the admission by the court of the testimony of the witness Wilkerson "that a week or two before the fire in question there was another fire on defendant's right of way, about fifteen or twenty feet east of this one, in the shucks around these barns." The objection to this testimony was that it was irrelevant and immaterial. The objection was overruled, and the evidence admitted. The action of the court in admitting the testimony presents no reversible error. There was sufficient competent evidence to support the judgment, and the admission of this evidence could not have affected the result. The case was tried by the court without a jury. The trial court must have discriminated between the evidence which was legal and the evidence which was not, and based his judgment on the legal evidence. First Nat. Bank of Greenville v. Greenville Oil & Cotton Co. (Tex. Civ. App.) 60 S. W. 828; Melton v. Cobb, 21 Tex. 539. It is contended that the court erred in admitting the testimony of the witness Dillinger "that about a month before the fire in question he saw a fire on the side track just north of the Wooldridge barn, and that the engineer and fireman put it out." This evidence was objected to as being irrelevant and immaterial, which objection was overruled, and the testimony

admitted. This evidence was admissible to show that the officers and agents of the company were not careful in keeping the right of way free from combustible matter, and also as tending to show that all of the appliances used to prevent the escape of fire were not used on the engines of defendant. *Railway Co. v. Donaldson*, 73 Tex. 124, 11 S. W. 163.

It is contended that the court erred in finding from the evidence that the shucks thrown out by persons who shucked the corn accumulated on defendant's switch track. This contention is without merit. The appellee testified: "There were lots of hay, straw, and shucks scattered over the side-track. Had been there for years." It was stated in the statement of facts that the testimony of the witnesses Vaughan and Law was substantially the same as that of appellee as to the condition of the shucks upon the track. Hicks Johnson testified: "The land along where the switch is, and south of the switch, was in a pretty bad fix. It had shucks, hay, and weeds upon it." Wilkerson testified: "There were Spanish nettles around there also, growing thick. Some were live and some dead." Again, he testified: "There was a good deal of shucks, hay, and weeds around these barns and the track at the time of the fire." We conclude that the evidence was sufficient to justify the finding that corn shucks and Spanish nettles were permitted by appellant to accumulate upon its right of way and remain there, and that the same were combustible.

Complaint is made of that part of the court's finding to the effect that weeds and nettles "would catch and did catch and hold the shucks that were thrown out of said buildings." We think it immaterial, under the evidence, whether the same was sufficient to authorize the finding embraced in the quotation. There is evidence which inferentially supports the finding. The evidence shows that there were dry weeds, known as "Spanish nettles," upon appellant's right of way where the fire originated. The court found that the shucks accumulated on the defendant's right of way between said building and the seed house, and on said right of way north of both of said buildings up to and on said defendant's side switch, and that this was the usual condition of said right of way at said place for several years prior to said date. The evidence and the finding of the trial court show that corn shucks and Spanish nettles accumulated and were permitted to remain on defendant's right of way, and, in view of this finding, it is immaterial whether the nettles "would catch and hold the shucks that were thrown out of said buildings."

It is contended that the court erred in finding from the evidence that the employees of the defendant were guilty of negligence in running and operating the engine at the time the fire occurred. One of the witnesses testified that: "I saw the train switching down west, and it then coupled up, and passed through, going east on the main track. It was about

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300 yards west when it coupled up and started out. The engineer seemed to pull it wide open, and turn it 'go.' It appeared to me it was using all the steam it had. I last saw it just east of the depot, between the depot and the barn. They are from 100 to 125 yards apart. I heard the engine puffing unusually hard continuously. It was running faster than it usually does out of there. It was 4 or 5 minutes after this I saw the fire." The witness Graves testified: "I was standing on the side of the railroad, not more than 6 or 8 steps, when the train passed. The train was moving pretty fast,—about 25 or 30 miles per hour. It was running faster than they ordinarily run there. I don't know that it was making any noise. It was smoking like it was running very hard. I don't know how long it kept up. It was acting that way when it passed me and passed on through. That is what drew my attention, and I noticed cinders falling on the ground." Again, he testified: "It was about 20 feet from the main track due south to the Wooldridge barn. That is where I was when I saw the cinders falling, and it was north of the barn where I saw the fire burning." The evidence was sufficient to authorize the court to find that the defendant was guilty of negligence in running and operating its engine at the time and place of the fire. We think that the evidence further shows that such negligence was the proximate cause of the fire which destroyed plaintiff's property, and in deference to the findings of the trial court we so conclude.

Complaint is made of the findings of the trial court that defendant was guilty of negligence in permitting its right of way to get in a dangerous condition as regards fires from passing trains. It is contended that the shucks which accumulated on the right of way were material from appellee's barn and from the Wooldridge barn, which had been thrown out and accumulated on the right of way, and it is contended that appellee was guilty of contributory negligence in storing his hay in his barn under the circumstances. These contentions are without merit. The appellee's barn was on his own premises, and he was making a lawful use of the same. The contentions insisted on are decided against appellant in the cases of *Rutherford v. Railroad Co.* (Tex. Civ. App.) 61 S. W. 422, and *Railroad Co. v. Wooldridge* (Tex. Civ. App.) 63 S. W. 905.

Finding no reversible error in the record, the judgment is affirmed.

## NOTES.

## FIRES SET BY RAILROAD LOCOMOTIVES—ADMISSIBILITY OF EVIDENCE OF OTHER FIRES.

## I. Evidence of Origin of Fire.

## 1. Fires Set by Same Engine.

- a. In General.
- b. Subsequent Emission of Sparks by Same Engine.
- c. Similar Conditions.



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- d. Absence of Evidence against Particular Engine.
- e. Distance to Which Sparks Were Thrown.
- 2. Fires Set by Other Engines.
  - a. In General.
  - b. Prior Fires.
  - c. Other Fires during Same Summer.
  - d. Distance to Which Sparks Were Thrown.
  - e. Qualifications of Rule—Time.
    - Similar Conditions.
  - f. Engine Not Identified.
  - g. Only Admissible Because Tending to Show Probability That Fire Was Caused by Particular Engine.
  - h. Engine Identified.
- II. Evidence of Negligence.
  - 1. Fires by Same Engine.
    - a. In General.
    - b. Several Fires on Same Day.
    - c. On Same Trip.
    - d. Several Fires about Same Time.
    - e. Ten Days after.
    - f. Twenty-Seven Days after.
    - g. Prior Fires.
    - h. Habitually Scattering Sparks.
    - i. Where No Proof of Negligence.
    - j. In Rebuttal.
    - k. Similar Conditions.
  - 2. Fires Set by Other Engines.
    - a. In General.
    - b. Fires Set about Same Time.
    - c. Prior and Subsequent Fires.
    - d. Same—Rubbish Previously Fired by Trains of Same Character.
    - e. Distance to Which Sparks Were Thrown.
    - f. Qualifications of Rule—Time.
      - Similarity of Engines.
    - g. Question for Jury.
    - h. Knowledge of Danger to Be Guarded against.
    - i. Engine Identified.
    - j. Fire Set by One of Two Engines.
    - k. Rebutting Evidence as to Good Condition of Engines.

## I. EVIDENCE OF ORIGIN OF FIRE.

## 1. FIRES SET BY SAME ENGINE.

## a. In General.

In an action to recover damages for the destruction of property by fire claimed to have been communicated by a particular locomotive, evidence tending to show that other fires were set about the same time by the same engine is competent to prove the origin of the fire. *Haseltine v. Concord R. Co.*, 64 N. H. 545, 35 Am. & Eng. R. Cas. 236; *Smith v. Railroad*, 63 N. H. 25; *Boyce v. Railroad*, 43 N. H. 627; *Atchison, T. & S. F. R. Co. v. Hamilton*, 6 Kan. App. 447, 50 Pac. 102; *Stertz v. Stewart*, 74 Wis. 160, 42 N. W. 214; *Taylor v. Louisville, etc., R. Co.* (Ky. 1897), 41 S. W. 551. See *Hoyt v. Jeffers*, 30 Mich. 187; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Louisville, etc., R. Co. v. McCorkle*, 12 Ind. App. 691; *Hinds v. Barton*, 25 N. Y. 544; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 297.

Evidence that other fires occurred in the neighborhood about the time and immediately after the passing of the locomotive in question is admissible as tending to show the origin of the fire injuring plaintiff's property. *Lake Side & M. R. Co. v. Kelly* (Ohio C. C.), 3 Ohio Dec. 319.

Evidence showing, among other things, that at the time and place of the setting of the fire, one of the defendant's engines was passing

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along their railroad track, at a speed of from forty-five to fifty miles an hour; that it was an exceedingly dry time, and sparks and cinders which kindled other fires along the track were issuing from such engine. was held to support a verdict that the fire was set through the negligence of defendant's employee in running such engine. *Stertz v. Stewart*, 74 Wis. 160, 42 N. W. 214.

**b. Subsequent Emission of Sparks by Same Engine.**

In *Nashville, etc., R. Co. v. Tyne* (Tenn.), 7 Am. & Eng. R. Cas. 515, it was held competent for the plaintiff to prove that two weeks after the fire the same engine was seen to emit such sparks at the point where the fire occurred as would have been sufficient to occasion it.

**c. Similar Conditions.**

But there are authorities holding, that to render evidence of this character admissible it must be shown that the condition of the engine and the other circumstances were substantially the same. *Wheeler v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 639; *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339; *Collins v. New York Cent., etc., R. Co.*, 109 N. Y. 243, 32 Am. & Eng. R. Cas. 366; *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; *Hinds v. Barston*, 25 N. Y. 544; *Huyett v. Phil. & Reading R. R. Co.*, 23 Pa. 373; *Menominee River Sash, etc., Co. v. Milwaukee, etc., R. Co.*, 91 Wis. 447, 65 N. W. 176; *Piggot v. Eastern Counties R. R. Co.*, 3 M. G. & S. 239.

Thus in an action for damages caused by setting fire to plaintiff's property from defendant's engine because of an alleged defective spark arrester, it was error to allow plaintiff to prove the size of the sparks emitted from the engine several months after the fire, without any proof that the construction of the arrester was clearly defective in the first place, or that the engine and arrester were in the same condition of repair as at the time of the fire. *Collins v. New York Central, etc., R. Co.*, 109 N. Y. 243, 32 Am. & Eng. R. Cas. 366.

Where fire occurred on September 30th, it was proper to exclude evidence of fires caused by the same engine in April, May, and June, the engine having been repaired in July, and sent from the shop in good condition. *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176.

**d. Absence of Evidence against Particular Engine.**

Where there was no evidence that a fire near a right of way was started by a particular engine, evidence of other fires started by such engine is inadmissible. *Chicago & E. I. Ry. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451.

**e. Distance to Which Sparks Were Thrown.**

If in an action against a railroad corporation to recover damages for the destruction of property by fire communicated by a locomotive engine, it is relied upon as a ground of defense that no burning sparks could reach so far as to set fire to the property, evidence is competent to show that the same engine, using similar fuel, has emitted burning sparks which have fallen at as great a distance. *Ross v. Boston & W. R. Co.*, 6 Allen (Mass.) 87; *Gulf, Colorado & Santa Fe Ry. Co. v. Holt*, 1 Tex. Civ. App. Cas. 373, 11 Am. & Eng. R. Cas. 72.

Evidence as to the distance to which a locomotive threw sparks on a former occasion is admissible as tending to show that it was the cause of the damage for which the action is brought. *Taylor v. Louisville, etc., R. Co.* (Ky.), 41 S. W. 551.

**2. FIRES SET BY OTHER ENGINES.**

**a. In General.**

Where the engine setting the fire in question is not identified, it may be declared as a general rule, that evidence is admissible to show that fires were communicated by defendant's locomotives on different occasions about the same time and vicinity as that of the

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fire causing the damage for which the action is brought, as tending to show the origin of such fire.

*United States.*—Chicago, St. P., M. & O. Ry. Co. v. Gilbert, 52 Fed. 711, 10 U. S. App. 375; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Northern Pac. R. Co. v. Lewis, 51 Fed. 658.

*California.*—Henry v. Southern Pac. R. Co., 50 Cal. 176.

*Georgia.*—East Tennessee, etc., R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 838; Inman v. Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

*Illinois.*—Lake St. El. R. Co. v. Peterson, 93 Ill. App. 118.

*Indiana.*—Pittsburgh, etc., R. Co. v. Noel, 77 Ind. 110.

*Iowa.*—Gandy v. Chicago, etc., R. Co., 30 Iowa 420, 6 Am. Rep. 682.

*Kansas.*—St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47; Kentucky C. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165.

*Maine.*—Dunning v. Maine Cent. R. Co., 91 Me. 87; Thatcher v. Maine Cent. R. Co., 85 Me. 502.

*Maryland.*—Annapolis, etc., R. Co. v. Gantt, 39 Md. 137; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 54 Am. Rep. 755.

But in Baltimore, etc., R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72, the court said: "After all the testimony in the cause had been given, except that which constitutes the point of the first exception, the plaintiff offered to prove 'that before the occurrence of the fires upon the plaintiff's farm, as given in the evidence, fire had been communicated by the defendant's engine to the property of other persons on said road, and that it had been burned in consequence of such fire.' This proof was objected to, but the court permitted it to be given.

"It is said this evidence was proper for the purpose of authorizing the jury to believe that if the engine of the company created the fires offered to be proved, it also occasioned the one in controversy. And if not admissible with that view, it was so for the purpose of rebutting the proof given by the defendant to show care and diligence.

"The point in controversy or in issue was, whether the property of the plaintiff was fired by the engine of the defendant by negligence; the plaintiff being required to prove the firing; the defendant to show the want or absence of negligence.

"The books are full of cases showing how careful the courts have been to refuse the admission of collateral matters in evidence. And this refusal is founded upon principles of sound reasoning. Collateral facts are calculated to introduce a wide scope of controversy, drawing off the mind of the jury from the point really in issue, and the adverse party not having notice before the trial that such evidence is to be produced, cannot be prepared to rebut it. See 1 Greenleaf Ev., sec. 52. In this section, and in the authorities cited below, cases will be found where this species of proof was rejected, when the facts offered to be introduced were quite as pertinent to the issue as in the present instance: 3 Phill. Ev. 443, 444; Cowen's & Hill's note, 330; Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill. & J. 311, 313, 314.

"It is by no means a necessary consequence that because the engine did set fire to the property of another it was also the cause of burning that of the plaintiff. The only legitimate inference from the former fire would be to show that a locomotive engine running upon a railroad is an instrument which can and probably will set fire to property along the road. The very nature of such an engine is sufficient to satisfy a jury of that fact. And if the jury are to be considered as knowing nothing on the subject without proof, the appropriate testimony would be to describe the construction of the engine, the means of propelling it, and the manner in which it throws out sparks of fire when in motion."

*Massachusetts.*—Ross v. Boston, etc., R. Co., 6 Allen (Mass.) 87; McGinn v. Platt, 19 Am. & Eng. R. Cas., N. S., 245.

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*Minnesota*.—Davidson v. St. Paul, etc., R. Co., 34 Minn. 51, 23 Am. & Eng. R. Cas. 352.

*Missouri*.—Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 42 Am. St. Rep. 530; Matthews v. Missouri P. R. Co., 142 Mo. 645, 10 Am. & Eng. R. Cas., N. S., 673, 44 S. W. 802; Hoover v. Missouri Pac. R. Co. (Mo. 1898), 16 S. W. 480.

*Nevada*.—Longabaugh v. Virginia City, etc., R. Co., 9 Nev. 271.

*New Hampshire*.—Boye v. Cheshire R. Co., 42 N. H. 97.

*New York*.—Few v. Buffalo & S. L. R. Co., 22 N. Y. 209; Field v. New York Central R. Co., 32 N. Y. 339; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun (N. Y.) 182; McNaier v. Manhattan R. Co., 46 Hun 502, 12 N. Y. S. R. 562; Sheldon v. Hudson River R. Co., 14 N. Y. 221, 67 Am. Dec. 155; Webb v. Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389, affirming 3 Lans. (N. Y.) 453; Westfall v. Erie R. Co., 5 Hun (N. Y.) 75; Wheeler v. New York Cent., etc., R. Co., 67 Hun (N. Y.) 639.

*Ohio*.—Lake Side & M. R. Co. v. Kelly (Ohio C. C.), 3 Ohio Dec. 319; Pennsylvania Co. v. Rossman, 3 Ohio C. C. 111, 76 Ohio Dec. 119.

*Oregon*.—Koontz v. Oregon R., etc., Co., 20 Ore. 3, 23 Pac. 820.

*Pennsylvania*.—Henderson, Hull & Co. v. Phil. & R. R. Co., 144 Pa. St. 461, 27 Am. St. Rep. 652, 48 Am. & Eng. R. Cas. 16; Pennsylvania R. Co. v. Stranahan, 79 Pa. St. 405; Philadelphia, etc., R. Co. v. Schultz, 93 Pa. St. 341.

*Rhode Island*.—Smith v. Old Colony, etc., R. Co., 10 R. I. 22.

*Tennessee*.—Burke v. Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618.

*Texas*.—Galveston, H. & S. A. Ry. Co. v. Hertzog (Tex.), 12 Am. & Eng. R. Cas., N. S., 846; Gulf, etc., R. Co. v. Holt, 1 Tex. App. Civ. Cas. § 835; Texas, etc., R. Co. v. Land, 3 Tex. Civ. Cas. § 50; Wilson v. Pecos & N. T. Ry. Co. (Tex.), 58 S. W. 183.

*Vermont*.—Cleveland v. Grand Trunk R. Co., 42 Vt. 449; Hoskinson v. Central Vermont R. Co., 66 Vt. 618, 31 Atl. 24.

*Virginia*.—Brighthope R. Co. v. Rogers, 76 Va. 443; Kimball v. Borden, 95 Va. 203, 28 S. E. 297.

*England*.—Aldridge v. Great Western R. Co., 3 M. & G. 515; Piggot v. Eastern Counties R. Co., 3 C. B. 230, 54 E. C. L. 230.

In Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 42 Am. St. Rep. 530, it is said in the opinion: "During the trial witnesses were permitted to testify, over the objection of defendant, that other fires, both before and subsequent to the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's engines. The admission of this evidence is assigned as error.

"In Coole v. Hannibal, etc., R. R. Co., 60 Mo. 227, this court held that, in order to prove that one engine was insufficient, or that the employees of the company in charge of such engine were careless or incompetent, evidence was not admissible to prove that other engines were defective and other employees were incompetent or negligent. The ruling in that case is not controlling on the question of the admissibility of the evidence complained of here, for the reason that the statute creates an absolute liability, without respect to the character of the machinery or the competency of the employees. The admission of the evidence was clearly harmless if it only tended to prove want of care on the part of defendant.

"The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property directly, or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial whether the fire causing the damage did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that

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they contained heat enough to set it on fire. The fact that live sparks were thrown from engines, and did ignite grass and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine, from which alone the fire could have been communicated, was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 223, 67 Am. Dec. 155, by a divided court.

"The court in that case says: 'The competency of this evidence has been directly decided in the English court of common pleas: *Piggott v. Eastern Counties Ry. Co.*, 10 Jur. 571; *Aldridge v. Great Western Ry. Co.*, 3 Man. & G. 515. These cases, upon this point, are well decided. The principle is essential in the administration of justice; inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury.' This ruling was followed without division in *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339; *Webb v. Rome, etc., R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389.

"A similar ruling was made by the supreme court of the United States in *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 470. Mr. Justice Strong, who wrote the opinion of the court, says: 'The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire.' He follows this statement of the law by a number of citations, both English and American, including the case of *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 223, 67 Am. Dec. 155.

"Further on in the same opinion the judge says: 'The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage.' To the same effect are the following cases: *Smith v. Boston, etc., R. R. Co.*, 63 N. H. 25; *Chicago, etc., Ry. Co. v. Gilbert*, 52 Fed. Rep. 711; *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 509.

"We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage, had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court: *Coale v. Hannibal, etc., R. R. Co.*, 60 Mo. 227; *Patton v. St. Louis, etc., Ry. Co.*, 87 Mo. 117, 56 Am. Rep. 446. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue."

Where the question is whether a fire originated from sparks emitted by defendant's engine, evidence was admissible to prove the emission of sparks by defendant's engines about the time of the fire in question. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 297.

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It is proper to prove that the company's engines had, about the time of the fire in question, and at other places, some as much as twenty miles distant, emitted sparks, the proof being proper for the purpose of showing that the fire in question originated from the company's engine. *Texas & P. R. Co. v. Land*, 3 Tex. App. (Civ. Cas.) 74.

Evidence was admissible to show that fires had been caused by one of defendant's locomotives at other points on the same day that plaintiff's property was damaged by the fire set by defendant's locomotive. *Galveston, H. & S. A. Ry. Co. v. Hertzig* (Tex.), 12 Am. & Eng. R. Cas., N. S., 846.

## b. Prior Fires.

In an action against a railroad company for the negligent burning of buildings situated near its tracks, where the only issue was as to the origin of the fire, evidence that, on different occasions within some weeks prior to the loss, fire had escaped from engines of the company in the immediate vicinity of the property, was admissible as tending to prove the possibility, and the consequent probability, that some engine caused the fire. *Chicago, St. P., M. & O. Ry. Co. v. Gilbert*, 52 Fed. 711, 10 U. S. App. 375.

In an action against a railroad company for damages by a fire apparently originating from coals dropping on the track from a locomotive, evidence that locomotives had on former occasions dropped coals at or near this place, is competent. *Field v. New York Central R. Co.*, 32 N. Y. 339.

## c. Other Fires during Same Summer.

Evidence that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill, is admissible. *Grand Trunk Railway Co. v. Richardson*, 91 U. S. 356.

## d. Distance to Which Sparks Were Thrown.

Evidence that at other times sparks and fire had been thrown from locomotives to a greater distance from the track than the building destroyed, such as were liable to set fire to objects, is admissible. *Sheldon v. Hudson River Co.*, 14 N. Y. 218, reversing 29 Barb. 226.

Evidence that the company's engines, either before or afterwards, threw sparks as far from the track as the place of the fire, and that they set other fires, is admissible to show the possibility that a certain engine set the fire in question. *Gulf, Colorado and Santa Fe Ry. Co. v. Holt*, 1 Tex. Civ. App. Cas. 383, 11 Am. & Eng. R. Cas. 72.

In an action against a railroad company for damages for the destruction of plaintiff's barn, alleged to have been caused by sparks from defendant's locomotive, evidence to show that a spark from one of the defendant's locomotives subsequently fell upon a tent standing upon the ground where the barn had stood was admissible; and it was not necessary for plaintiff to show before introducing such evidence that the conditions at the time were the same as those existing at the time of the destruction of the barn. *Matthews v. Missouri P. R. Co.*, 142 Mo. 645, 10 Am. & Eng. R. Cas., N. S., 673, 44 S. W. 802.

## e. Qualifications of Rule—Time.

But there are decisions to the effect that this class of testimony is exceptional in character at the best, and is admissible only because direct evidence is impracticable; and that the examination, therefore, should be confined to the negligent operation of the engines at and about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to make such proofs practicable. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. 851; *Galveston, etc., R. Co. v. Rheiner* (Tex. Civ. App.), 25 S. W. 971; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 111, 7 Ohio Cir. Dec. 119.

In an action for damages for the alleged destruction of plaintiff's elevator and its contents by fire escaping from defendant's locomotive

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engine on account of its careless and negligent construction and management, evidence offered to show a "negligent habit" on defendant's part as with respect to the construction and use of its engines was properly confined to such as tended to show the prevalence of such "habit" at or about the time of the fire complained of. *Davidson v. St. Paul, etc., R. Co.*, 34 Minn. 51, 24 N. W. 324, 23 Am. & Eng. R. Cas. 352.

Evidence of the emission of sparks by other engines on other occasions must be confined to times and points not remote from the fire in question; and even then it is not admissible until plaintiff has given evidence tending to show that the fire could not have had any other origin. *Pennsylvania Co. v. Rossman*, 3 Ohio C. C. 111, 7 Ohio Dec. 119.

It was error in this case to admit an offer to show the repeated emission of sparks of unusual size by defendant's engines during a period of six months preceding the fire, and also a similar offer, unlimited as to time, under which testimony was received covering periods of two, three and six months, and other testimony not indicating the time to which it referred. *Henderson v. Philadelphia & R. R. Co.*, 48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. 851.

**Similar Conditions.**

Upon the question whether fire was communicated to a building by sparks from particular engines running at a particular time, evidence that sparks were thrown from other engines running upon the same road on other occasions will be competent, if it be conceded that those other engines were of the same construction, used in the same manner, and in the same state of repair. *Boyce v. Cheshire R. Co.*, 43 N. H. 627; *Boyce v. Cheshire R. Co.*, 42 N. H. 97.

Where a fire was alleged to have been caused by sparks emitted by a particular engine, it was error to admit evidence of other fires caused by passing trains in fields past which another railroad ran, without showing the condition of the engines or the attending circumstances. *Hygienic Plate-Ice Mfg. Co. v. Raleigh & Augusta Air-Line R. Co.*, 36 S. E. 279, 126 N. Car. 797.

**f. Engine Not Identified.**

In an action for loss by a fire claimed to have been started by sparks from a railroad engine, evidence of the emission of sparks by defendant's locomotives at other times, and of other fires caused thereby, was admissible as tending to show the possibility, and, in the absence of any other apparent cause, the probability, that one of defendant's locomotives caused the fire in question. *McGinn v. Platt (Mass.)*, 19 Am. & Eng. R. Cas., N. S., 245.

Where the action is for burning property by sparks from a locomotive, proof need not be confined to the fire that was scattered at the particular time when the injury was done, nor to defects in a single engine. *Westfall v. Erie R. Co.*, 5 Hun (N. Y.) 75.

**g. Only Admissible Because Tending to Show Probability That Fire Was Caused by Particular Engine.**

In *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132, it is said in the opinion: "The fire was discovered soon after the passenger train passed that point, and there was no evidence whatever that this particular fire was set by any other engine on the road. The circuit court admitted evidence, against the objection of the appellant, of fires in the vicinity on this same road, both before and after this fire, occurring after the passage of other locomotives. This was clearly erroneous. Such evidence would open the door for a wide issue of great importance,—whether such other locomotives caused such fires or not,—and could not affect the issue in the cause, even if it had been proved that other locomotives caused other fires in the vicinity. The rule has never been extended further than to allow proof of other fires caused by the same machinery. If it had been proved in this case, beyond a doubt, that one of these locomotives—either that of the freight or passenger train passing soon or immedi-

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ately before the fire occurred—caused the fire, it could not add to the defendant's liability by showing its habitual carelessness in respect to other locomotives; and if it had been proved that other locomotives on the same road caused other fires, at other times and places, it would not be even presumptive evidence that the locomotives in question were insufficient in any respect, or that they caused this particular fire." \* \* \*

"The case of *Brusberg v. M., L. S. & W. Ry. Co.*, 55 Wis. 106 (S. C. 12 N. W. Rep. 416), does not militate against this principle, but rather strengthens it. Other fires in the vicinity were allowed to be shown as tending to prove that the particular train in question caused them, which involved the question whether that engine was properly constructed or managed to prevent sparks from being emitted along the track. In this case, as said before, the fire was caused by the engine in the freight or passenger train which passed soon or immediately before the fire. The plaintiff was on the ground, and discovered no fire before one or the other of these engines passed the place of the fire. If there was no evidence that one or the other of those engines caused the fire, there was no evidence that any engine of the company caused it; so that, within the authorities, proof that other engines caused other fires at other times and places, would not show a 'possibility,' and consequently not a 'probability,' that these particular engines caused the fire. The admission of that evidence in this case was, therefore, erroneous. I could write 50 pages of opinion in examining and criticising authorities on this question, on account of their looseness of expression when the question is really in a 'nutshell' and we are ready to disapprove of any and all of them which assert a different principle."

In *Pennsylvania R. Co. v. Stranahan*, 79 Pa. St. 405, the court said: "This was not a case where a certain engine had thrown out the sparks which set fire to the plaintiff's barn, but it was where the engine was unknown. Yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire."

\* \* \* Hence, it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent, and was permitted to be done by a number of engines." This is the true rule and its limitation, approved by the weight of authority as well as by reason. 4 South. Law Rev. (N. S.) 710; *Henry v. S. P. R. Co.*, 50 Cal. 176; *Woodson v. M. & St. P. Ry. Co.*, 21 Minn. 60."

#### h. Engine Identified.

There is a line of decisions holding that evidence of the emission of sparks by other engines at other times is admissible when the engine alleged to have emitted sparks is not identified, but that such evidence is not admissible where it is identified. *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 9 So. 661, 49 Am. & Eng. R. Cas. 603; *Lake St. El. R. Co. v. Peterson*, 93 Ill. App. 118; *Hoopeston First Nat. Bank v. Lake Erie, etc., R. Co.*, 174 Ill. 36, 50 N. E. 1023; *Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. 426; *Lester v. Kansas City, etc., R. Co.*, 60 Mo. 265; *Haseltine v. Concord R. Co.*, 64 N. H. 545, 15 Atl. 143, 35 Am. & Eng. R. Cas. 236; *Erie R. Co. v. Decker*, 78 Pa. St. 293.

Where the locomotive which caused the fire for which the action is brought, is not identified, the plaintiff may prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence in question, threw sparks of unusual size and kindled fires upon that part of defendant's road. In the admission of such evidence reasonable latitude must be allowed; and the plaintiff is not confined to the exact or precise time of the occurrence. *Henderson, Hull & Co. v. Phil. & R. R. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, 48 Am. & Eng. R. Cas. 16.

In this case it is said in the opinion: "Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known



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and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. *Erie R. Co. v. Decker*, 78 Pa. St. 293. In the case cited, the house of the plaintiff, which stood near the track of the defendant's railroad, was destroyed by fire on the 6th of March, 1872. The plaintiff alleged that the fire originated from sparks thrown from locomotive engine No. 458, belonging to the defendants, which passed his house about the time the fire commenced, and that the throwing of the sparks was from the negligence of the defendants in not having their apparatus in proper order. Mr. Justice Gordon, in the opinion of the court, says: 'It appears from the evidence, and it was conceded in the argument, that the only locomotive that could have fired the premises in question was that numbered 548, in charge of Alfred Carpenter as engineer. It follows, therefore, that the condition of this engine and its management were all that were legitimately before the court. If it was properly constructed as to its furnace and smokestack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though the building were burned by fire accidentally issuing from it. *Lackawanna & B. R. Co. v. Doak*, 52 Pa. St. 379. If, then, this engine was in a proper condition, it mattered not that every other engine owned by the company was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if this engine was dangerous in this respect, it was of no consequence that all others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging to this company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending, and should have been excluded.' So, in *Albert v. Northern Cent. R. Co.*, 98 Pa. St. 316, where it appeared that the plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, both of which were identified, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. 'The evidence below,' said our Brother Paxson in that case, 'established the fact that, if the plaintiff's property was destroyed by fire communicated by defendant's locomotive, it was done by engine No. 21 or engine No. 126, and by no others. Hence it is entirely clear that evidence that other engines, upon some other day, threw out an unusual amount of large sparks and live coals, was immaterial, and, if received, could only have confused, and might have misled, the jury; nor would it have been evidence to show that the spark arresters on engines 21 and 126 were out of order.' That is to say—for the last sentence is, perhaps, a little obscure—the fact that other engines, at other times, threw out an unusual amount of large sparks and live coals, would not have been evidence to show that the spark arresters on engines 21 and 126 were out of order. To the same effect is *Jennings v. Pennsylvania R. Co.*, supra; *Railroad Co. v. Gantt*, 39 Md. 124; and other cases that might be cited."

## II. EVIDENCE OF NEGLIGENCE.

## 1. FIRES BY SAME ENGINE.

## a. In General.

In an action for injury to property from a fire set by a railroad locomotive, according to the weight of authority, where there is no direct evidence of negligence, evidence of other fires by the same engine, occurring about the time of the fire in question, is admissible, as tending to show that such fire was the result of negligence.

*United States*.—*Northern Pac. R. Co. v. Lewis*, 51 Fed. 658.

*California*.—*Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

*Georgia*.—*Brown v. Benson*, 101 Ga. 753, 29 S. E. 215.

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- Illinois*.—*Lake Erie R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660.  
*Indiana*.—*Lake Erie, etc., R. Co. v. Gould*, 18 Ind. App. 275;  
*Louisville, etc., R. Co. v. McCorkle*, 12 Ind. App. 691.  
*Iowa*.—*Lanning v. Chicago, etc., R. Co.*, 68 Iowa 502, 27 N. W. 478; *Slossen v. Burlington, etc., R. Co.*, 60 Iowa 215, 11 Am. & Eng. R. Cas. 67.  
*Kansas*.—*Atchison, etc., R. Co. v. Campbell*, 16 Kan. 201; *Missouri Pac. R. Co. v. Kincaid*, 29 Kan. 654, 11 Am. & Eng. R. Cas. 83; *Atchison, etc., R. Co. v. Bales*, 16 Kan. 252.  
*Kentucky*.—*Taylor v. Louisville, etc., R. Co. (Ky.)*, 41 S. W. 551.  
*Maryland*.—*Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 54 Am. Rep. 755.  
*Massachusetts*.—*Loring v. Worcester, etc., R. Co.*, 131 Mass. 469.  
*Michigan*.—*Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. 426.  
*Missouri*.—*Patton v. St. Louis, etc., R. Co.*, 87 Mo. 117, 56 Am. Rep. 446, 23 Am. & Eng. R. Cas. 364; *Hoover v. Missouri Pac. R. Co.*, 16 S. W. 483, overruling *Coale v. Hannibal, etc., R. Co.*, 66 Mo. 227, and *Lester v. Kansas City, etc., R. Co.*, 60 Mo. 265.  
*New Hampshire*.—*Haseltine v. Concord R. Co.*, 64 N. H. 545, 15 Atl. 143.  
*New York*.—*Webb v. Rome, etc., R. Co.*, 49 N. Y. 420; *Hinds v. Barton*, 25 N. Y. 544.  
*North Carolina*.—*Aycock v. Raleigh, etc., Air-Line R. Co.*, 29 N. Car. 321.  
*Pennsylvania*.—*Thomas v. New York, etc., R. Co.*, 182 Pa. St. 538, 36 Atl. 413; *Philadelphia, etc., R. Co. v. Schultz*, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271.  
*South Dakota*.—*Smith v. Chicago, etc., R. Co.*, 4 S. Dak. 71, 55 N. W. 717.  
*Tennessee*.—*Nashville, etc., R. Co. v. Tyne (Tenn.)*, 7 Am. & Eng. R. Cas. 515.  
*Texas*.—*Martin v. Texas, etc., R. Co.*, 87 Tex. 117, 26 S. W. 1052.  
*Virginia*.—*Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *Brighthope R. Co. v. Rogers*, 76 Va. 443, 8 Am. & Eng. R. Cas. 710.  
*Wisconsin*.—*Stertz v. Stewart*, 74 Wis. 160; *Brusberg v. Milwaukee, etc., R. Co.*, 55 Wis. 106.  
*Canada*.—*Canada Cent. R. Co. v. McLaren*, 8 Ont. App. 564.

It is admissible, in an action for damages caused by a railway fire, to show that defendant's locomotive, on other occasions than that for which the action was brought, emitted sparks and communicated fire along the track and right of way. *Brighthope Ry. Co. v. Rogers*, 76 Va. 443, 8 Am. & Eng. R. Cas. 710.

In this case it is said in the opinion: "In the case of *Grand Trunk R. Co. v. Richardson*, 1 Otto, 454, the Supreme Court of the United States was of opinion that evidence was properly received to show that fire had been communicated by sparks at other times and from other locomotives of the same company, in order to show a negligent habit of its officers and agents. In the case before us the testimony is limited to one and the same locomotive, and is clearly admitted, according to all the authorities. *Pierce on Railroads*, 438; *Sherman & Redfield on Negligence*, 380."

In an action for damages for injury to property caused by fire set out by a passing steam engine, an instruction to the effect that the fact of the repeated setting out of fire by the same engine on the same day tends to show that such engine was not properly constructed as to its appliances for prevention of escape of fire, or that the same was not properly used at the time, or that it was not in repair, is not erroneous. *Slossen v. Burlington, C. R. & N. Ry. Co.*, 60 Iowa 215, 11 Am. & Eng. R. Cas. 67.

Where the evidence shows that other fires were set in the same vicinity on the day of the fire in question by the same engine, and that it ran rapidly and threw out a great many cinders where the fire

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started, a finding that the fire was due to sparks from a locomotive and caused by a high wind and careless management of the engine, is warranted. *Atchison, T. & S. F. R. Co. v. Hamilton*, 6 Kan. App. 447, 50 Pac. 102.

In *Railroad Co. v. Gould*, 18 Ind. App. 275, 47 N. E. 941, appellee was permitted to testify to other fires on the same day his property was destroyed, which were set out by the same locomotives. Such evidence was held competent, and in passing upon it the court, by Henley, J., said: "It would be competent as going to show either a careless operation or faulty construction of the locomotive which set out the fire which destroyed appellee's property."

**b. Several Fires on Same Day.**

In an action to recover for injuries to property caused by a fire, it is proper in such a case for plaintiff to show that the locomotive of defendant which caused the injury complained of set fire to several other places on the same day, such evidence tending to show that the engine was not properly constructed, or else not properly managed. *Launing v. Chicago, etc., R. Co.*, 68 Iowa 502, 25 Am. & Eng. R. Cas. 493.

**c. On Same Trip.**

Where there is no dispute as to the identity of the locomotive from which the fire escaped and was communicated to plaintiff's premises, it is competent to show that fire escaped from the same locomotive earlier on the same trip, setting out other fires in its passage, as raising an inference of some weight that there was something unsuitable in its construction or management. *Patton v. St. Louis & S. F. R. Co.*, 23 Am. & Eng. R. Cas. 364, 87 Mo. 117; *Slossen v. Burlington, C. R. & N. R. Co.*, 11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. 244.

**d. Several Fires about Same Time.**

While evidence of the single fire may not be sufficient to warrant a finding of negligence against the company, yet when it appears that at or about the same time several fires are by the same engine thus caused, and that only at or about that time were any fires caused by such engine, although used continuously for months; and also that an engine in good order and properly managed does not ordinarily cause fires, a jury are justified in finding negligence, and this notwithstanding they are unable to point out specifically wherein the negligence consists. *Missouri Pac. R. Co. v. Kincaid*, 11 Am. & Eng. R. Cas. 83, 29 Kan. 654.

Evidence tending to prove that a locomotive engine which caused a fire destroying plaintiff's property also set two other fires about the same time is not necessarily overcome by evidence that the engine was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer, as a matter of law. Such evidence tends to raise a conflict in the evidence as to the negligence of the defendant, which must be determined by the jury; and this court cannot say that the jury, from such evidence, were not justified in finding that the engine was not in good condition. *Smith v. Chicago, Milwaukee & St. Paul R. Co.*, 4 S. Dak. 71, 56 Am. & Eng. R. Cas. 123, 55 N. W. 717.

**e. Ten Days after.**

In *Baltimore, etc., R. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833, it was held that it was competent to show that the locomotive claimed to have caused the fire in question emitted cinders ten days after its occurrence, as such evidence tended to show that the engine was out of order at the time of the fire.

**f. Twenty-Seven Days after.**

But in *Peck v. New York Cent., etc., R. Co.*, 37 N. Y. App. Div. 110, it was held that an inference of negligence in the emission of sparks at the time in question was not warranted by evidence that

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the same spark arrester of defendant emitted sparks twenty-seven days after the fire.

**g. Prior Fires.**

Where the fire resulting in the injury complained of is shown to have been set by a particular locomotive, evidence of former fires set out by the same engine is admissible as tending to prove its defective construction or condition or improper management. *Jacksonville, T. & K. W. R. Co. v. P. L., T. & M. Co.*, 27 Fla. 1, 49 Am. & Eng. R. Cas. 603.

In this case it is said in the opinion: "The authorities hold that, where it is shown, as it is in this case, that the fatal fire has been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine, but not by any other engine of the defendant company. *Ireland v. Cincinnati, W. & M. R. Co.*, 79 Mich. 163, 44 N. W. 426; *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227; *Brighthope R. Co. v. Rogers*, 76 Va. 443, 8 Am. & Eng. R. Cas. 710; *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132, 13 Am. & Eng. R. Cas. 469; *Slossen v. Burlington, C. R. & N. R. Co.*, 60 Iowa 215, 14 N. W. 244, 11 Am. & Eng. R. Cas. 67; *Lanning v. Chicago, B. & Q. R. Co.*, 68 Iowa 502, 27 N. W. 478, 25 Am. & Eng. R. Cas. 493; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 253, 254. Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, of improper management; and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive. It is objected that evidence violative of this principle was introduced, against the objection of defendant."

**h. Habitually Scattering Sparks.**

Proof that a locomotive habitually scatters sparks so as to endanger combustible material along the line of the road is sufficient to warrant a jury in inferring negligence against the company. *Green Ridge R. R. Co. v. Brinkman*, 64 Md. 52, 23 Am. & Eng. R. Cas. 342, 20 Atl. 1204, 54 Am. Rep. 755.

In *Railroad Co. v. McCorkle*, 12 Ind. App. 691, 40 N. E. 26, it was held, that, while a single fire occasioned by the emission of sparks from an engine may not be sufficient to establish the fact that the spark arrester was worn and defective, yet, where a locomotive, day after day, emits fire, igniting adjacent premises for distances from 50 to 150 feet from the track, the jury may infer negligence on the part of the company with respect to such appliances. The particular negligence charged in that case was that the spark arrester and other appliances were defective, so that sparks and coals of fire would escape, and in permitting such fire to escape from the company's right of way to the adjacent premises of the appellee.

Evidence showing the condition of the spark arrester of the same engine just preceding and a short while subsequent to the date of the fire, and also that other fires were caused prior thereto by the same engine, was admissible as showing the condition of such engine at such times, from which, in the absence of testimony showing that the locomotive was in proper condition at the time of the fire, the jury might infer that the defective condition of such engine existed at the date of the fire. *Brown v. Benson*, 10 Am. & Eng. R. Cas., N. S., 161, 101 Ga. 753, 29 S. E. 215.

**i. Where No Proof of Negligence.**

But in an action for damages from another fire set by the same engine it is improper to admit evidence that fire was communicated by sparks from the engine to a rotten pine stump 50 feet from the main line where there is no evidence that in either instance the sparks were of unusual size or were thrown to an unusual distance. *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176.

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## j. In Rebuttal.

In an action against a railway company for damage caused by sparks emitted from an engine, the defendant adduced proof that the locomotive was furnished with an approved spark arrester, in rebuttal of which the plaintiff was permitted to introduce evidence of numerous fires caused by the same engine. It was held that the question of negligence was properly submitted to the jury. *Philadelphia & Reading R. R. Co. v. Schultz*, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271.

Where a defendant company has introduced evidence that its engine was provided with ordinary appliances for the prevention of the escape of sparks, which were examined the day before the fire on the return trip and found to be in good condition, as well as the engine, and that the same kind of fuel was used as on the outward trip, it is competent for plaintiff to show in rebuttal that the engine on the return trip threw out sparks which set fire to other property in the neighborhood of the plaintiffs. *Loring v. Worcester & N. R. Co.*, 131 Mass. 469; *Thatcher v. Maine C. R. Co.*, 85 Me. 502, 27 Atl. 519.

## k. Similar Conditions.

Where it is alleged that the fire was caused by the defective condition of the engine, it has been held that it must be shown, to render evidence of other fires by the same engine admissible, that its condition was substantially the same at the time of the fire in question as on other occasions. *Babcock v. Chicago, etc., R. Co.*, 62 Iowa 593; *Loring v. Worcester, etc., R. Co.*, 131 Mass. 469; *Wheeler v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 639; *Collins v. New York Cent., etc., R. Co.*, 109 N. Y. 243, 16 N. E. 50, 32 Am. & Eng. R. Cas. 366; *Menominee River Sash, etc., Co. v. Milwaukee, etc., R. Co.*, 91 Wis. 447, 65 N. W. 176.

## 2. FIRES SET BY OTHER ENGINES.

## a. In General.

It is generally held that where the engine causing the fire cannot be identified, or where there is no direct evidence of negligence, evidence of other fires caused by defendant's locomotives is admissible as tending to show negligence on the part of the railroad.

*United States*.—*Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658.

*California*.—*Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Steele v. Pacific Coast R. Co.*, 74 Cal. 323, 15 Pac. 857.

*Georgia*.—*East Tennessee, etc., R. Co. v. Heaters*, 90 Ga. 663, 15 S. E. 828; *Inman v. Elberton Air-Line R. Co.*, 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Noel*, 77 Ind. 110; *Louisville, etc., R. Co. v. Lange*, 13 Ind. App. 337; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57; *Gandy v. Chicago, etc., R. Co.*, 30 Iowa 420, 6 Am. Rep. 682.

*Kansas*.—*Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *St. Joseph, etc., R. Co. v. Chase*, 11 Kan. 47.

*Kentucky*.—*Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165.

*Maine*.—*Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 39 Atl. 352.

*Maryland*.—*Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 138.

But in *Baltimore, etc., R. Co. v. Woodruff*, 4 Md. 254, the court, referring to evidence of this character, said: "The evidence offered is no less objectionable in reference to the question of negligence than to that of the firing itself. There is no time specified. We do not know whether it was one month or five years before the injury in dispute. And the instances alluded to might have occurred without the least negligence, which the defendant would have been able to show by satisfactory proof, if notified of an intention to introduce them. Or if they had been the result of great carelessness, nevertheless the injury complained of in this suit might have occurred when

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the agents of the company were using all proper precaution. For it cannot be denied that such an engine may communicate fire when running in the best condition."

*Missouri*.—Hoover *v.* Missouri Pac. R. Co. (Mo. 1891), 16 S. W. 480.

*Montana*.—Diamond *v.* Northern Pac. R. Co., 6 Mont. 580.

*Nevada*.—Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271.

*New York*.—Field *v.* New York Cent. R. Co., 32 N. Y. 339; Wheeler *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 639; Sheldon *v.* Hudson River R. Co., 14 N. Y. 221, 67 Am. Dec. 155.

*Ohio*.—Lake Side, etc., R. Co. *v.* Kelly, 10 Ohio C. C. 322, 6 Ohio Cir. Dec. 555, 3 Ohio Dec. 319.

*Pennsylvania*.—Huyett *v.* Philadelphia, etc., R. Co., 23 Pa. St. 373; Philadelphia, etc., R. Co. *v.* Schult, 93 Pa. St. 341; Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366; Gowen *v.* Glaser (Pa.), 10 Atl. 417; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652.

*Oregon*.—Koontz *v.* Oregon R., etc., Co., 20 Ore. 3.

*Texas*.—Texas, etc., R. Co. *v.* Land, 3 Tex. App. Civ. Cas., sec. 50; Gulf, etc., R. Co. *v.* Holt, 1 Tex. App. Civ. Cas., sec. 835, 11 Am. & Eng. R. Cas. 72.

*Vermont*.—Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24; Cleveland *v.* Grand Trunk R. Co., 42 Vt. 449.

*Virginia*.—New York, etc., R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264.

*England*.—Piggot *v.* Eastern Counties R. Co., 3 C. B. 230, 54 E. C. L. 230.

*Canada*.—Robinson *v.* New Brunswick R. Co., 23 New Bruns. 323.

Where the plaintiff cannot identify the engine which caused the fire, evidence tending to prove the habitual use of defective spark arresters on defendant's engines is admissible as tending also to show the negligence of the defendant and inferentially the defect of the locomotive causing the fire. *Pennsylvania R. Co. v. Stranahan*, 79 Pa. 405, and *Gowen v. Glaser* (Pa.), 3 Cent. Rep. 109.

In *Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755, it is said in the opinion: "In the plaintiff's third prayer the jury are told, that if they believe from the evidence that the engine 'habitually scattered sparks to such an extent as to endanger combustible material along the line of the road,' it is a fact from which they may find negligence on the part of the defendant. In *Gantt's Case*, in 39 Md. 135, a witness stated that he had seen the engines 'scattering large sparks in passing, capable of setting fire to combustible articles along the road; and that about a week before he had put out a fire in the leaves caused by these sparks; but he could not say that he had ever seen any such sparks from the locomotive that was drawing the freight train the morning of the fire.'

"Chief Judge Bartol, in delivering the opinion of the court, said: 'We entertain no doubt that this was a competent and admissible evidence, both for the purpose of proving that the fire in question was occasioned by the locomotives, and as tending to prove negligence on the part of the defendant in the construction and management of its engines.'

"The learned chief judge in support of these propositions cited the case of *Piggot v. Eastern Counties Ry. Co.*, 54 Eng. C. L. 228; and also referred to a number of American cases in which the same principle is enunciated."

In *Field v. New York Cent. R. Co.*, 32 N. Y. 339, it is said in the opinion: "The evidence objected to was therefore competent on the question of the cause of the fire. But it was also competent on the question of defendant's negligence." It appeared that defendants were running a number of trains at the time this fire occurred back and forth over their road. That four or five of the engines used were without screens on the fire-pans to catch falling coals; and there

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was evidence from engineers tending to show that the engines may be so guarded as to avoid scattering fire, and if they do scatter fire to any great amount, they are either improperly constructed or out of order. To use an engine which scatters coals of fire and endangers the property of others, because of its improper construction, or by reason of its being out of order, would be negligence, and for the purpose of establishing that the engines used by defendant were out of order or improperly constructed, it was clearly competent to show that they were accustomed to drop coals of fire along the track, in quantities which would not be emitted by engines in proper condition. The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that on the particular occasion the dropping of fire was an unavoidable accident."

In *Atchison, etc., R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362, it is said in the opinion: "These cases hardly sustain the plaintiff in error, but rather the reverse. These cases do not require that the plaintiff should show by direct evidence some defect in the engine, or some mismanagement of the same. Indeed, in our opinion it would be extremely unreasonable to require a stranger to the company to do any such thing. The engines are all alike to him. He does not know them apart. Nor does he know when any particular engine is used, or who manages it. And when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to ever afterward identify it. What the engine is, and how it is managed, is peculiarly within the knowledge of the company. Therefore, when the plaintiff has shown that one of defendant's engines has caused one or more fires, and that the ordinary working of an engine under like circumstances does not ordinarily produce such a result, or that engines properly constructed in proper condition, and properly managed, do not ordinarily under like circumstances produce such a result, then we think the plaintiff has made out a prima facie case of negligence; then we think the plaintiff has done enough to require the defendant to show that its engines are properly constructed, in good order, and properly managed. The following authorities we think sustain these views: *Hull v. Sacramento V. R. Co.*, 14 Cal. 387; 111. Cent. R. R. Co. *v. Mills*, 42 Ill. 407; *Ellis v. Portsmouth R. R. Co.*, 2 Iredell (N. Car.) 138; *Piggott v. Eastern Counties R. R. Co.*, 3 Man. Gr. & Scott 229; S. C., 54 Eng. C. L. 229; *Sheldon v. Hudson Riv. R. R. Co.*, 14 N. Y. 218 to 222; *Field v. N. Y. Cent.*, 32 Id. 339; *Huyett v. Phila. & Read. R. R. Co.*, 23 Penn. St. 373."

**b. Fires Set about Same Time.**

In an action for damages from fire started by defendant's engine, when the negligence complained of is in allowing combustible material to accumulate on the right of way, evidence of other fires started by defendant's engines about the same time is admissible. *Pittsburgh, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

Evidence of other fires started along the line of a railroad at about the same time by the company's engines is admissible in an action for damages by fire set by a railroad engine, upon the question of the company's negligence. *Louisville N. A. & C. R. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609.

**c. Prior and Subsequent Fires.**

In a suit against a railroad company for negligently setting fire to plaintiff's premises, evidence of fire on the right of way before and after the one in question is competent where defendant introduced evidence that all its engines were in such condition as not to throw out fire, and that the right of way was kept free from combustible matter. *International & G. N. R. Co. v. Newman* (Tex. Civ. App.), 40 S. W. 854.

**d. Same—Rubbish Previously Fired by Trains of Same Character.**

In an action against a railway company for negligently permitting

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rubbish on its right of way to take fire, whereby plaintiff's warehouse was burned, evidence was admissible that a few weeks or months prior thereto other fires were set by cinders in the same rubbish by local trains of the same character as the one alleged to have caused the fire in question, and that such prior fires were put out by the train crews. *Texas & P. Ry. Co. v. Wooldridge* (Tex.), 63 S. W. 905.

e. Distance to Which Sparks Were Thrown.

Evidence that the company's engines, either before or afterwards, threw sparks as far from the track as the place of the fire, and that they set other fires, is admissible as proof of negligence. *Gulf, Colorado & Santa Fe Ry. Co. v. Holt*, 1 Tex. Civ. App. Cas. § 835, 11 Am. & Eng. R. Cas. 72.

f. Qualifications of Rule—Time.

But some authorities hold that such testimony should be confined to the operation of the engines about the time of the fire. *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652; *Pennsylvania Co. v. Rossman*, 13 Ohio C. C. 111, 7 Ohio Cir. Dec. 119.

In *Louisville, etc., R. Co. v. Miller*, 109 Ala. 500, 19 So. 989, it is said in the opinion: "The court, however, erred in allowing the plaintiff to propound to the witness Wise this question, 'State whether or not you have had any fence or any property burned by the railroad'; and also in allowing the answer, 'I had some fences burned once or twice. Supposed to have been done by the L. & N. R. R. Co. They were right along by the railroad,' to go to the jury. It is not hypothesized in this question, nor does it appear by the answer, that the fires inquired and testified about occurred near the time of the fire alleged to have damaged the plaintiff, nor at or near the same place, nor that it caught from sparks emitted by this engine, or from an engine at all, nor that the engines were like the one used on this occasion, nor that the fire began on the roadway, and spread to witness' property, nor, indeed, that any of the circumstances of this fire were present on the occasion of the other; and this witness' further testimony showed that these fires occurred 10 or 12 years before the fire involved in this suit. This testimony, moreover, does not even tend to show that these long-ago fires were caused by the railroad company."

In an action for damages for the alleged destruction of plaintiff's elevator and its contents by fire escaping from defendant's locomotive engine on account of its careless and negligent construction and management, it was held that evidence offered to show a "negligent habit" on defendant's part as respects the construction and use of its engines was properly confined to such as tended to show the prevalence of such "habit" at or about the time of the fire complained of. *Davidson v. St. Paul, etc., R. Co.*, 34 Minn. 51, 23 Am. & Eng. R. Cas. 352.

Evidence as to other fires, caused several years before the fire in question, by the absence of proper spark arresters, was inadmissible. *Galveston, etc., R. Co. v. Rheiner* (Tex. Civ. App.), 25 S. W. 971. In this case the court said: "It was error to permit testimony to be introduced in regard to other fires caused by appellant's engines years before the fire in question took place. Appellant may have changed the appliances on its engines in that time, and the circumstances may have been totally different under which the fires took place; and it would be rank injustice to have a jury presume negligence, in this instance, because, two or three years before, other fires had occurred along the line of appellant's railroad. Because engines were not at one time supplied with good spark arresters could be no reason for supposing they were not at the time of this fire."

Similarity of Engines.

In *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132, it is said in the opinion: "Testimony showing that some of the company's locomotives had previously or subsequently scattered fire is



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not admissible unless it is also shown that the locomotive which caused the fire was one of them, or was similar in construction, state of repair, or management. *Boyce v. Cheshire R. Co.*, 42 N. H. 97; *Phelps v. Conant*, 30 Vt. 277; *Malton v. Nesbit*, 1 Car. & P. 70; *Hubbard v. Railroad Co.*, 39 Me. 506; *Standish v. Washburn*, 21 Pick. 237; *Collins v. Dorchester*, 6 Cush. 396; *Robinson v. Railroad Co.*, 7 Gray 92; *Jordan v. Osgood*, 109 Mass. 457; *Sheldon v. Railroad Co.*, supra; *Smith v. Railroad Co.*, 37 Mo. 287; *Railroad Co. v. Doak*, 52 Pa. St. 379."

## g. Question for Jury.

Where the action is for dropping fire in dry weeds and other rubbish on the right of way, which extends to plaintiff's lands, and there is positive evidence by the plaintiff that the engines frequently dropped fire and coals of considerable size, and witnesses for the defendant testify that the engines were properly equipped and in good order, but make admissions tending to show that there was something in the mode of attaching some of the appliances that might give a chance for the escape of fire, the question of the company's negligence is properly left to the jury. *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, 4 Am. Ry. Rep. 547.

## h. Knowledge of Danger to Be Guarded against.

Using a shingle roof on a depot is not in itself negligence, but where it has been frequently fired by sparks from passing trains, of which fact the company has knowledge, continuing the use of a spark-throwing locomotive near such depot, thereby firing it, becomes negligence. *Cincinnati, etc., R. Co. v. Barker*, 94 Ky. 71, 21 S. W. 347, 56 Am. & Eng. R. Cas. 106.

## i. Engine Identified.

There are authorities holding that where the locomotive causing the fire is identified, evidence to show defects in other engines of the company, or negligence in their management, is not admissible for the purpose of proving that the fire resulted from negligence on the part of the company.

*California*.—*Flynn v. Railroad Co.*, 40 Cal. 14; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 13 Am. Ry. Rep. 168.

*Florida*.—*Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 49 Am. & Eng. R. Cas. 603.

*Georgia*.—*Inman v. Elberton Air-Line R. Co.*, 90 Ga. 663, 35 Am. St. Rep. 232, 16 S. E. 958.

*Illinois*.—*Hoopeston First Nat. Bank v. Lake Erie, etc., R. Co.*, 174 Ill. 36, 50 N. E. 1023.

*Indian Territory*.—*Missouri, K. & T. Ry. Co. v. Wilder (Ind. Ter.)*, 53 S. W. 490.

*Michigan*.—*Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. 426.

*Minnesota*.—*Nelson v. Chicago, etc., R. Co.*, 35 Minn. 170, 28 N. W. 215.

*New Hampshire*.—*Haseltine v. Concord R. Co.*, 64 N. H. 545, 15 Atl. 143, 35 Am. & Eng. R. Cas. 236.

*New York*.—*Rood v. Railroad Co.*, 18 Barb. (N. Y.) 80; *Sheldon v. Railroad Co.*, 14 N. Y. 218.

*Pennsylvania*.—*Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345; *Railroad Co. v. Yeaser*, 8 Pa. St. 366; *Glaser v. Lewis*, 17 Phila. (Pa.) 345, 42 Leg. Int. (Pa.) 141; *Erie R. Co. v. Decker*, 78 Pa. St. 293; *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652.

*Wisconsin*.—*Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132, 13 Am. & Eng. R. Cas. 469.

*England*.—*Vaughan v. Railroad Co.*, 5 Hurl & N. 679; *Railroad Co. v. Brand*, L. R. 4 H. L. 171, 201, 202; *Higgs v. Maynard*, 12 Jur. (N. S.) 705; *Welfare v. Railroad Co.*, L. R. 42, B. 693; *Wright v. Railroad Co.*, L. R. 89 Exch. 137, 42 Law Exch. 89.

In an action to recover damages for a loss sustained by fire set by a passing locomotive which is identified, evidence of other fires

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caused by different locomotives before and after the fire complained of is not admissible. *Hoopeston First Nat. Bank v. Lake Erie & W. R. Co.*, 174 Ill. 36, 50 N. E. 1023, aff'g 65 Ill. App. 21.

In an action against a railroad for damages caused by an engine emitting sparks, the engine being identified, evidence of other engines of defendant emitting sparks on other occasions is incompetent; defendant's liability depending on its negligence in operating the particular engine, and not in operating engines generally. *Missouri, K. & T. Ry. Co. v. Wilder (Ind. Ter.)*, 53 S. W. 490.

If the particular engine which is supposed to have caused the fire is known, no evidence respecting the condition of any other should be received. *Glaser v. Lewis*, 17 Phila. (Pa.) 345.

In *Gibbons v. Wisconsin Valley R. Co.*, 58 Wis. 335, 17 N. W. 132, it is said in the opinion: "The fire was discovered soon after the passenger train passed that point, and there was no evidence whatever that this particular fire was set by any other engine on the road. The circuit court admitted evidence, against the objection of the appellant, of fires in the vicinity on this same road, both before and after this fire, occurring after the passage of other locomotives. This was clearly erroneous. Such evidence would open the door for a wide issue of great importance,—whether such other locomotives caused such fires or not,—and could not affect the same in the cause, even if it had been proved that other locomotives caused other fires in the vicinity. The rule has never been extended further than to allow proof of other fires caused by the same machinery. If it had been proved in this case, beyond a doubt, that one of these locomotives—either that of the freight or passenger train passing soon or immediately before the fire occurred—caused the fire, it could not add to the defendant's liability by showing habitual carelessness in respect to other locomotives; and if it had been proved that other locomotives on the same road caused other fires, at other times and places, it would not be even presumptive evidence that the locomotives in question were insufficient in any respect.

In an action against a railroad company for the burning of a building by sparks from an engine, where the engine has been identified, evidence of other fires kindled by sparks from other engines is inadmissible; and this even where defendant's witnesses state that the engine in question had the same kind of appliances for arresting sparks as all the other engines. *First Nat. Bank of Hoopeston v. Lake Erie & W. R. Co.*, 174 Ill. 36, 50 N. E. 1023.

In this case, however, the court said: "If, in the present case where the engine alleged to have caused the injury was identified, testimony as to other fires occurring on the line of the road shortly before or after the fire in question was admissible at all, it was inadmissible as a part of appellant's original case. To make a *prima facie* case, it was bound to introduce evidence tending to show that a spark from the engine caused the fire. Evidence that other engines had caused other fires about the same time was merely evidence tending to show that this fire may have been caused by a spark from the particular engine in question. Therefore the testimony should have been introduced, if at all, as a part of plaintiff's original case. It was, however, offered as a part of plaintiff's rebutting testimony. Where testimony which might properly have been introduced as proof in chief is offered by the plaintiff in rebuttal, it is discretionary with the trial court whether such testimony shall be admitted or not, and the action of the court in this regard is not assignable as error. *City of Sandwich v. Dolan*, 141 Ill. 441, 31 N. E. 416; *Railroad Co. v. Richardson*, supra; 8 Enc. Pl. & Prac. p. 132. Inasmuch, therefore, as the offered evidence, if competent at all, would have been, in strictness, a part of the plaintiff's original case, its admission or exclusion upon the rebuttal was a matter of discretion, and, whether right or wrong, cannot be reviewed here."

**Missouri Doctrine.**

In *Hoover v. Pac. R. Co. (Mo.)*, 16 S. W. 480, which is sometimes

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cited as opposed to this doctrine, it is said in the opinion: "The last point for consideration is whether the testimony of \* \* \* was properly admitted in evidence, to the effect that on several occasions, from three to six months before, he, living some half mile from the mill, had put out fires caused by defendant's locomotives on his land along the line of its road, and some 300 yards from the mill. The general current of authority undoubtedly, as shown by plaintiff's counsel is in favor of the admissibility of such testimony, not only as to prior, but as to subsequent, occurrences of such a nature; the theory being that such accidents have a tendency to show negligent management of the defendant company's locomotives. There are a few authorities to the contrary; but it is believed that the theory first mentioned is better supported by reason, as it certainly is by authority. There are two cases cited from our own reports which seem to hold contrary to the views here announced,—*Coale v. Railroad Co.*, 60 Mo. 227, and *Lester v. Railroad Co.*, *Id.* 265, but we overrule them." But in this case the engine causing the fire was seen as it passed plaintiff's property, but was not identified.

And in *Campbell v. Missouri Pac. R. Co.*, 121 Mo. 340, 42 Am. St. Rep. 530, it is said in the opinion: "If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court: *Coale v. Hannibal, etc.*, R. R. Co., 60 Mo. 227; *Patton v. St. Louis, etc.*, Ry. Co., 87 Mo. 117, 56 Am. Rep. 447."

j. Fire Set by One of Two Engines.

It being alleged that the burning was caused by sparks which escaped from one of two engines described in the declaration, by reason of the defective condition of the engine and the negligent manner in which it was operated, the refusal of the court to admit evidence that other engines of the defendant besides these two, and not shown to be of like construction, had at other times emitted sparks at or near the same place is not ground for a new trial. *Inman v. Elberton Air-Line R. Co.*, 90 Ga. 663, 16 S. E. 958. In this case it is said in the opinion: "Error is assigned upon the refusal of the court to admit evidence that other engines of defendant, besides the two alleged in the declaration, had at other times emitted sparks at or near the place of the fire in question; this evidence being offered to show general carelessness or negligence on the part of the defendant. We think the court was right in declining to admit evidence of this kind. The declaration alleged that one of two particular engines caused the burning, and the engines referred to were distinctly identified. One was the Nancy Hart and the other the Ellen B. Peeples. It was not claimed that the fire was caused by any other. The question before the jury was whether it was caused by one of these, and the negligence alleged was negligence in the condition and management of these two. How then could it be material or relevant to show negligence on other occasions and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction? The cases cited in support of the contention that this testimony should have been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire; and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter; but when the engine is identified, the same reason does not operate, and evidence as to the condition of other engines and of their causing fire is clearly irrelevant. To this effect see 2 *Shearman and Redfield*

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on Negligence, sec. 675, ed. 1888, and cases cited. See especially the following cases: *Albert v. Northern Cent. Ry. Co.*, 98 Pa. St. 316; *Erie Ry. Co. v. Deker*, 78 Pa. St. 293; *Coale v. Hannibal, etc., R. R. Co.*, 60 Mo. 227; *Boyce v. Cheshire R. R. Co.*, 42 N. H. 97; *Jacksonville, etc., R. R. Co. v. Peninsular, etc., Land Co.*, 27 Fla. 1, 9 So. 661; *Ireland v. Cincinnati, etc., R. R. Co.*, 79 Mich. 163, 44 N. W. 426; *Gibbons v. Wisconsin, etc., R. R. Co.*, 58 Wis. 335, 17 N. W. 132. In the last of these, the question is considered at some length, and among the cases discussed is that of *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, which was the authority mainly relied upon by counsel for the plaintiff in error here. It is said: "In that case, both in the brief of the learned counsel and in the opinion of Mr. Justice Strong, the language is very carelessly used, that evidence that the locomotives of the company, at other times and places on the same road, were so constructed as to scatter fire along the track might tend to prove a possibility, and a consequent probability, that some locomotive of the company caused the fire and show a negligent habit of the officers and agents of the railroad company. But in that case it is said in the opinion: 'The particular engines which caused the fire were not identified.' In such a case such evidence might tend to prove the possibility and consequent probability that some locomotive of the company caused the fire. This wonderfully loose logic may be satisfactory to a judicial mind in cases where there was no proof that any particular and identified locomotive caused the fire in question, if any locomotive of the company did. But in due deference to the learned judge who wrote the opinion, and the other judges who have used this language, it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law. It would be a monstrous doctrine that when a party is sued in tort for a personal injury to another, occasioned by his negligence in not furnishing proper appliances, or otherwise, his common carelessness, or carelessness in other cases, tend to prove the "possibility," and therefore "probability," that the act charged was the result of his negligence, without proof even that he committed it."

"In the case of *East Tennessee, etc., Ry. Co. v. Hesters*, 90 Ga. 11, decided by this court at the last term, in which the testimony as to the escape of sparks from engines of the defendant on occasions previous to the fire in question was held admissible, the evidence for the company showed that all the locomotives of the company were kept substantially in the same condition. Besides, in that case there was a general allegation that the fire was caused by the defendant's engines, and no particular engines were described or identified."

k. **Rebutting Evidence as to Good Condition of Engines.**

Where the company attempted to show its diligence as to the condition of the particular locomotive, by evidence tending to prove that all its locomotives run over its road were kept in substantially the same condition, and that such condition was good, this evidence might be rebutted by evidence that on previous occasions and at different places the company's locomotives had emitted sparks which caused, or were capable of causing, similar fires. *East Tenn., V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828.

Defendant, sued for setting fire from its locomotive to grass, having given evidence that its engines and spark arresters were new, and were and had been in good order ever since they were put on the road, 6 to 12 months before the fire, plaintiff's rebutting evidence, that a person riding on one of defendant's trains 5 or 6 months before the fire saw fire start up freshly in the grass on the right of way, and saw no cause for it, no one being there, is not too remote. *Wilson v. Pecos & N. T. Ry. Co. (Tex.)*, 58 S. W. 183.

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SOUTHERN PAC. CO. *v.* WINTON *et al.**(Court of Civil Appeals of Texas, Dec. 11, 1901.)*

[66 S. W. Rep. 477.]

**Death by Wrongful Act—Assignment of Wife's Cause of Action—Statute.**

Under Rev. St. art. 3025, providing that in an action for injuries resulting in death, if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate, and article 4647, authorizing the assignment of any claim after suit brought, a surviving wife's cause of action for negligence resulting in the death of her husband is not assignable before a suit is brought thereon.

**Same—Right of Attorney to Intervene.**

Where an attorney performs services for a widow in the prosecution of an action against a railroad company for negligence resulting in the killing of her husband, the claim of such attorney for compensation is not an interest in the cause of action which entitles him to intervene in such suit.

**Killing of Brakeman—Mismatched Couplings.\***

Where a railroad company starts over its road a train of cars having coupling appliances so mismatched that on coupling the cars the appliances on one car may slip past that on the other, and let the cars together, so as to endanger the life of the brakeman who is attending to the coupling, and the brakeman is so killed, the company is chargeable with negligence which is the proximate cause of the injury.

**Same—Same—Liability for Failure to Inspect as Affected by Existence of Rule Requiring Inspection.**

The railroad company could not shift its duty of inspection and starting out only such cars as were properly equipped onto its brakemen by a rule forbidding them to put cars into a train which are not properly equipped.

**Same—Same.**

A train of "tourists' sleepers" loaded with colored soldiers was received by a railroad company for carriage over its tracks. Some of the cars had the Miller coupler and some the Janney coupler. These styles of couplers do not match, and when coming together may slip past each other, letting the car platforms come so near together as to endanger the life of a brakeman attending to the coupling. The defect was discernible on inspection: *held*, that the company owed the duty to its employees of proper inspection of the cars and appliances, and, if they were not reasonably safe and proper, it must remedy the defect, or refuse to take the cars.

**Same—Same—Contributory Negligence.**

A rule of a railroad company forbid its employees to place a car with defective couplings in a train. It received from another road and carried a train of tourist sleepers having mismatched couplers. While stopping at a station the train was separated to leave a highway open. While coupling up preparatory to going on, such couplers slipped past each other, letting the cars together, crushing the brakeman who was attending to the coupling: *held*, that making such coupling was not placing such cars in the train, and not contributory negligence, or a violation of such rule.

**Same—Same—Same.**

A railroad company received from another road a train of tourists' sleepers having cars with couplers so mismatched that they were liable to slip past each other and let the platforms come together when they were being coupled. A freight brakeman, where such couplers were not ordinarily used, and who did not appear to have ever made or seen

\*See generally, 7 Am. & Eng. Enc. Law (2d Ed.) 1047 et seq.; 5 Rap. & Mack's Dig., 85 et seq.

## Southern Pac. Co. v. Winton

made a coupling with such appliances, was required to brake on such train. The train was temporarily separated, and such brakeman was ordered to make the coupling, but was not warned of the hazard of working with such couplers. The couplers slipped past each other, and he was crushed between the cars: *held* that, as he had the right to presume that the company had furnished appliances which were reasonably safe when used in accordance with its rules, and that he would be warned if there was extra or unusual hazard, he did not assume the risk of the use of such unsafe couplers.

**Direction of Verdict.**

Where, in an action against a railroad company for injury resulting from negligence, it is not clearly established that a fact essential to plaintiff's recovery has not been proven, or that one which is a complete defense is shown, the court should not direct a verdict for defendant.

**Death by Wrongful Act—Excessive Verdict.**

Where, in an action against a railroad company by a mother for the negligent killing of her married son, it appears that she is 73 years old, living with her married daughter, and the son, earning \$100 a month, had contributed \$50 per year for her support, a verdict of more than \$1,000 is excessive.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by Minnie Winton and another against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Affirmed on conditions.

Beall & Kemp, for appellant.

W. B. Brack, Edwards & Edwards, W. M. Peticolas, and Patterson & Buckler, for appellees.

NEILL, J. This suit was brought by Minnie Winton, as surviving wife, and Annie H. Winton, as the mother, of Benjamin S. Winton, against appellant and the Galveston, Harrisburg & San Antonio Railway Company to recover damages occasioned by the death of Benjamin, who was alleged to have been killed by the defendants' negligence, when in the employ of appellant as a brakeman, while attempting to couple two passenger cars equipped with mismatched couplers,—one a Miller hook, and the other a Janney coupler. The defendants answered by general demurrer, a plea of not guilty, and pleaded specially assumed risks, contributory negligence, disobedience by decedent to rules of the company, that the cars between which he was killed came beyond the state of Texas and appellant was obliged by the laws of the state to receive and transport them without delay, and that it was a part of the duty of decedent's employment to inspect such cars and report any imperfections or defects therein. Messrs. Patterson & Wallace, attorneys at law, claiming an interest in plaintiffs' cause of action through contract with Minnie Winton, authorizing them to sue for plaintiffs on this cause of action, and agreeing to give them one-half of the recovery, intervened in this suit. The court having sustained exceptions made by plaintiffs to the petition of intervention, the defendants, by a trial amendment in the nature of an interpleader, prayed to be protected against the claim of inter-

veners, and asked that they be retained as parties. However, the petition of intervention was dismissed. The case was tried before a jury, whom the court peremptorily instructed to return a verdict in favor of the Galveston, Harrisburg & San Antonio Railway Company, and submitted the case on the law and facts against the appellant only, against whom a verdict was returned in favor of Minnie Winton for \$10,500, and in favor of Annie H. Winton for \$2,500. From the judgment entered on this verdict the Southern Pacific Company has appealed. Messrs. Patterson & Wallace have also appealed from the judgment dismissing their petition in intervention. (Questions of jurisdiction omitted.)

The interveners, Messrs. Patterson & Wallace, assign as error the action of the court in striking out, on motion of appellees, their petition in intervention. It will be seen from our statement of the case that interveners alleged in their petition that appellee Minnie Winton entered into a written contract with them, as attorneys at law, whereby she, in consideration of legal services to be rendered in instituting and prosecuting suit against defendants for damages occasioned by the death of B. S. Winton, assigned them one-half of her cause of action for the death of her said husband; and that in making said contract all the formalities of law required were complied with, save that it was entered into before suit was filed. They set up a partial performance of their part of the contract, their ability and willingness to fully perform it, the value of the services performed, that they were without cause discharged from their employment by Minnie Winton, and that she is insolvent. They prayed, in the event they were not entitled to recover on the contract, for judgment for the value of their services rendered. To entitle one to intervene in an action, the interest claimed by him must be in the subject-matter in the suit, and not in some incidental or collateral matter. The subject-matter, when interveners came into this suit, was the damages plaintiffs were entitled to recover against the appellant for injuries by it inflicted resulting in the death of B. S. Winton. Their cause of action, if any they had, against Mrs. Winton, was for a breach of contract; and, if it bore any relation at all to the subject-matter involved in appellees' action against appellant, it was only incidental or collateral. If they had any cause of action against appellant, it must necessarily have arisen from the alleged assignment by Mrs. Winton to them of one-half of her cause of action against it for the death of her husband, for it cannot be successfully contended that the Southern Pacific Company would be liable to interveners on a quantum meruit for services rendered by them in instituting and prosecuting a suit against it upon a contract between interveners and Mrs. Winton. However meritorious, so far as plaintiffs are concerned, such services may have been, we apprehend that appellant could see as little merit in as it received value from them. Things in

action which do not pass to the personal representatives of a decedent as assets of his estate, in the absence of a statute authorizing their assignment, are not assignable. Pom. Eq. § 1275. Until the act of 1895 (Rev. St. art. 3353a), "in all cases of injuries to the person, whether by assault, battery, false imprisonment, slander or otherwise, if either the party who received or committed the injury died, no action could be supported either by or against the executors or other personal representatives." *Taney v. Edwards*, 27 Tex. 225. The act referred to provides that causes of action brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such action shall have accrued. It is thus seen at the time of this enactment that it was recognized by the legislature that actions for personal injuries resulting in death did not survive, and that the statute expressly excepts such causes of action from its operation. An action of this character is for the sole benefit of the parties to whom the right is given, and it is expressly provided that "the amount recovered therein shall not be liable for the debts of the deceased" (Rev. St. art. 3021), and that, "if the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate" (Id. art. 3025). But it would seem that Rev. St. art. 4647, which provides for the "sale of a judgment or any part thereof of any court of record within this state, or the sale of any cause of action or interest therein after suit has been filed thereon," when evidenced, acknowledged, filed, and a minute of such transfer made, as required by the article, is applicable "to any judgments, suits, claims or causes of action whether assignable in law or equity or not." It, however, does not apply to the sale of a cause of action before suit is brought. *Railway Co. v. Wooten* (Tex. Civ. App.) 30 S. W. 684. We conclude, therefore, that it appears from the face of interveners' petition that they have no interest in the subject-matter of this suit, and that the court did not err in striking their pleading from the record and dismissing their alleged cause of action.

This brings us to the consideration of the case upon its merits. Under appellant's second assignment of error it is contended that the court erred in submitting the case to the jury under the facts, and in charging that under any phase of the evidence plaintiffs were entitled to a recovery. This requires a consideration of the facts and the law applicable to them. We will therefore state the facts. Such as are undisputed may be considered as our conclusions. But when the evidence raises an issue as to the existence or nonexistence of a material fact, we will, after considering the testimony, determine the issue in accordance with the verdict, if we find the evidence reasonably sufficient to support it.



On the 25th day of September, 1899, a train loaded with negro soldiers, destined for the Pacific coast, came from some point beyond the state of Texas over the line of the Texas & Pacific Railway Company, and was received from that company by the Southern Pacific Company at its depot in the city of El Paso, Tex., to be carried over its road west to its destination. The cars composing the train were tourist sleepers. While waiting at El Paso, the train was cut in two at a certain street crossing. When the time came for the train to depart on its journey west, the conductor directed Benjamin S. Winton, who had on that day been taken by appellant from his employment as a brakeman on its freight trains and assigned to duty as a brakeman on this passenger train, to couple the cars at the crossing where it had been cut in two. In obedience to the order of the conductor, he made the coupling, when, by reason of the coupling appliances being mismatched,—one being a Miller hook and the other a Janney coupler,—they slipped by each other before he could get out from between the cars, and by their coming together he was crushed so that he died soon thereafter. Each of the couplers was automatic when worked with its own kind. When they were used together they would not couple automatically, but could be coupled by the use of a link and pin. When coupled by these means,—as they were in this instance,—their tendency, on account of the lateral motion in the Miller hook, was to slip by each other, and allow the ends of the cars or their platforms to come so close together as to endanger the life of any one between them. It is generally recognized among railroad men that the use of these kinds of coupling appliances together is dangerous. The accident happened in the daytime, when the kind and character of the coupling appliances could be plainly seen. The deceased was an experienced brakeman, 35 years old, and had worked for the Southern Pacific Company as a brakeman on its freight trains about a year and a half before his death. Prior to his employment by appellant he had worked for the Santa Fe System in Southern California for about two years on passenger trains the greater part of the time. Rules 59 and 60 of appellant company are as follows: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplings of cars and engines cannot be uniform in style or strength, and are apt to be broken from various causes, so as to render it dangerous to expose the hands, arms, or person of those engaged in making couplings, all employees are enjoined before coupling cars or engines to examine and to know the kind and condition of drawhead, drawbar, link, and coupling apparatus, and are forbidden to place in trains any car with a defective coupling, until they shall have reported the defect to the conductor or yard master. Sufficient time may be taken by employees in all cases to make the examination required." "In coupling Miller hooks with other styles

of drawbars, the link should first be inserted to the hook, using the pin chained to the Miller platform. In coupling a Miller hook with link and pin to an automatic coupler, the link should first be inserted in the hook; then the coupling be made to the closed knuckle of the automatic coupler. The person making the coupling as a rule should stand on the guardarm side of the automatic coupler." We conclude and find as a fact that appellant was negligent in having in said train the two coaches one of which was equipped with what is known as a "Miller hook" and the other with a "Janney coupler," and that such negligence was the proximate cause of the death of Benjamin S. Winton.

The issues of fact (1) as to whether decedent knew, or by ordinary observation could have known, when he went between the coaches to make the coupling, that the lateral motion in the Miller hook was sufficient to allow it to slip past the Janney coupler, and subject him to an unusual danger; and (2) whether, in making the coupling, he observed the rule of the company prescribing the manner in which it should be done,—are controverted, and upon them the evidence was conflicting. There was, however, evidence upon each of said issues sufficient to warrant the jury in finding that decedent did not know, and by ordinary observation could not have known, of the liability of the Miller hook to pass the Janney coupler. As to the second issue stated, we think it is demonstrable from the evidence that the decedent obeyed to the letter the rule of the company in making the coupling. In view of the verdict, we find on each of the issues of fact in accordance therewith. Having found (1) that appellant was negligent in having the two cars in its train with mismatched coupling appliances; (2) that such negligence was the proximate cause of Winton's death; (3) that the risk attending one in coupling such cars was unusual; (4) that the decedent was unacquainted with, and could not by ordinary observation have known of, unusual danger caused by the liability of the mismatched coupling appliances to pass each other; and (5) that in making the coupling Winton complied with the rule of the company in making it,—we are brought to the question raised by this assignment: Did the court err in submitting the case to the jury on these facts? This question requires us to consider the law upon (1) negligence of appellant; (2) on assumed risk; and (3) upon contributory negligence.

1. It is the duty of the master to use ordinary care, diligence, and skill for the purpose of protecting his servants from encountering unnecessary risks in his service. He personally owes to his servants the duty of using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. These instrumentalities must be adapted to the work in hand. It is not enough that they should be good under ordinary conditions, but they must be suitable for the work to which they are applied by the master,

and properly adjusted to each other. If, therefore, the master knows, or would have known if he had used ordinary care to ascertain the facts, that the machinery or appliances which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor. The master is not entitled to time to discover defects in things which are defective when put to use, but he should examine them before putting them to use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the appliances furnished by him. *Shear. & R. Neg.* (5th Ed.) § 194, and authorities cited in notes. Railroad companies owe to their employees the duty of proper inspection of cars and their appliances for the purpose of discovering defects. If the appliances are not reasonably safe or proper on any of the cars, they should not be put in the train and started out. And it makes no difference whether the cars belong to the company or were received by it from some other railroad. They must first be inspected, and, if found unsafe, must not be put in the train. As is said in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, 24 Am. & Eng. R. Cas. 421: "It [the railroad company] owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must remedy such defects, or refuse to take such cars. So much, at least, is due from it to the employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road." As the evidence shows without contradiction that the appellant knew, when it received the train carrying the two cars with mismatched coupling apparatus, that it was extrahazardous to its employees to couple them together, it was guilty of a breach of duty to its servants. As is seen, it could not, under the law, shift the consequence of its negligence from itself to its servants,—as it claims in this case it had done,—by a rule imposing upon its servants a duty it personally owed to secure their safety while in the discharge of the duties of their employment. Even if the master were permitted in this way to shirk his duty and avoid the consequence of his negligence, the rule of the company forbidding its employees to place in trains any cars with defective couplings cannot be held in this case to have that effect. It was not the decedent's duty to place cars in trains. This duty was appellant's, or such of its servants' to whom it had been delegated by the company; and whose failure to discharge it would, as to all employees except themselves, be the negligence of the master. The cars had been placed in the train before Winton was assigned to it in the capacity of a brake-

man. The train might have been hauled over appellant's entire line without it becoming necessary for a brakeman either to couple or uncouple any of the cars, had it not been cut in two at the street crossing in El Paso. Because of its being parted there, the brakeman who had to make the coupling so it could proceed on its journey cannot be held to the liability of a servant whom appellant had "forbidden to place in trains any car with defective couplings." These principles of law, when applied to the facts, show to a moral certainty the negligence of appellant.

2. As to the doctrine of assumed risks: "A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of entering upon the business, are known to him, or should be readily discernible by a person of his age and capacity, in the exercise of ordinary care, and whether the business is dangerous or not. The ordinary risks of a particular business are those which are a part of the ordinary method of conducting that business, even though they might be fairly called extraordinary with reference to different business, or a different department of the same business. If the business is essentially attended with extraordinary dangers, these are among the risks assumed." *Joyce v. Worcester*, 140 Mass. 245, 4 N. E. 565. "But a servant does not assume risks which are not thus known or discernible, nor any which do not exist at the time when he enters into his master's service, and of which he has not notice in time to protect himself against them; nor does he assume extraordinary risks, unusual in his business, of which he has not timely notice." *Shear. & R. Neg.* §§ 185, 185a. "He does not assume the risks arising from the failure of the master to do his duty, unless he knows of the failure and the attendant risks, or in the ordinary discharge of his duty must necessarily have acquired that knowledge." *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508. A servant has the right to presume, and to act upon the presumption, that his master or his vice principal has and will continue to perform every duty incumbent upon him; that there are no risks attending the business other than such as usually attend business of that general nature, and existed when he entered into the service, or such as have been explained to him, or are known by or perfectly obvious to him; that it is safe to obey orders; that the place of work is safe, and the appliances reasonably good and adequate. *Shear. & R. Neg.* § 185b. When the master has been guilty of negligence, knowledge on the part of the servant of such negligence and of the danger arising therefrom is the foundation of assumed risk. *Railway Co. v. Engelhorn* (Tex. Civ. App.) 62 S. W. 561. If it be admitted the decedent saw, at the instant he attempted to make the coupling, the dissimilarity between the couplings, that would not give rise to the doctrine of assumed risk; for, if he acquired that knowledge at the time he attempted to make the coupling, the

doctrine of assumed risk does not apply. *Railway Co. v. Milam* (Tex. Civ. App.) 50 S. W. 417. The rule prescribing how the coupling should be made when "coupling Miller hooks with other styles of drawbars" would imply that, if the coupling were made in compliance with the rule, no extraordinary risk would be encountered. A servant upon whom the duty devolved of performing the service would have the right to presume that his master knew it was safe if done in the manner prescribed. If making the coupling according to the rule of his instruction would expose him to unusual danger, it was the company's duty to inform him of the extra hazard. The decedent was not bound to know what was unusual, and not to be expected in the usual course of his employment. *Kerns v. Railway Co.* (Iowa) 62 N. W. 692. The decedent's employment was that of a brakeman on freight trains, upon which such coupling appliances as a "Miller hook" and "Janney coupler" were not ordinarily used. It does not appear that he ever made or ever saw a coupling made with such mismatched appliances. The fact that it was generally known among railroad men that making a coupling with such devices was dangerous would not, as a matter of law, impute to him knowledge of such danger. The rules furnished him provide for making such a coupling and he was ordered by his conductor (the company's vice principal) to make it. He had, in addition to the presumptions arising from the rule forbidding cars with defective couplings being placed in trains, and prescribing how couplings should be made with a Miller hook, and that he was not exposing himself to unusual danger, the right to assume that the conductor would not order him to make the coupling if the appliances were unsafe. It not appearing that Winton knew, or by the exercise of ordinary observation ought to have known, that the lateral motion of the Miller hook was sufficient to permit it to slip by the Janney coupler, it cannot be said he assumed the risk of losing his life in undertaking to couple the cars. *Russell v. Railway Co.* (Minn.) 20 N. W. 147; *Martin v. Railway Co.* (Cal.) 29 Pac. 645; *Railway Co. v. Smith* (Tex. Civ. App.) 57 S. W. 999. As the risk to Winton in making the coupling was one that arose from the negligence of appellant, and not such as was ordinarily incident to his employment, nor of which he had knowledge, nor readily discernible, and of which he had knowledge in time to protect himself, therefore we conclude, under the law and facts, that it cannot be held to be such a risk as was assumed by him.

3. Little need be said as to contributory negligence. If one is injured in the discharge of his duty by an occurrence of which he assumed the risk of the danger, it can make little difference whether he was negligent in the performance of the duty or not. In either event he is not entitled to a recovery. If the injury results from a risk which was not assumed, but from his contributory negligence, he cannot recover, though

his employer may have also been guilty of negligence. The only ground upon which it is possible to say that decedent was guilty of contributory negligence is that he did not obey the rule of the company as to the manner of making the coupling. Upon this point we have found that it is demonstrable from the testimony that in this he observed the rule to the letter. We must therefore hold that he was not guilty of any negligence proximately contributing to his death.

It follows from what we have said that the court did not err in submitting the case to the jury on the facts. It is only when it is so clearly established from the undisputed testimony as to admit of no other reasonable hypothesis or conclusion that either a fact essential to plaintiff's action is not proven, or one which is a complete defense has been shown, that it becomes the duty of the court to instruct a verdict for the defendant. *Sanches v. Railway Co.*, 88 Tex. 117, 30 S. W. 431; *Railway Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588; *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; *Choate v. Railway Co.*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Haass v. Railway Co.* (Tex. Civ. App.) 57 S. W. 855.

All of the questions raised in the assignments which complain of the charge, except one, are involved in what we have already stated to be the law applicable to the facts in this case. The charge is in perfect accord with our view of the law as before expressed, and we deem it unnecessary to say more than that, in our opinion, none of such assignments, as well as none of those which complain of the court's refusal to give certain special instructions requested by appellant, is well taken. As the charge shows that the only issues of negligence submitted to the jury were: (1) Whether appellant was guilty of negligence in using a Miller hook in connection with a Janney coupler; (2) whether or not it was negligent in failing to inform deceased of the unusual danger in making the coupling; and (3) whether Winton was guilty of contributory negligence,—the appellant could not have been prejudiced by the court's telling the jury in its charge that, before they could find for plaintiffs they must find that decedent's "injury was caused through the negligence of the defendant in some one of the respects above named," i. e., some one of the grounds of negligence alleged in plaintiffs' petition. When the charge is considered as a whole, the jury were only permitted to consider or find against appellant upon one or both of the grounds of negligence submitted to them.

The evidence shows that Annie H. Winton, the mother of the deceased, was 73 years old when her depositions were taken in the case; that her life expectancy was 7 years; that he gave her about an average of \$50 a year; that she resided with her daughter, Cora Caswell, in California, at the time of his death; that Mrs. Caswell and another married daughter contributed to her support by giving her a home. Deceased was earning \$100 per month when he was killed. In May,

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1899, he spoke of his intention to care for his mother the remainder of his life, saying that he wanted her to live with him, and take life easy; that theretofore he did not have money to do for her as he liked, "but now [May, 1899] he was out of debt, making money, and able to support her." Had deceased contributed one-third of his earnings during her life expectancy, it would have amounted to little more than the judgment. She already had a home with her daughter, and it is not shown that she ever intended to change it for a home with her son. There is nothing to show that she had any reasonable expectation of receiving pecuniary aid of more than \$1,000 in value from her son had he lived. That sum we believe will amply compensate her for the pecuniary loss she has sustained. We do not believe the damages awarded Minnie Winton, the wife of deceased, is excessive. If within 15 days from this date a remittitur is entered by Mrs. Annie H. Winton of \$1,500, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

## TARBELL v. RUTLAND R. CO.

*(Supreme Court of Vermont, Rutland, Nov. 9, 1901.)*

[51 Atl. Rep. 6.]

**Validity of Contract with Next of Kin Releasing Company from Liability—Public Policy.**

A contract between a railroad company and the next of kin of an employee, whereby the next of kin released the railroad from all damages that might accrue to him by reason of the railroad's negligence, is void as against public policy.

**Same—Injury to Employee—Statute.**

V. S. § 3924, declares that, if any agent of a railroad is guilty of negligence whereby an injury is done, he shall be imprisoned or fined, but that the section shall not exempt the corporation from an action for damages. Sections 3886, 3887, forbid railroad companies having ladders and steps on cars to the top on the sides of the cars, and require them to be placed on the inside or ends of cars: *held* that, where an employee was killed by being knocked from the ladder on the side of a car, a contract between the railroad and deceased's next of kin, exempting the railroad from liability for negligence, was no defense to an action for the death.

**Exceptions from Rutland county court; Munson, Judge.**

Action by Darius Tarbell, as administrator of the estate of Arthur W. Tarbell, deceased, against the Rutland Railroad Company. From a judgment sustaining a demurrer to certain pleas of defendant, the latter excepted. Affirmed.

Argued before TAFT, C. J., and ROWELL, TYLER, START, and WATSON, JJ.

Butler & Moloney, for plaintiff.

F. H. Button and Barber & Darling, for defendant.

TYLER, J. Action, case, for defendant's negligence, through its servants and agents, in leaving, or permitting to be left, a car loaded with lumber to stand upon a side track in such proximity to the main track that the plaintiff's intestate,

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while descending a ladder on the outside of one of the cars which the defendant was operating on the main track, was struck, knocked from the car, and so injured that he died. The question before us is raised by the plaintiff's demurrer to the defendant's pleas, wherein it is alleged that the plaintiff, as next of kin of the intestate, Arthur W. Tarbell, before the latter's employment by the defendant, and in consideration that it would employ him, entered into a written agreement with the defendant by which the plaintiff released and discharged it from all damages that might accrue to the plaintiff, as next of kin of the intestate, by reason of the defendant's negligence during his employment. The defendant contends that, though such a contract between itself and the injured employee might not be upheld, this contract, being with the next of kin of the employee, does not contravene public policy. The general rule of law is stated to be that whatever tends to injustice or oppression, restraint of liberty, and natural or legal right, or to the obstruction of justice, or to the violation of a statute, and whatever is against good morals, when made the subject of a contract, is against public policy, and void. It is said that they are not contracts, but unlawful agreements, which are void in their inception. 9 Am. & Eng. Enc. Law (1st Ed.) 880; 15 Am. & Eng. Enc. Law (2d Ed.) 932. The decision of this case may rest upon two grounds, and it may here be said that whether a contract not forbidden by law is immoral in its tendency, and should be declared void, is a question that must be left to the judgment of the court in which it is sought to be enforced; as, when a voter agreed to exert his influence in an election against what he believed was for the public good, the agreement was held void, though the voter resorted to no unlawful means in exerting his influence. *Nichols v. Mudgett*, 32 Vt. 546. There are many instances of this kind mentioned in *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684. In general, when a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury has resulted to the public. If it is immoral, or contrary to the policy of the law, it will be declared void. Contracts of the kind under consideration are clearly against public policy, and invalid, for the reason that they tend to promote negligence on the part of railroad companies in respect to the personal safety of their employees. But the policy of the law in respect to such contracts is declared in V. S. § 3924, which is: "When an engineer, fireman, or other agent of a railroad is guilty of negligence or carelessness, whereby an injury is done to a person or corporation, he shall be imprisoned not more than one year, or be fined not more than one thousand dollars. This section shall not exempt a person or corporation from an action for damages." Sections 3886 and 3887 forbid railroad companies having ladders or steps upon cars of their own to the top on the sides of the



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cars, and require that they be placed upon the ends or inside of the cars, and a forfeiture of \$50 a day is imposed as a penalty for failure to comply with the statute. It is the law that courts will not enforce contracts made for the purpose of violating statutes, but will hold them inoperative and void. Rob. Dig. 152, pl. 54 et seq. This subject is fully considered in *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793; *Riley v. Jordan*, 122 Mass. 321. It was aptly said by Shaw, C. J., in *White v. Buss*, 3 Cush. 448, that "the law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect; \* \* \* that it will not promote in one form that which it declares wrong in another." In *Elkins v. Parkhurst*, 17 Vt. 105, it was held that the imposition of a penalty implies prohibition. To the same effect is *Bank v. Owens*, 2 Pet., at page 539, 7 L. Ed. 512, where the court quotes from the opinion in *Webb v. Pritchett*, 1 Bos. & P. 264, as follows: "Then how shall an action be maintained in that which is a direct violation of public law? The contract is bottomed in malum prohibitum of a very serious nature in the opinion of the legislature. How, then, can we enforce a contract to do the very thing which is so much reprobated by the act?" *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, does not controvert, but sustains, the rule of law above stated. As the purpose of the contract was to exempt the defendant from its statutory liability for its negligence, and thus defeat the statute, it was an immaterial fact that one of the contracting parties was the next of kin, and not the employee. It is held that the employee may stipulate that, if injured through the fault of the railroad company, he will then elect whether to accept certain benefits by means of a relief fund created by the company alone or with other companies, and that he will not claim double compensation; but in such cases it is said that he does not stipulate for the future, but accepts compensation for the injury already received. *Railway Co. v. Moore* (Ind. Sup.) 53 N. E. 290; *Johnson v. Railroad Co.*, 163 Pa. 127, 29 Atl. 854. These cases do not support the defendant's position. *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, *Railroad Co. v. Bishop*, 50 Ga. 465, and *Railway Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681, cited by defendant, sustain its contention that such contracts are not against public policy, and other courts of last resort have upheld them; but the general holding is against their validity, and for the reason, sometimes overlooked, that they offer a premium for carelessness. See *Carroll v. Railway Co.*, 57 Am. Rep. 382, and notes. This disposes of the only question in the case, the demurrer to the declaration being waived by the defendant's repleading. *Rea v. Harrington*, 58 Vt. 184, 2 Atl. 475, 56 Am. Rep. 561; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

Judgment of the court below sustaining the plaintiff's demurrer and adjudging the pleas insufficient affirmed, and cause remanded.

## MILLER v. GREAT NORTHERN RY. CO.

*(Supreme Court of Minnesota, Jan. 17, 1902.)*

[88 N. W. Rep. 758.]

**Injury to Employee—Dangerous Appliances.\***

Facts in an action for personal injuries resulting from the failure of the master to furnish a safe and proper instrumentality for his servant's use in the construction of a bridge, whereby such servant was injured, considered, and *held*, upon the evidence, that the jury were justified in finding that the master had been negligent in his duty in that respect. (Syllabus by the Court.)

Appeal from district court, Stearns county; D. B. Searle, Judge.

Action by Christ J. Miller against the Great Northern Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

W. E. Dodge and Geo. H. Reynolds, for appellant.

Donohue & Stephens and Calhoun & Bennett, for respondent.

LOVELY, J. Action for personal injuries sustained by an employee while at work for defendant in the construction of a bridge over the Shell river. While turning a jackscrew by means of a defective crowbar, it broke, whereby he was injured. The answer is a general denial. Plaintiff recovered a verdict. A new trial was denied. Defendant appeals.

From the evidence, which the verdict requires us to adopt, it substantially appears that plaintiff, a young man, 30 years old, was required in his service to work on a scaffolding 18 feet above the ice in the bed of the Shell river, and to stand on a plank 12 inches wide to assist in the turning of a jackscrew placed on such plank in order to raise one end of the bridge. He usually worked with the foreman of the bridge crew, and on the occasion when he was injured took from a tool box where the tools used in his employment were commonly kept a crowbar such as had been previously used by him and others in turning the jackscrew. He carried the bar to the jackscrew, and while standing on the platform inserted it in one of the holes of the screw, and with another servant applied some force thereto to turn the same, when the bar suddenly broke a short distance from its end, plaintiff was, by means of such force and the breakage, thrown backwards, and precipitated upon the ice below, receiving the injuries by his fall, for which he recovered substantial damages. It is unnecessary to cite authorities to support the very elementary legal questions involved on this appeal. There is no doubt whatever that it is the duty of the master to furnish reasonably safe instrumentalities for the use of his servants in the performance of their duties in his service; also to exercise ordinary care to

\*As to the master's duty to furnish tools, see 5 Rap. & Mack's Dig., 67 et seq.

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keep them in that condition. There was evidence reasonably tending to show that the crowbar had been used in the same work plaintiff was performing for some time; that he, as well as others, had so used the same for that purpose; that it was at the end of each day placed with other tools in a tool box, and each morning taken therefrom for such use; that plaintiff was performing his duties in the usual way, when he was, by the fact of the breakage, thrown to the bed of the river below. There was also evidence tending to show that four or five days before the injury the crowbar was injured during a fire in defendant's coal sheds by pouring, while heated, upon it, large quantities of water. The injurious effect of the application of water to heated steel by weakening its strength was shown by competent evidence of qualified witnesses to support plaintiff's claim in that respect, and it would seem to us quite probable, even from common knowledge applied to the facts, that such a result would follow, and the jury might be justified in the conclusion that the crowbar was defective after the fire, even if of good quality when furnished. This evidence, taken in connection with the effect of the application of the slight force shown to have been applied in attempting to move the screw by it when it broke, might well furnish grounds to support the conclusion that a reasonable inspection would have discovered its condition. While the foreman in charge of the plaintiff worked with him, it does not appear that he or any one else was charged with the duty of inspecting and examining the tools for imperfections where circumstances arose to change their character; and, if such inspection had taken place, the consequences that followed might reasonably tend to show that it was incomplete and ineffective. The duty to furnish safe instrumentalities is one of the absolute duties of the employer which he may commit to other servants, but it does not appear that he did so here. The plaintiff being without fault, as found upon sufficient evidence, his right to recover depends, therefore, entirely upon the imperfect character of the implement he was given to work with, and which was broken while in use in his master's service.

Order affirmed.

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INTERNATIONAL & G. N. RY. CO. v. VINSON *et al.*

(*Court of Civil Appeals of Texas, Feb. 5, 1902.*)

[66 S. W. Rep. 800.]

**Killing of Conductor—Contributory Negligence.**

It appeared that while a freight train was being backed down a grade at night it was derailed, and the conductor was killed. The evidence showed that the train started back at a high speed; that the conductor gave directions to the brakeman to be ready to apply the air brake, and went out on the platform. The engine slowed up to about ten miles an hour, and then increased its speed. The conductor gave no signal to lower the speed. By the rules of the company, he was primarily in

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charge of the train, and its speed was limited to eight miles an hour: *held*, that the evidence did not show, as a matter of law, that the conductor was guilty of contributory negligence.

**Assumption of Risk.**

The evidence did not show, as a matter of law, that the conductor assumed the risk.

**Killing of Conductor—Contributory Negligence—Proximate Cause.\***

Where a freight conductor was killed by the derailment of his train while backing down a grade at night, the evidence showed that the engineer could not lower the speed because the air brakes were not filled, and that with a full pressure of air the train could have been suddenly stopped, or within five or six car lengths. The conductor gave no signals to have the train slow down. Defendant requested an instruction that if the conductor knew that the engineer was running the train at a higher speed than permitted by the company's rules, and could have lowered the speed by a signal, and failed to do so, there could be no recovery: *held*, that the requested instruction was properly refused, as it required a verdict for defendant if the conductor could have checked the train, though insufficiently to prevent the accident.

**Evidence.**

Permitting a brakeman on the train to testify that, in his opinion, the rate of speed of the train coming in contact with the obstruction on the track caused the derailment, was not prejudicial, where his opinion was in accord with the testimony in the case.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by Brenda C. Vinson and others against the International & Great Northern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Denman, Franklin & McGown, for appellant.

W. W. King and Nat B. Jones, for appellees.

JAMES, C. J. Appellee Brenda C. Vinson the widow of Charles Vinson, recovered judgment for \$10,000 damages on account of the death of her husband, a conductor on one of appellant's freight trains. One ground for reversal is the contention that the testimony clearly established that his death was due to his contributory negligence, and that the danger which occasioned it was a risk he assumed. It is not necessary to state the evidence, further than to show, if possible, that these issues should have been submitted to the jury for decision.

The train was being backed down a hill or grade at night. The rules of the company provided that a freight train shall not be run backwards at night at a speed exceeding eight miles an hour; also that a freight train shall be under the control of the conductor, unless the conductor does something that is contrary to the rules, and then the engineer and conductor are held equally responsible. The contention, in substance, is that the conductor, Vinson, on this occasion, was permitting the train to move faster than eight miles an hour, when it backed against a steer, which caused the caboose, upon the platform of which he stood, to be derailed and upset,

\*See 20 Am. & Eng. Enc. Law (2d Ed.) 138 et seq.; 5 Rap. & Mack's Dig., 187 et seq.

and that he was thereby killed. The following facts appear in S. D. Cochran's testimony: "When the engineer gave the back signals, we started back pretty lively. Vinson was sitting at his desk in the caboose, making up his reports. He got up and said to me, 'I don't like this running so fast,' and as he started out the engineer applied the air and slowed up a little, and Vinson said, 'I will stand out here with my light, and you have your hand on the lever, so that if I give you a signal you put the air on in emergency,' and we went on a few minutes, but a very few minutes after that; and I applied the air once in a while to see if it was all right; and then the cars commenced increasing in speed until, in my judgment, they were running about fifteen miles an hour, when all of a sudden the caboose went up." This witness went on to say: That just as Vinson went out on the platform it slowed up a little,—to about 12 miles an hour. It was a very short time after it began to increase the rate of speed before the accident happened. That after Vinson went out on the platform, witness could see his light through the door, and supposed that he was looking in the direction the train was going. "When he got up to go out on the platform he appeared to be all broke up on account of starting down the hill as fast. After he got out on the platform it started up faster,—so fast that it scared me." Witness did not see Vinson give any signals to the engineer. After he made the above remark about speed he walked directly to the door, opened it, and stood on the rear platform of the caboose, but gave no signal that witness could see. He said to witness: "I am going to watch this track for stock, and if I see anything in the way I will give a signal, and you put the air on in emergency." "When we first started out fast, before the engineer first reduced his speed, I tried the air just a little, to see whether it would take effect. I wanted to feel confident that it was all right. While I was applying it the engineer applied it and reduced the speed." "After Mr. Vinson got out on the platform it was a very short time before we struck the steer. I could not tell how far we ran. It must have been a hundred yards; may be not that far." The testimony of Armstead Scott, the engineer, evidenced the following facts: That the night was dark, and he could not say positively as to the exact rate the train was running. That he "just opened up enough to start the train and let it roll down, then increased to about fifteen miles an hour, and when about halfway from the start to where we stopped I reduced it to about ten miles, at which speed it ran until the accident happened." But he testified also: "When the caboose was cut out it ought to have put on the emergency brakes, and if I had not just released the brakes it would, but I released them just as the accident happened. I wanted to speed the train,—thought we were going too slow." "After the brakes were thrown off and the speed increased going down hill, I could not fill the air, because the

accident happened about the time I released it, and before the air chambers could be refilled." It appears that it was about 11 o'clock at night, dark, and had been raining. The road was unfenced at this place. These were the only witnesses to the circumstances of the occurrence. Their testimony will admit of inferences in favor of the verdict. According to the testimony of Cochran, deceased was quick to perceive the high rate of speed at which the train was running soon after it started down. He was alarmed and went out upon the platform, instructing Cochran to be ready at the lever to apply the brakes upon his signal. He went out for the purpose of taking action. According to Cochran, as soon as he was on the platform the engineer began reducing the speed, and, according to the engineer, it was reduced to about 10 miles an hour. The night was dark, and if, as the engineer says, he could not be certain about the rate of speed, for this reason is Vinson to be held, as a matter of law, to have known the exact speed, or that it exceeded 8 miles an hour? We think not. If, as the train was slowing, or had slowed to about 10 miles an hour, the conductor could not, under the circumstances, in the brief time that elapsed before the accident, with reasonable certainty have appreciated the fact that it exceeded the prescribed rate, his conduct would not have been a willful or a negligent violation of the rule. Upon such view of the facts, he could not be held to have assumed the risk of the excessive speed, nor would he have been chargeable with contributory negligence. The jury could have found from the testimony before them that Vinson did not signal the engineer, when he went out, to slow up, because the engineer was then in the act of slowing; that it slowed down to about 10 miles an hour, as the engineer says, and that he did not then signal because he thought it was running at or about the prescribed rate, or did not know that it was running faster; and that he did not have time to do anything when the train was subsequently started at a greater speed, because the engineer testified that as soon as he again released the brakes, and thus increased the speed, the accident happened. That the engineer was negligent, in the way he handled the train under the circumstances, may well have been found as the cause of Vinson's death; but the evidence was not such as would have warranted a withdrawal from the jury of the issues of contributory negligence or assumed risk. Therefore the court did not err in refusing to direct a verdict for the defendant, as alleged in the first assignment, nor in overruling the motion for new trial, as alleged in the fourth.

The second assignment is that the court should have given the following requested charge: "The court instructs you that if you believe from the evidence that Charles Vinson, the deceased, knew the engineer was running the train in violation of the rules of the company, and at a dangerous rate of

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speed, and that he could have slacked the speed of said train prior to the accident by signal to the engineer, or by directing the brakeman to put on the brakes, and failed to give such signals, then the court instructs you to return a verdict for the defendant." The evidence is that the accident occurred immediately or very soon after the engineer had released the brakes, and they could not have been effectively put on until the air chambers had been refilled. The engineer testified that after he had thrown the brakes off, and the speed increased going downhill, he could not fill the air, because the accident happened about the time he released it, and before the chambers could be refilled. Cochran testified that, if there had been a full pressure of air, this train should have stopped very suddenly, or in five or six car lengths, after the caboose was derailed. It did not stop that quickly. It ran about 26 or 27 car lengths. The testimony amounts to this: That the train could not have been stopped after the brakes were thus released, but that its speed might have been checked to some extent had the conductor given signals. But it does not necessarily follow that it could have been sufficiently checked in that brief space of time to have prevented this accident. The charge requested would have entitled defendant to a verdict if it could have been checked at all on a signal, it matters not how little. To have been correct in this respect, the charge should have required the jury to find the deceased could have, by signals, checked the speed, and thereby prevented the accident. If he could not have done this, his failure to give the signals could not have been contributory negligence. The court gave a proper charge on that issue.

The special charge No. 3 refused is squarely based upon the theory that the violation of the rule in respect to speed was negligence, and that the dangers incident thereto were assumed risks. Besides, the same defect exists in this charge as in the one above discussed.

The fifth assignment is that the witness Cochran should not have been allowed to testify that, in his opinion, the rate of speed and coming in contact with the steer caused the derailment. As that opinion was in accord with all the testimony proved, no harm was done by admitting it.

Affirmed.

## CHICAGO &amp; S. E. RY. CO. v. GLOVER.

(*Supreme Court of Indiana, Nov. 26, 1901.*)

[62 N. W. Rep. 11.]

## Statute Providing for Monthly Payment of Wages Where No Written Contract—Construction—Demand.

Burns' Rev. St. 1901, §§ 7056, 7057 (Horner's Rev. St. 1897, §§ 5206a, 5206b), provide that a corporation shall, in the absence of a written contract to the contrary, pay its employees at least once a month, and, if it fails, "such employee may demand the same," and recover the wages, together with the penalty of \$1 for each succeeding day, to be collected

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by such employee in a suit: *held*, that the statute, being in derogation of the common law, was to be strictly construed, and therefore a demand by an assignee of the claims was not a compliance.

**Same—Burden of Proving Nonexistence of Written Contract.**

In an action under such statute, the "absence of a written contract to the contrary" must be affirmatively shown; and a special finding that "there was no contract of employment between any of the employees and the defendant" is not equivalent to a finding that there was no written contract as to the time of payment of wages contrary to the statute.

Appeal from circuit court, Madison county; J. F. McClure, Judge.

Action by Robert J. Glover against the Chicago & South-eastern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. R. Crawford and W. C. Stover, for appellant.  
Kennedy & Kennedy, for appellee.

MONKS, J. This action was brought in 1898 against appellant by appellee as assignee of a number of claims for labor. Appellant was a corporation engaged in the operation of a railroad. The labor sued for was performed for it by several persons in the years 1896 and 1897, to each of whom a separate time check was issued for each month. These time checks were assigned by the persons to whom issued to N. J. Glover & Son, and were by that firm assigned to appellee. Appellee sought to recover judgment for the time checks and interest, and for penalty and attorney's fees, under sections 1, 2, Acts 1885, p. 36, being sections 7056, 7057, Burns' Rev. St. 1901 (sections 5206a, 5206b, Horner's Rev. St. 1897). The cause was tried by the court, a special finding of facts made, and conclusions of law stated in favor of appellee, and judgment rendered against appellant for the amount of the time checks, interest, penalty, and attorney's fees, as provided in said sections. The correctness of the conclusion of law is challenged by the assignment of errors. Appellant insists that, upon the facts found, appellee was not entitled to recover the penalty and attorney's fees, under sections 7056, 7057, Burns' Rev. St. 1901 (sections 5206a, 5206b, Horner's Rev. St. 1897). Said sections are as follows:

"Sec. 7056 (1). That every company, corporation or association now existing, or hereafter organized and doing business in this state, shall, in the absence of a written contract to the contrary, be required to make full settlement with, and full payment in money to, its employees, engaged in manual or mechanical labor, for such work and labor done or performed by said employees for such company, corporation or association at least once in every calendar month of the year.

"Sec. 7057 (2). If any company, corporation or association shall neglect to make such payment, such employee may demand the same of said company, corporation or association,



or any agent of said company, corporation or association, upon whom summons might be issued in a suit for such wages, and if said company, corporation or association shall neglect to pay the same for thirty days thereafter, said company, corporation or association shall be liable to a penalty of one dollar for each succeeding day, to be collected by such employee in a suit (together with reasonable attorney's fees in said suit) for said wages withheld: provided, that said penalty shall in no instance exceed twice the amount due and withheld."

These sections, being penal and in derogation of the common law, must be strictly construed; and no one can recover under such a statute unless he, by averment or proof, brings himself clearly within its terms. *State v. Railway Co.* (this term) 61 N. E. 669; *Telegraph Co. v. Harding*, 103 Ind. 505, 508, 3 N. E. 172; *Same v. Axtel*, 69 Ind. 199; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Thornburg v. Strawboard Co.*, 141 Ind. 443-445, 40 N. E. 1062, 50 Am. St. Rep. 334, and cases cited; *McDonald v. Railway Co.*, 144 Ind. 459, 460, 43 N. E. 447, 32 L. R. A. 309, 55 Am. St. Rep. 185; *Railroad Co. v. Keely's Adm'r*, 23 Ind. 133, 23 Am. & Eng. Enc. Law, 375-378; *End. Interp. St.* §§ 340, 341, 471; *Black. Interp. Laws*, p. 300. In *Telegraph Co. v. Harding*, supra, at page 508, 103 Ind., and page 174, 3 N. E., this court said: "In construing a penal statute, it must be remembered that the law will intend nothing in favor of the imposition of a penalty until, upon a strict construction, it appears there has been a clear violation of the statutory obligation for which the penalty is imposed." In *Telegraph Co. v. Axtell*, supra, at page 202, 69 Ind., this court said: "A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and meaning of the act creating it." It was said by this court in *Railroad Co. v. Keely's Adm'r*, supra: "As the right to sue is purely a statutory one, and in derogation of common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover." Section 7057, supra, gives the penalty on the neglect to comply with the demand of the employee for payment. There is no provision of said section giving a penalty when the demand is made by an assignee of the employee. The failure of the appellant to comply with the demand of appellee as assignee is not an omission for which said section creates or provides a penalty.

It will be observed that sections 7056 and 7057 do not apply to a case where there is a written contract for the payment of the wages of such employees contrary to the provisions of said section 7056, supra. It is essential, therefore, to a recovery under said sections, that the facts showing the absence of such a contract be alleged and proven. In the special finding in this case no facts are found showing

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the absence of such a contract. It is true that the special finding states that "there was no contract of employment between any of the employees and the defendant;" but this is not equivalent to a finding of facts showing that there was no written contract between appellant and said employees as to the time of payment of wages contrary to the provisions of said section 7057, *supra*. There may be no express contract of employment when the services begin or while being rendered, but a contract in writing may be subsequently made as to the time of payment of the money found to be due for such services. The rule is well settled that every fact essential to a plaintiff's recovery must be stated in the special finding, and any such fact, if not stated, must be deemed to be found against him. *Relender v. State*, 149 Ind. 283, 290, 49 N. E. 30. There being no finding of facts showing the absence of the contract mentioned in said section 7056, *supra*, it follows that the conclusion of law that appellee was entitled to recover penalties and attorney's fees under said section 7057, *supra*, was erroneous.

It is insisted that said section 7057 is unconstitutional and void because in conflict with section 23, art. 1, and sections 22, 23, art. 4, of the constitution of this state, and of the fourteenth amendment to the constitution of the United States, for the reason that its operation is confined by section 7056, *supra*, to companies, corporations, and associations, regardless of the kind or nature of the business the company, corporation, or association may conduct, and does not apply to an individual who is conducting a similar business. It is settled, however, that this court will not pass upon the constitutional validity of a statute if the case in which the question is raised can be decided without passing upon that question. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 694, 43 N. E. 936, 4 Am. & Eng. R. Cas., N. S., 200; *Board of Com'rs of Jackson Co. v. Board of Com'rs of Washington Co.*, 146 Ind. 138, 144, 45 N. E. 60, 20 Am. & Eng. R. Cas., N. S., 716; *Legler v. Paine*, 147 Ind. 181, 196, 45 N. E. 604; *Cleveland, C., C. & St. L. Ry. Co. v. City of Connersville*, 147 Ind. 277, 279, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418, 9 Am. & Eng. R. Cas., N. S., 195.

Judgment reversed, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

LOUISIANA & N. W. RY. CO. *v.* PHELPS.

(*Supreme Court of Arkansas, Nov. 30, 1901.*)

[65 S. W. Rep. 709.]

**Statutory Provisions as to Payment of Wages of Discharged Employees Not Applicable Where Foreign Contract of Employment.\***  
*Sand. & H. Dig. § 6243*, providing that when a railroad corporation

\*See generally, 5 *Rap. & Mack's Dig.*, 10 et seq.

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discharges an employee, and his unpaid wages are not paid on the day of his discharge, "then as a penalty for such non-payment the wages of such servant or employee shall continue at the same rate until paid," does not protect an employee who was neither employed nor discharged in the state, and whose only claim for the penalty is that part of the services sued for were performed in the state.

**Foreign Laws—Presumptions.**

Though the courts can presume that the law of another state with respect to the payment of the wages of a discharged railroad employee are the same as its own, the courts cannot presume that the foreign laws impose such a penalty.

Appeal from circuit court, Columbia county; Charles W. Smith, Judge.

Action for wages, and for a penalty for the nonpayment thereof, by M. V. Phelps against the Louisiana & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

M. V. Phelps was a locomotive engineer of the Louisiana & Northwestern Railroad Company, in charge of an engine running between Gibsland, La., and McNeel, Ark.; about half of the distance being in Arkansas, and the other half in Louisiana. He was employed by the company at Shreveport, La., and he claims to have been discharged by it at Gibsland, in that state. He afterwards brought suit in this state to recover the wages alleged to be due him, and for the penalty imposed by the statute of this state for the failure of the company to pay such wages at the time of his discharge. He recovered a judgment both for the wages and the penalty, and the company appealed to this court.

J. Y. Stevens, J. M. Moore, and W. B. Smith, for appellant.

J. M. Kilso, for appellee.

RIDDICK, J. There is only one question that we need notice in this case. The plaintiff was employed by the defendant company in Louisiana, and he was discharged by the company in that state. Although he performed a portion of the services for which he sues in this state, still we think it is very clear that the right of action accruing to him by virtue of his contract and his discharge from the service of the company depends upon the laws of Louisiana, and not upon those of Arkansas. Under these circumstances, he has no right to claim a penalty under the statutes of this state providing that, when a corporation engaged in operating a railroad shall discharge any employee, the unpaid wages of such employee shall become due, and, if the same be not paid on the day of his discharge, "then as a penalty for such non-payment the wages of such servant or employee shall continue at the same rate until paid." Sand. & H. Dig. § 6243. That statute certainly does not protect an employee who was neither employed nor discharged in this state, and whose only claim for the penalty imposed is that he performed a portion of the

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services sued for in this state. If the discharge had occurred in this state, a different question would have been presented, which we need not determine. The case was tried below in 1899, before the passage of the act requiring courts of this state to take judicial notice of the laws of other states, and there was no proof as to the law of Louisiana. So far as the action for the unpaid wages is concerned, the courts can, in the absence of proof, presume that the law of Louisiana was the same as that of this state. But this rule does not apply to penalties, and we cannot presume that the laws of Louisiana impose a penalty upon the railroad company for the failure to pay the wages of the plaintiff at the time of his discharge. *Grider v. Driver*, 46 Ark. 50.

The plaintiff only claimed \$50 or \$60 due for wages, but he obtained a verdict for \$290.55, of which sum the circuit court required him to remit \$160.56, and gave judgment for the balance. The defendant claims that it does not owe the plaintiff any sum, and, as we are not certain what amount the jury found was due plaintiff for wages, the judgment must be reversed, and a new trial granted. It is so ordered.

## PENNSYLVANIA CO. v. MCCURDY.

(*Supreme Court of Ohio, March 18, 1902.*)

[63 N. E. Rep. 585.]

## Injury to Employee—Assumption of Risks.\*

An employee experienced in the services in which he is engaged is conclusively held to appreciate the dangers which may arise from defects of which he has, or in the exercise of due care might have, knowledge. (Syllabus by the Court.)

Error to circuit court, Stark county.

Action by one McCurdy against the Pennsylvania Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. R. Carey and F. J. Mullins, for plaintiff in error.

Webber & Turner, for defendant in error.

PER CURIAM. McCurdy brought suit in the court of common pleas to recover for a personal injury received while coupling cars. He was employed by the company in the capacity of yard conductor at Canton. The negligence alleged against the company was that it furnished a car with a Dowling coupler, which at the time was defective, in that the knuckle had been broken off. Upon the trial of the case on the usual issues plaintiff's testimony showed that he had been in the employ of the company for more than 15 years, during several years of which time he was employed as yard conductor. Testimony was also introduced to show that the

\*See generally, *Ladd v. Brockton St. Ry. Co.* (Mass.), 1 R. R. R. 342, and foot-note, 24 Am. & Eng. R. Cas., N. S., 342, and foot-note.

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defect in the car was open, visible to him, and observable by him at the time he sustained his injury, and, furthermore, that an inspector of cars had previously called his attention to the particular defect. Upon this state of the evidence the court gave to the jury, among others, the following instruction: "Employees are presumed to be aware of and take notice of all risks and dangers which are open to observation; and they must exercise their senses, and use reasonable care under the circumstances, in examining their surroundings; and if, in the exercise of such care, the plaintiff knew or could have known of the conditions and circumstances under which the work was being done, and the dangers incident thereto, and appreciated them, he must be held to have assumed the risk." The substance of the condition that plaintiff must appreciate the danger before being bound by its consequence was several times repeated in the charge. For this limitation upon his duty, in view of the fact that he was experienced in the service in which he was employed, there is no authority nor reason whatever. A servant is bound to appreciate dangers which may result from defects of which he has, or in the exercise of due care might have, knowledge, and a failure to appreciate danger arising from such sources is no excuse. *Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Hesse v. Railroad Co.*, 58 Ohio St. 167, 50 N. E. 354.

Judgment reversed.

BURKET, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

#### DUNBAR v. BOSTON & P. R. CORP.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 20, 1902.*)

[63 N. E. Rep. 916.]

#### Eminent Domain—Change of Grade—Damages—Limitations—Constitutionality of Statute.

St. 1896, c. 516, § 23, provides that where the property owner and the railroad company cannot agree as to the amount, where property is taken or damaged by a change of grade, on a petition filed within one year after the taking of the land the damages may be assessed by a jury. St. 1899, c. 386, provides that the time within which a party suffering damages, whose land is not taken, may file his petition for damages accruing from a change of grade occasioned by the construction of any railroad by any company, other than the terminal company, under the provisions of such section 23, is extended to January 1, 1900: *held*, that the act of 1899, in removing the bar of limitations so soon after it had run, and where the original time was so short, is not unconstitutional.

#### Class Legislation.

St. 1899, c. 386, is not invalid, as class legislation, because, while applicable to all other railroads, the terminal company is excepted from its operation.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Dunbar v. Boston & P. R. Corp

Action by Mabel T. Dunbar against the Boston & Providence Railroad Corporation. Defendant excepts. Exceptions overruled.

Albert P. Worthen, for plaintiff.

J. H. Benton, for defendant.

HOLMES, C. J. This is a petition for the assessment of damages to land of the petitioner on Dartmouth Street in Boston caused by raising the grade of that street under the Terminal Company act. St. 1896, c. 516. The petition was filed under section 23 of the act, and therefore we may assume that the claim was subject to the limitation of one year imposed by that section, although no land of the petitioner was taken. The section contains a general provision giving a jury to parties who have suffered damage to be compensated under the act, and the limitation no doubt was intended to be coextensive with the grant. Upon this construction it is admitted that the petition was not filed within the year, and indeed the opposite view was not much pressed on any ground. The answer relied upon is that on May 23, 1899, "the time within which any party suffering damages whose land is not taken may file his petition in the superior court for damages accruing from a change of grade occasioned by the location and construction of any railroad by any railroad company other than the terminal company" under the above section 23 was extended to January 1, 1900. St. 1899, c. 386. The defendant contends that this statute is unconstitutional and brings that question here by exceptions. It argues no other point.

The statute assailed is of general operation, and if valid applies as well to the petitioner, who had unquestioned notice of the change of grade by the actual completion of the work before the year expired, as to possible cases of persons who might have found their remedy gone before they knew that anything affecting their rights had been done. In such a case, apart from the authorities, it is impossible not to feel the greatest difficulty in sustaining the act. The nature of the difficulty is indicated in *Danforth v. Water Co.*, 178 Mass. 472, 59 N. E. 1033. However much you may disguise or palliate the change by saying that the statute deals only with the remedy, or that a party has no vested right to a merely technical defense, or by adopting any other cloudy phrase that keeps the light from the fact, such legislation does enact that the property of a person previously free from legal liability shall be given to another who before the statute had no legal claim. It is not merely as it was put by the counsel for the defendant, following the cases, that the defense is as valuable and as much entitled to protection as the claim, if that be true, but the effect of the statute by enabling the barred claim to be collected is to allow property of the defendant to be appropriated which before was free. *Woodward v.*

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*Railroad Co. (Mass.)*, 62 N. E. 1051. It is true that the property is not identified until it is seized on execution, but when it is identified by seizure it is taken as truly as land would be if it were allowed to be recovered in a real action notwithstanding the lapse of twenty years.

In the present case there is not the excuse apparent that the statute cured an earlier injustice, as might be the case where a petitioner had had no actual notice of the loss of any rights until he was too late. It cannot be said in more general terms that a statute of limitations as such embodies an arbitrary or merely technical rule. Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and presents disturbance in the form which its life has assumed. In cases like the present when the period of limitation is short no doubt other but also important elements are predominant,—the desirableness for business reasons of getting a quasi public transaction finished,—but whatever the details, the principle involved is as worthy of respect as any known to the law.

Nevertheless in *Danforth v. Water Co.*, 178 Mass. 472, 59 N. E. 1033, it was held that a statute was constitutional which removed the bar of an earlier statute under circumstances where, according to the language of the later act and the cases, the lapse of time had destroyed the jurisdiction of the court. *Id.*, 176 Mass. 118, 57 N. E. 351; *Riley v. City of Lowell*, 117 Mass. 76; *City of Cambridge v. Middlesex Co. Com'rs*, *Id.* 79, 83. So, whatever may be said of the reasoning by which the decision was reached, it was held in *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, that the fourteenth amendment does not prevent the removal of the bar from a personal debt. Without repeating what we have said so recently, it is enough to say that the constitutional provisions allow a certain limited degree of latitude in dealing with cases where remedies have been extinguished by lapse of time when the seeming infraction of right is not very great, and when justice requires relief. It is unnecessary to go so far as *Campbell v. Holt*. But in a case of this kind, where the original time allowed after actual notice was very short and may have seemed to the legislature inadequate, where the extension was granted within little more than two months of the time when it would have been granted without question and not improbably before the transaction as a whole had been finished, where the plaintiff's claim is held to be barred only by a somewhat doubtful inference and where in short we cannot say that the legislature with its larger view of the facts may not have been satisfied that substantial justice

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required its action, we are not prepared to pronounce the statute unconstitutional in the face of the most authoritative decisions. We regard this case as distinguishable from a wholesale attempt to relieve from the effect of open and adverse possession of land for twenty years, and even as distinguishable from the similar attempt with regard to debts upheld in *Campbell v. Holt*. As yet it is not necessary for us to choose between that decision and the weighty intimations to the contrary in this court and elsewhere.

It is suggested that this is class legislation because the Terminal Company is excepted from the act. The statute applies to all companies concerned except the one named, so that if any part of it were open to that criticism it would seem to be the portion which makes the exception, not that which lays down the rule. *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174. But we have no facts before us which show that the Terminal Company was not excepted on constitutional grounds.

Exceptions overruled.

BULLARD *et al.* v. NEW YORK, N. H. & H. R. CO. *et al.*  
(*Supreme Judicial Court of Massachusetts, Norfolk, May 21, 1901.*)

[60 N. E. Rep. 380.]

**Deed Construed to Convey Only Part of Grantor's Interest in Streets.**

A street had been laid out for the purpose of developing a city addition, and a few of the lots abutting on the street had been conveyed to defendant. One of the deeds, after reciting the description of the lots, contained a clause, "also intending to convey to the grantee all my rights in said Regent street above mentioned," and another described the lots as beginning at the southwesterly corner of said parcel where Regent street meets the land of the B. R. Co.; thence running northerly by the easterly line of Regent street," etc.; "also intending to convey to the grantee all my rights in said Regent street." Regent street was 2,700 feet in length, and but a few of the lots abutting thereon were conveyed to the grantee, the title to the greater number remaining in the grantors: *held*, that such reference in the deeds should be construed as conveying to the grantee the grantors' interest in Regent street "abutting the lots conveyed to them therein," and not all of the grantors' interest in the entire street.

**Right to Damages after Discontinuance of Highway and Its Use for Railway Purposes for Alteration of Grade on Ground That Land Was Still Subjected to More Onerous Use.\***

Where land claimed to be damaged by the alteration of a railroad grade crossing was a highway when the proceedings for alteration were begun, the fact that in the course of the proceedings the highway was discontinued, and the land was taken by the railroad company for railroad purposes, did not preclude a finding that the land was thereby subjected to a more onerous use than it had previously suffered so as to preclude the owners from proof of damages by reason of the alteration.

Report from supreme judicial court, Norfolk county.  
Action by Isaac Bullard and others against the New York,

\*See generally, 4 Rap. & Mack's Dig., 818 et seq.



*Bullard v. New York, etc., R. Co*

**New Haven & Hartford Railroad Company and others. Case reported to the supreme judicial court. New trial ordered.**

Charles F. Jenney, for plaintiffs.

J. H. Benton, Jr., for defendants.

**BARKER, J.** The principal question is whether the deeds of February 12, 1890, divested the grantors of title in the soil of those parts of Regent street which did not abut upon the lots conveyed by the deeds to the respondents. In Isaac Bullard's deed the only language relied upon to produce that effect is the clause, "Also intending to convey to the grantee all my rights in said Regent street above mentioned." This clause follows two separate descriptions of the premises which the deed purports to convey. The first description is of a certain parcel of land in Hyde Park, comprising the greater portion of six lots, whose numbers are stated, reference being made also to a plan. Then the deed states that the parcel "is bounded and described as follows." In the statement of bounds which follows is the first reference to Regent street, and it is in these words: "Beginning at the southwesterly corner of said parcel where Regent street meets the land of the Boston and Providence Railroad Company; thence running northerly by the easterly line of Regent street four hundred eight and eight-tenths (408.8) feet to a point; thence turning and running easterly," etc. In the rest of this clause there is no further mention of Regent street. The other deed of the same date is similarly drawn, and the clause in it, "also intending to convey to the grantee all our rights in said Regent street," should be given the same legal effect. The street was over 2,700 feet in length. It had been opened as a means of developing land divided into many lots, of which but a few were conveyed to the grantee by the deeds in question, and the title to much the greater number remained in the grantors. The grantee was a railroad corporation having no conceivable use for the title of much the greater portion of Regent street; while, if the grantors absolutely divested themselves of all rights in the whole street, the value of their unsold lots would be injuriously affected. The lots conveyed to the grantee ran back from Regent street to the railroad location, something over a hundred feet. In each deed the exact description of the granted premises carried them only to that line of the street which was nearest the location of the railroad. The rights stated as those which the grantors were "also intending to convey to the grantee" were not stated in the clauses to be "all my rights in Regent street," or "all our rights in Regent street," but in the first deed,—“all my rights in said Regent street above mentioned,” and in the second “all our rights in said Regent street.” In form the clauses purport to express the intention of the preceding grants of lots, rather than to make a grant of an additional parcel of land. After the delivery of the deeds the

grantee graded the land lying between the railroad location and the easterly line of Regent street, and did not grade any part of the street, and erected a fence on the easterly line of the street. Under these circumstances it seems to a majority of the court that the title to the soil in those parts of the street against which the lots granted did not abut remained in the grantors. The use of the name of a street in such a connection does not mean necessarily the street throughout its whole length. Streets are often miles in length, and it would be to give language a meaning contrary to its ordinary acceptation that such a mention of a street must mean the street in its whole length. Such a clause in a deed of land on Beacon street near the state house ought not to be held to convey the grantor's interest in Beacon street opposite another lot of his land located at the other extremity of the city. Therefore the words are open to construction in the light of the circumstances attending the making of the deeds. Under the circumstances the meaning which should be given to them is that they designate those parts of the street which in the deeds are said to bound the lots conveyed as the Regent street in which it is the intention of the grantors to part with all their rights. These circumstances fairly distinguish the case from that of *Holt v. City of Somerville*, 121 Mass. 574. That was not a case where lots fronting on a street were being conveyed, but of the conveyance, as part of an adjustment of land damages, of land so cut up by a taking for a park that it could not be used as lots.

The remaining question is whether, owning the fee of the land, the petitioners should have been allowed to introduce evidence tending to prove that they were damaged by the taking of the land for railroad purposes by the decree for the alteration of the grade crossing. The land was a highway when the proceedings for the alteration began. In the course of the proceedings the highway was discontinued, and the land taken by the railroad company for railroad purposes. If we should assume that the petitioners had no such right to damages as if the discontinuance of the highway and the taking for railroad purposes were not, in effect, one transaction,—a question upon which we express no opinion at present,—it cannot be said as matter of law that the devotion of the land to a new and different use from that to which it had been subjected by its taking for a highway may not have been more onerous upon the landowner than the former use. The petitioners contended that they were damaged, and offered evidence in support of their contention, which was excluded under their exception. It should have been admitted, and the damages, if proved, awarded. In accordance with the terms of the report, the case must stand for trial.

SIMS, Sheriff, *v.* NORFOLK & W. R. CO. *et al.*

(*Supreme Court of North Carolina, May 27, 1902.*)

[41 S. E. Rep. 673.]

**License Tax—Goods Shipped into State—Payment Condition Precedent to Delivery under Bill of Lading—Contracts Executed within State.**

Where a resident of another state shipped sewing machines into the state on bills of lading providing that the machines should not be delivered until paid for by the consignee, title did not pass until payment, and the contract was executed within the state, so that the sellers were liable to the tax under Laws 1901, c. 9, § 52, requiring every person selling machines in the state to pay a license tax.

**Same—Same—Same.**

The title having remained in the shipper, the machines were properly levied on before payment for the license due under Laws 1901, c. 9, § 101, providing that on failure of any person to pay the license the sheriff may levy on his property.

Appeal from superior court, Person county; Neal, Judge.

Proceedings by John R. Sims, sheriff, against the Norfolk & Western Railroad Company and others, for the collection of a license for selling certain goods within the state. From a judgment for plaintiff, defendants appeal. Affirmed.

Guthrie & Guthrie, for appellants.

Shepherd & Shepherd, with the Attorney General, for appellee.

CLARK, J. Laws 1901, c. 9, § 52, provides that "every manufacturer of sewing machines, and every person or persons, or corporation, engaged in the business of selling the same in this state, shall, before selling or offering for sale any such machine, pay to the state treasurer a tax of three hundred and fifty dollars and obtain a license," and makes the failure to do so a misdemeanor. By the "facts agreed" in this case it appears that Sears, Roebuck & Co., of Chicago, have not paid said tax, nor obtained a license, and that prior to this transaction they had made several deliveries at various points in North Carolina on the lines of other interstate railroads running into this state, and that all these shipments, like the one here in question, were made on bills of lading providing that the sewing machine should not be delivered till it was paid for by the person named as consignee. Thus the title could not pass till such payment was made to the common carrier, acting as agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made, and thus the sale was executed in North Carolina, and the shippers are liable to the above tax. The title to this machine having remained in the shipper until such payment (Tied. Sales, §§ 95, 97), the machine was properly levied on before such payment for the license tax due by the shippers (Laws 1901, c. 9, § 101, last paragraph of section). The well-known case of *O'Neil v. Vermont*, 144 U. S. 324, 12

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Sup. Ct. 693, 36 L. Ed. 450, is decisive of the point. There, in the shipment of liquor from New York into Vermont C. O. D., it was held that the completed executory contract was in New York, but the completed sale was in Vermont,—as here. *Ober v. Smith*, 78 N. C. 313, and *State v. Groves*, 121 N. C. 632, 28 S. E. 262, relied on by defendants, were cases of an unconditional delivery to the common carrier, and, of course, the title passed to the consignee upon delivery to the carrier. *State v. Wernwag*, 116 N. C. 1061, 21 S. E. 683, 28 L. R. A. 297, 47 Am. St. Rep. 873, is much like the present case.

No error.

## LAMPLEY v. ATLANTIC COAST LINE R. CO.

(*Supreme Court of South Carolina, April 15, 1902.*)

[41 S. E. Rep. 517.]

**Obstructing Watercourse—Negligence in Constructing Embankment.\***

Where a railroad so constructed an embankment as to prevent the flow of 80 per cent. of the water through the occasional openings, it is proof of negligent construction in violation of the rights of adjoining landowners.

**Same—Pleading.**

A complaint alleging that plaintiff's crop of oats was destroyed by a freshet by reason of the fact that the waters were held on such oats by the negligent construction of defendant's embankment longer than they would have been, and were collected in great volumes above such embankment, and discharged with great force through the narrow and insufficient openings, whereby his land was washed away by its force, states a cause of action.

**Same—Same—Damages.**

Damages caused by the overflowing of land through negligent construction of a railroad embankment, where the crops were immature, consist of the rental value of the land, the cost of fertilization, cost of preparation and cultivation of the crops, value of the services of the owner in overlooking the work, and interest on amount lost until verdict.

Appeal from common pleas circuit court of Darlington county; Gary, Judge.

Action by John C. Lampley against the Atlantic Coast Line Railroad Company. From judgment in favor of plaintiff and order as to new trial, both parties appeal. Reversed.

Geo. W. Brown, Stevenson & Matheson, and A. M. Rankin, for appellant.

J. T. Barron, E. Keith Dargan, and Woods & Macfarlan, for appellee.

GARY, A. J. The complaint sets forth two causes of action. The railroad track crosses the Pee Dee river and runs for about three miles through the low grounds, and when there is a flood the river is about three miles wide. The track is laid on embankments through these low grounds,

\*See generally, 8 Rap. & Mack's Dig., 169 et seq.

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with occasional openings, on trestlework. The plaintiff owns land both above and below the railroad, and also leased and planted a large tract above the railroad. There was testimony to the effect that the means of escape for the water were insufficient. The plaintiff complains: (1) That his crop of oats for 1899 was destroyed by the freshets in the river, by reason of the fact that they were held on those lands above and also on those below longer than they would have been without said dam. (2) By the waters being collected in great volume above said embankment, and being discharged with great force through the narrow and insufficient openings, his land below was washed off by its force. The jury rendered a verdict in favor of the plaintiff for \$350.

The record contains the following statement: "Upon the reading of the complaint the defendant submitted an oral demurrer, having complied with the rule of court relating thereto, and moved to dismiss the same upon the ground that the said complaint failed to state facts sufficient to constitute a cause of action, because the plaintiff's alleged damage as to both causes of action arose from diffusion and overflow of the freshet water of the Great Pee Dee river, which had diffused itself in a time of freshet over his cultivated lands; and that said water was a common enemy, and that no right of action for damage thereby could arise against the defendant; and upon the further ground that the allegations of the complaint as to overflow of surface water, whether separately stated as a distinct cause of action or not, were insufficient to base a claim for damages upon against defendant, and should be dismissed, and stricken from the complaint. The demurrer was overruled by the presiding judge. After the rendition of the verdict, defendant duly moved the court for a new trial upon the grounds that the verdict was contrary to the charge of the judge in the following particulars: (1) Because his honor charged the jury, in effect, that the damages arising merely by backing or retention of surface water would not give plaintiff a right of action for damages, and there was no evidence of damage from any other cause. (2) Because his honor charged the jury, in effect, that the railroad company was not required to provide against extraordinary floods and freshets, and the undisputed testimony was that the freshet to which plaintiff laid his damage was of such character,—indeed, was one of the largest ever known. (3) Because his honor charged the jury, in effect, that as to damages on account of obstruction of the river the jury must conclude that the railroad bridge or piers wrongfully obstructed the running stream, and there was no evidence to that effect. (4) Because there was absolutely no proof upon which the jury could legally estimate the damage to the plaintiff's crops under the charge of the court as to what the true measure of damage was, his honor having charged the jury, in effect, that the damage must be proved, and that speculative damages could not be found.

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The other grounds of the motion related to the insufficiency of the testimony to support the verdict, and are not involved in this appeal. The motion for a new trial was refused, but the presiding judge thereafter passed the following order upon said motion: 'The complaint herein contains two causes of action, separately stated and numbered as such. Under the first, two elements of damages are alleged,—one to real estate, and the other to the destruction of 2,000 bushels of oats,—caused by the careless and negligent construction of defendant's railroad bridge, trestles, and embankments for its track. Under the second cause of action, the identical injuries to plaintiff are alleged in consequence of the wrongful obstruction of a water course known as the "Pee Dee River," under the provision of an act of 1897 (22 St. at Large, p. 489), without any allegation of negligence. No motion having been made to compel plaintiff to elect upon which cause of action he would proceed, both were tried together, and the jury found a general verdict for the plaintiff of \$350. A motion for a new trial upon the minutes being made by defendant's counsel, now, after hearing argument pro and con, and carefully considering all the evidence in the case, I am satisfied that the acts of negligence complained of in the first cause of action were not supported by the proof. I fail to find from the evidence any fact to warrant a conclusion that the bridge, trestles, and embankments which support defendant's railroad track are so constructed as to support the allegation of a nuisance, as alleged in the first cause of action. Under the second cause of action, however, the element of negligence is not a necessary ingredient, since that is based upon the aforesaid act of 1897, for the wrongful obstruction of a water course. The jury having passed upon the facts under that cause of action, I do not feel at liberty to interfere with their finding, in so far as it may relate thereto. It is therefore ordered that, in so far as the verdict of the jury may refer to or be based on the first cause of action, it is set aside and defendant's motion sustained; but the said verdict may be referred to the second cause of action, and to that extent and for that purpose the defendant's motion for a new trial is refused.' " The plaintiff has appealed from so much of said order as set aside the verdict of the jury in so far as it refers to or is based on the first cause of action.

The practical question presented by the plaintiff's exceptions is whether his honor the presiding judge erred in ruling that there was no evidence to support the acts of negligence alleged in the first cause of action, and that he failed to find from the evidence any fact to warrant a conclusion that the bridge, trestles, and embankments which support defendant's railroad track are so constructed as to support the allegation of a nuisance, as alleged in the first cause of action. The plaintiff's attorneys, in their argument, say: "The evidence that about eighty per cent. of the water passage is shut off

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by an embankment, may not be evidence of negligent construction, in so far as the security of the trains, etc., is concerned, but it is proof of negligent disregard of the right of the landowner to have the water flow past his land in its natural way, without being retarded or concentrated and poured through with increased force." That is a correct statement of the law, and there was error in granting the new trial.

The defendant has also appealed, and the first question presented by its exceptions involves the construction and effect of the order granting a new trial as to the first cause of action and refusing it as to the second cause of action, when the jury, by their verdict, did not state what amount was found under the first cause of action and what amount was found under the second cause of action, but simply found a general verdict for \$350. Having reached the conclusion that there was error in granting the new trial as to the first cause of action, this ceases to be a vital question in the case. We may say, however, in order to settle the practice in such cases, that the order granting a new trial as to one cause of action necessarily has the effect of granting a new trial as to the other causes of action, for the reason that it is impossible to ascertain in what manner the verdict should be apportioned, or what were its component parts.

The next question arises under the fourth exception, which is as follows: "(4) His honor erred, as it is respectfully submitted, after stating to the jury that the second cause of action was brought under the statute for wrong obstruction of the running stream or river, in failing to state to the jury what would constitute a wrongful obstruction of such stream; thus leaving the jury without any rule or principle by which to determine whether the stream or river was wrongly obstructed or not." The presiding judge substantially charged the law applicable to the case, and, if the defendant desired more specific instructions, it should have prepared requests to that effect.

The fifth exception is as follows: "(5) His honor erred, as it is respectfully submitted, in overruling the demurrer of defendant to the complaint upon the ground that the real causes of action set forth therein were based upon alleged damage by surface water, as to which no cause of action could arise under the allegations of the complaint. If not in error in failing to sustain said demurrer to the whole complaint, his honor should have sustained the same as to all allegations of fact relating to damage arising from surface water, although not separately and distinctly stated as a cause of action; because, even if a demurrer cannot be successfully interposed to part of a cause of action, it may be to any cause of action set forth in the complaint, whether confused with other causes or distinctly and separately stated." This court is satisfied with the circuit judge's construction of the complaint, and this exception cannot be sustained.

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The sixth exception is as follows: "(6) His honor erred, as it is respectfully submitted, in allowing certain witnesses to testify against the objection of the defendant as to the usual yield of the lands planted in oats by plaintiff, as such testimony could only be offered for the purpose of proving the amount of damages, and was entirely incompetent for the purpose, and was irrelevant to the issue." When this testimony was offered, the ground of objection was not stated, nor does it appear that the circuit judge overruled the objection before allowing the attorney to state the ground of his objection. The question raised by this section is, therefore, not properly before this court for consideration. We do not deem it necessary to cite the numerous and recent cases sustaining this conclusion.

The next question arises out of the eighth exception, which is as follows: "(8) Because his honor erred in charging the jury with regard to the amount the plaintiff could recover upon the alleged damage to the oat crop, when stating to them the rule as to speculative damages: 'So it is in a crop of that description, for they must show from the nature and character of the land and the maturity of the crop at that stage of the crop what the crop would reasonably have made. That is one mode of ascertainment, and another is what would be its rental value per acre,'—it being respectfully submitted that by neither of such modes would the jury arrive at the true measure of damages, which in such case is the cost of planting the oats, the rental value of the land, and interest thereon." Immediately preceding that portion of the charge set forth in the exception his honor used the following language: "In estimating damages to growing crops, you cannot take into consideration speculative damages; that is, if the crop had been matured, he would have made so many bushels to the acre, and, if that crop had been marketed at a certain period of the year, they would have brought so much, and that would be his damages. That is not the rule. It is not the rule of the girl with the pail of milk, from the proceeds of the sale of which she would buy a dress. The pail fell, the milk spilled, and she did not get the dress. That was speculative on her part; she was going to get the money to buy that dress." It is evident that the circuit judge intended his charge to be applicable to an immature crop, and he charged correctly that the value of the crop at the time of the injury furnishes the proper measure of damages, and that speculative damages are not recoverable. But he erred in charging that the jury might take into consideration what the crop would reasonably have made, in determining the value of the crop at the time of the injury. *Horres v. Chemical Co.*, 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36. This would be but an indirect mode of allowing speculative damages, and is condemned by the leading authorities, as will be seen by reference to the cases cited in appellant's argument in *Horres v. Chemical*



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Co., *supra*. It is, however, competent for the plaintiff to introduce testimony to show the rental value of the land on which the crop destroyed was planted, the costs of the fertilizers used, the cost of the labor, etc., in the preparation of the land, and the cultivation of the crop up to the date of injury, the fair value of the services of the owner of the crops in overlooking and attending to the preparation of the land and the cultivation of the crop, interest on the amount lost until verdict, if not *eo nomine*, then by way of damages.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

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PITTSBURGH, FT. W. & C. RY. CO. v. GILLESPIE, Surveyor.

(*Supreme Court of Indiana, May 2, 1902.*)

[63 N. E. Rep. 845.]

Drains—Care of Drains—Allotment—Decision of Circuit Court—Appeal.

Burns' Rev. St. 1894, §§ 5633-5635, provides that the county surveyor shall allot to the owner of each tract of land assessed for the destruction of a ditch the portion which such owner shall keep in repair, and that he shall give notice thereof to the landowners, and hear all objections to such allotment, which he may confirm or change as justice may require. Section 5636 authorizes an appeal from the determination of the surveyor to the circuit court, and provides that its decision shall be final: *held*, that an appeal would not lie from the decision of the circuit court in such case.

Appeal from circuit court, Kosciusko county; H. S. Biggs, Judge.

Objections by the Pittsburgh, Ft. Wayne & Chicago Railway Company to an apportionment of a ditch for repair purposes by Morton Gillespie, county surveyor. From a decision of the surveyor the company appealed to the circuit court, and from its decision the company appeals. Appeal dismissed.

Zollars, Worden & Zollars, for appellant.

Andrew A. Adams, for appellee.

JORDAN, C. J. Appellee, in November, 1898, as the surveyor of Whitley county, made allotments, under the statute, for the purpose of cleaning out and keeping in repair certain portions of a public ditch known as the "Mud Run" or "Gearin Ditch," which had been previously established and constructed in the counties of Allen and Whitley. The portion of the ditch allotted by the surveyor to appellant railroad company was in number of feet 5,500. From this decision of the surveyor appellant appealed to the Whitley circuit court, from which the cause was subsequently venued to the Kosciusko circuit court, wherein, upon a trial had, the court reduced the allotment of 5,500 feet, as made by the surveyor to appellant, to 4,500 feet. The 1,000 feet deducted by the court from appellant's original allotment was by the court added to the

allotment apportioned to Union township, of Whitley county, and the township's allotment, as made by the surveyor, was thereby increased 1,000 feet. The court thereupon ordered and adjudged that the allotments so made should stand, and they were in all respects ratified and confirmed by the court. From this judgment appellant prosecutes this appeal, and seeks a reversal thereof for numerous alleged errors of the trial court.

The provisions of the statute relating to and authorizing allotments of a public ditch to be made by the county surveyor after the construction thereof, for the purpose of cleaning and keeping it in repair, in part are as follows: Section 5633, Burns' Rev. St. 1894, § 2 (Acts 1889, p. 353), empowers the county surveyor to allot to the owner of each tract of land assessed for the construction of a drain or ditch the portion which he should annually clean out and keep in repair. Section 5634 provides that the surveyor shall reduce such allotments to writing, and record the same in a book to be kept for that purpose, and shall give notice to the landowners of the time and place where and when he will hear all objections that may be made to such allotments. Section 5635 provides that upon the day named in such notice the surveyor shall be present at the time and place therein mentioned, and shall hear all objections made to such allotments, etc., and that after hearing all objections that may be offered to such allotments he shall confirm or change the same as justice may require, and enter an order accordingly. Section 5636 provides that any person or corporation aggrieved may appeal from the order of the surveyor to the circuit or superior court of the county by filing with the clerk of the court within 10 days from the time of such order an undertaking conditional that he will duly prosecute such appeal and pay all costs that may be adjudged against him, etc.; whereupon such clerk shall issue a notice in the nature of a summons to such surveyor, which shall be served by the sheriff of said county. It is further provided that "all other persons interested shall take notice of such appeal, which shall be tried by the court." If the court reduces the allotment one-fifth in amount, then all costs occasioned by such appeal shall be taxed against said surveyor, and paid out of the general funds in the county treasury not otherwise appropriated; otherwise the costs shall be adjudged against appellant. If more than one person appeals separately, the cases shall be consolidated and tried together. The court may confirm the allotment made by the surveyor or change the same, and the statute then declares that the decision upon such appeal "shall be final and conclusive."

At the very threshold we are confronted with a question in respect to our jurisdiction in this appeal. The county surveyor, under the statute, in making the ditch allotments, simply acts in an administrative capacity, and, were it not for

the express provision of the statute granting an appeal to the circuit or superior court by any person aggrieved by his order, no appeal therefrom could be taken. *Ellis v. Steuben Co.*, 153 Ind. 91, 54 N. E. 382. The legislature, however, seems to have deemed it proper to allow an appeal from the order of the surveyor made by him in the discharge of his administrative duty imposed by law, in order to bring the matters involved in the allotment proceedings before a court wherein such matters could be judicially determined and settled. But, having granted this right of appeal, the legislature seems to have been impressed with the fact that matters involved in a proceeding in respect to the mere cleaning out and keeping a public ditch in repair were not of such importance as to justify an appeal to a higher court, and thus enable the litigation between the parties to be continued indefinitely. Consequently it will be seen that it is declared in positive and unmistakable language, in section 5 of the original act (section 5636, Burns' Rev. St. 1894), that "*the decision upon such appeal shall be final and conclusive.*" (Our italics.) If the legislature did not intend by this provision to exclude or deny the further right of appeal, then the language employed is without meaning or purpose, and such an absurdity cannot be attributed to that body. To interpret the language in question as not excluding the right of appeal from the judgment of the circuit court would, in effect, be to eliminate the word "final" from the statute. If it does not signify that it was the legislative will that the decision or judgment of the circuit court in respect to the matters involved in the proceeding should be an end to the controversy, so far, at least, as any appeal was concerned, then no legitimate use or purpose for employing the term or terms can in reason be suggested. To declare that the decision of the court shall be "final and conclusive" is certainly the equivalent of declaring that the court's judgment shall not be subject to a review on appeal. The word "final" has a well-understood and accepted meaning. The Century Dictionary defines it to be in a legal sense as follows: "Precluding further controversy on the question passed upon, as a statute declaring that the decision of a specified court shall be final." In 18 Am. & Eng. Enc. Law (2d Ed.) p. 19, it is said that "final" means conclusive, from which there is no appeal. In *Re Mayor, etc., of City of New York*, 49 N. Y. 150, in which the matter of the widening and straightening of Broadway street in the city of New York was involved, the statute under which the proceedings were had provided that the report of the commissioners in such cases, when confirmed, "shall be final and conclusive." The court in construing this language in that appeal held that it had reference to an appeal from the judgment of the court confirming the report, and, while the provision was intended to deny an appeal from such judgment, still it did not prohibit an application to set aside the judgment con-

firming the report of the commissioners on the ground of irregularity, fraud, or mistake. An act of the legislature of the state of Connecticut provided that "the board of councilmen for the city of South Norwalk shall be the final judges of the election returns, and of the validity of elections and qualifications of its own members." In *Selleet v. Common Council*, 40 Conn. 361, in considering this statute, the court said: "By the use of the word 'final' the legislature intended to divest the superior court of jurisdiction in such cases, and make the common council the sole tribunal to determine the legality of the election of its own members." In *People v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179, a provision in a city charter made the common council the final judges of the election of aldermen. The phrase "final judges," as employed in the charter, was held to deny the jurisdiction of the court to reinstate a member who had been excluded from the board of aldermen without a proper hearing. *Coon v. Mason Co.*, 22 Ill. 666, was a proceeding before the county court to lay out and open a public highway. The statute under which the proceeding was instituted granted an appeal from the judgment of the county court to the circuit court, and provided that the decision of the circuit court in such cases should be final. An appeal in that case was prosecuted from the judgment of the circuit court to the supreme court. The latter, in construing this provision of the statute, said, "We are of the opinion that the legislature intended to prohibit the prosecution of a writ of error as well as an appeal," and the motion to dismiss was sustained. See, also, *Simon v. Common Council*, 9 Or. 437; *Snell v. Manufacturing Co.*, 41 Mass. 296; *Bateman v. Megowan*, 1 Metc. (Ky.) 538; *Newcum v. Kirtley*, 13 B. Mon. 517; *Moore v. Mayfield*, 47 Ill. 167. A statute was enacted by our legislature in 1861 providing that in a proceeding before a board of commissioners to obtain a license to sell intoxicating liquors an appeal from the order of the board might be taken to the circuit or common pleas court, and further provided that the decision or verdict of the jury in the latter court "shall be final and conclusive, and without appeal therefrom." In the case of *Board v. Lease*, 22 Ind. 261, which was an appeal from the judgment of the common pleas court in an application for a license to retail liquors, this court, in construing that statute in respect to the appeal in that case, said: "Under the statute of 1861 we are of opinion we cannot entertain this appeal. The statute makes the determination of the circuit or common pleas court to which an appeal may be taken final; therefore we cannot look into the case to determine even whether the change of venue was properly taken." The appeal in that case was dismissed, on the court's own motion. In *Brown v. Porter*, 37 Ind. 206, which was also an application for a license to sell intoxicating liquors, the holding in the *Lease Case*, 22 Ind. 261, was followed, the court saying: "The language of the

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statute is a little ambiguous, but we think it was the intention of the legislature that no appeal should lie to this court in such cases. Perhaps the reason was that the time of this court should not be consumed in the decision of controversies of such character." The appeal in this latter case was also dismissed by the court on its own motion for want of jurisdiction. The fact that the statute of 1861, in addition to the phrase "final and conclusive," contained the words "and without appeal therefrom," is not of importance, as these words were simply a repetition of, or rather served to make more evident, that which was declared by the immediately preceding words, "final and conclusive." The case of *Grusenmeyer v. City of Logansport*, 76 Ind. 549, involved the right of an appeal to the circuit court from an order of the board of commissioners annexing certain territory to the city of Logansport, and that case, under the provision of the statute therein involved, is clearly distinguishable from the holding in the present appeal. The provision of the statute there in issue declared that the entry or order of the board of commissioners, or an attested copy thereof, "shall be conclusive evidence in all courts of such annexation." This court held in that case that this provision of the statute did not deny the right of appeal from the order of the board to the circuit court, and thereby overruled *Trustees v. Manck*, 35 Ind. 51, and other decisions of this court, resting on the doctrine asserted in *French v. Lighty*, 9 Ind. 475, to the effect that there is no right of appeal in "a special proceeding, for a special purpose, based on a special statute, which gives no right of appeal." It follows, and we so conclude, that the appeal in the case at bar is prohibited by the statute in controversy; hence we have no power to entertain the same, and therefore are constrained to dismiss it on our own motion, for want of jurisdiction.

Appeal dismissed.

## UNITED STATES v. ST. ANTHONY R. CO.

(*Circuit Court of Appeals, Ninth Circuit, March 3, 1902.*)

[114 Fed. Rep. 722.]

## Public Lands—Cutting Timber—Right of Railroad.

Under Act March 3, 1875, § 1, granting railroad companies the right of way through public lands, with right to take from public land "adjacent" to the line of railroad timber necessary for the construction of the road, timber cut at a distance from the road of 17 to 23 miles by air line, 20 to 25 miles by wagon road, and 22 to 26 miles by the windings of a river down which some of it was floated, was taken from "adjacent" land, within the meaning of the act; it appearing that it was a barren, frontier country, with no suitable timber nearer than that taken, and that the lands from which it was taken were materially benefited by the road, and the timber could be hauled that distance with reasonable profit.

## Statute—Construction.

In Act March 3, 1875, § 1, the meaning of the word "adjacent," as applied to public lands, should be determined by the evidence in each particular case.

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In Error to the Circuit Court of the United States for the Southern Division of the District of Idaho.

This is an action to recover from the defendant in error the value of timber cut by it upon the public lands of the United States in Idaho for use in the construction of the railroad of the defendant in error. After the filing of complaint and answer, the case was submitted to the lower court upon an agreed statement of facts, substantially as follows: The plaintiff in error was the owner and in possession of the lands described in the complaint. During the summer and fall of the year 1889 the defendant in error, an Idaho corporation, entered upon the said lands, and, through its agents and representatives, cut and removed therefrom 1,682,975 feet of timber, of the manufactured value of \$12.35 per thousand feet, and of a stumpage value of \$1.50 per thousand feet, and used the same in the construction of its railroad between Idaho Falls, in Bingham county, and St. Anthony, in Fremont county, state of Idaho, a distance of approximately 40 miles. Said railroad passed through public lands of the United States, and the defendant in error had duly complied with all the requirements of the act of March 3, 1875, granting to railroad companies the right of way through the public land of the United States, and became entitled to the benefits and privileges therein granted to railroad companies. The timber was cut at a distance from the road of 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles following the windings of the river, down which much of the timber was rafted. The remaining portion was hauled by wagon, the road being a good one, with no unusual grades; and the timber could be hauled by wagon to the place where it was used with reasonable profit. There was no other suitable timber-bearing land upon either side of the line of the railroad as near as were the lands in question, and said lands were so situated with reference to said railroad as to be benefited thereby. It is admitted that the defendant in error, in going upon said lands and cutting and removing timber therefrom, did not act under a mistake of fact, but believed that it had the right to do so, using ordinary care and prudence, and acting under the advice of its counsel. Upon the questions involved in this statement of facts the court below rendered its decision in favor of the defendant railroad company, and the plaintiff sued out a writ of error thereupon to this court.

R. V. Cozier, U. S. Atty.

P. L. Williams and F. S. Dietrich, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error present this question: Were the lands from which the timber was cut by the defendant in error "adjacent" to the line of its railroad, within the mean-

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ing of the act of March 3, 1875? Section 1 of the said act provides:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, \* \* \* which shall have filed with the secretary of the interior a copy of its articles of incorporation and the proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public land adjacent to the line of said road, material, earth, stone and timber necessary for the construction of its said railroad." 18 Stat. 482.

It is contended by the plaintiff in error that the word "adjacent," in this section, should be construed to mean "in proximity to," "contiguous," or "near" the line of the railroad, and that the distance of 17 to 26 miles cannot reasonably come within such a definition. The section has been variously construed by the trial courts, but not definitely passed upon by the court of last resort. In *U. S. v. Denver & R. G. R. Co.* (D. C.) 31 Fed. 886, the court construed the language of the act as intending to indicate such timber and other materials as could be conveniently reached by ordinary transportation by wagons. In *U. S. v. Chaplin* (C. C.) 31 Fed. 890, land was declared to be "adjacent," within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefited by the construction of the railroad. And in *U. S. v. Lynde* (C. C.) 47 Fed. 297, 300, the court expressed the opinion that just what should be considered adjacent land must be determined by the evidence in each particular case. The latter view has met with the approval of this court, as indicated by the opinion of Judge Hawley in *Stone v. U. S.*, 12 C. C. A. 451, 64 Fed. 667, 29 U. S. App. 32. No exact definition was there attempted, the court merely holding that, "under the facts presented," a reasonable construction of the language of the act would not permit the timber land in question to be deemed adjacent to the line of railroad of the defendant company. This decision was affirmed by the supreme court of the United States (*Stone v. U. S.*, 167 U. S. 178, 191, 17 Sup. Ct. 778, 42 L. Ed. 127), without further determining the boundary of adjacency contemplated by the act of congress. The court concurred with the view expressed in *Denver & R. G. R. Co. v. U. S.* (C. C.) 34 Fed. 838, 841, that congress did not intend to grant anything like a general right to take timber from land where it was most convenient, but, other than this expression, did not attempt to interpret the language of the act, and left the decision dependent upon the particular facts presented.

It is well settled that, while public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implica-

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tion. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. *Railroad Co. v. Barney*, 113 U. S. 618, 625, 5 Sup. Ct. 606, 28 L. Ed. 1109. In *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 1, 15, 14 Sup. Ct. 11, 37 L. Ed. 975, this rule of construction was held to be properly applicable to the act of 1875 in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railway of the defendant, but was used in the construction of its road at points distant from the place at which it was taken. Under the rule of construction above stated, it was held to be the purpose of congress to aid railroad companies entitled to the benefits of the act by conferring the right to take timber necessary for road construction from adjacent public lands, and use it upon distant portions of their lines. Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that, according to the admitted facts, there was no suitable timber upon either side of the said road nearer than the lands in question, and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privilege conferred by congress has been properly exercised, and whether the mutual benefits contemplated by the act are likely to be realized. The case of *Bacheldor v. U. S.*, 28 C. C. A. 246, 83 Fed. 986, presented a similar state of facts to the one at bar. *Bacheldor*, acting for the *Denver & Rio Grande Railway Company*, had cut timber from government land some 25 miles distant by wagon road from the line of railroad, in the construction of which it was to be used. No suitable timber could be found nearer. The trial court instructed the jury that the word "adjacent," as used in the act of congress authorizing the cutting of timber for railroad construction, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the proposed railroad passed. The supreme court of the territory of New Mexico affirmed the conviction of *Bacheldor*, but the judgments of both courts were reversed by the circuit court of appeals for the Eighth circuit; Judge Thayer, speaking for the court, declaring that no court can say, as a matter of law, that a trespass was committed because timber was taken from a place 25 miles distant by wagon road from the right of way of the railroad, but it should be left to a jury of the vicinage to determine, under proper instructions from the court, whether the right accorded by the statute was fairly exercised, as congress intended it should be. The fact that congress did



not in definite terms limit the right to take timber and other materials to adjoining townships, but used the word "adjacent,"—a purely relative term, which may be understood differently when applied to different objects or under different circumstances,—was there considered very persuasive evidence that congress did not intend to fix an arbitrary line, beyond which the right to take timber and other materials should not extend, but that its purpose was to leave such right to be governed by circumstances. It was further said:

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way, within the spirit and intent of the act."

We are in accord with this construction of the act. And while, under some circumstances, the cutting of timber from public lands at a distance of from 17 to 26 miles from the line of railroad under construction would undoubtedly be deemed a trespass, as without the meaning of the word "adjacent" in said act, the circumstances of the present case do not warrant such a holding. No injury appears to have been suffered by the plaintiff in error by reason of the act of the defendant in error. On the contrary, the land from which the timber was cut is admittedly benefited by the construction of the railroad, and, under all the conditions existing, it should be considered to be "adjacent" to the line of railroad constructed by the defendant in error, as contemplated by the act of 1875.

The judgment of the circuit court is affirmed.

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GREEN v. METROPOLITAN ST. RY. CO.

(*Court of Appeals of New York, May 13, 1902.*)

[63 N. E. Rep. 958.]

**Privileged Communications—Statements to Physician.**

Where a physician acquired his information as to how an accident happened from the injured party while attending him as a surgeon, he

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is not rendered incompetent to testify thereto by Code Civ. Proc. § 834, unless the information was "necessary to enable him to act in that capacity"; and, in the absence of evidence of that fact, exclusion of such evidence on the ground that it was privileged was error.

Werner, Martin, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Action by William Green, an infant, by Edward J. Green, his guardian ad litem, against the Metropolitan Street Railway Company. Judgment for plaintiff was affirmed by the appellate division (72 N. Y. Supp. 524), and defendant appeals. Reversed.

The action was brought to recover damages for injuries received by the plaintiff from being run over by one of the defendant's cable cars in the city of New York. The plaintiff was a boy of about 12 years of age, living with his father on Columbus avenue, in the vicinity of the scene of the accident. He had been delivering goods between 8 and 9 o'clock in the evening, and was returning to his employer's store, when, upon reaching a point in Columbus avenue between street crossings, he stopped near a pillar of the elevated railroad, and looked up and down the avenue. He saw a car coming from the north, and another, about the middle of the block, coming from the south. Without waiting for them to pass, he started to cross the avenue, and was struck by the south-bound car. According to his testimony, he was thrown into the air, fell upon the track, and was caught on a small fender under the platform of the car, in front of the wheels. He was carried in that way about 100 feet, when he fell from the fender, and the car wheel cut off his leg. The trial court submitted to the jury the question whether the accident occurred through the negligence of the defendant's servants, and instructed them, whatever the degree of negligence on the part of the plaintiff in the original contact with the car, that, from the moment he was caught upon the fender, a new relation existed between the parties, and any act or omission on the part of the defendant exhibiting a lack of care on its part in the then situation was sufficient to charge it with negligence. The plaintiff recovered a verdict, and the judgment thereupon was affirmed by the appellate division, in the First judicial department, by a divided court. The defendant appealed from the affirmance of this court.

Charles F. Brown, Theodore H. Lord, and Henry A. Robinson, for appellant.

Franklin Pierce and William M. K. Olcott, for respondent.

GRAY, J. (after stating the facts). I think this judgment should be reversed, and that a new trial should be had, for the error in excluding the testimony of the witness Moorhead when asked by defendant's counsel to state "what he [the plaintiff] said, if anything, as to how this accident happened."

Moorhead was a surgeon attached to the J. Hood Wright Hospital, and was in charge of the ambulance which was summoned to convey the plaintiff after meeting with his accident. It will be observed that the question called for no information which was acquired by the surgeon to enable him to act as such. It called for evidence merely of what had preceded and had caused the accident, according to the plaintiff's knowledge. Section 834 of the Code of Civil Procedure, whose privilege has been extended to cover this question, applies, by its language, to cases where information has been acquired by a physician or a surgeon while "attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." We may readily admit that Dr. Moorhead acquired the information which the question called for while attending the plaintiff in a professional capacity, and still we would be far from the point of the legislative purpose in enacting the section of the Code. That was that the information should be of a character necessary to enable Dr. Moorhead or the hospital staff to act professionally upon the case. As it was observed in *Edington v. Insurance Co.*, 77 N. Y. 564, "it is not sufficient to authorize the exclusion that the physician acquired the information while attending the patient, but it must be the necessary information mentioned." The object of the statute, as we are bound to presume, was the accomplishment of a just and salutary purpose, which was that the relations between physician and patient should be protected against public disclosure, so that the patient might unbosom himself freely to his medical adviser, and thus receive the full benefit of his professional skill. Surely it could not have been intended that any truthful version of a narrative of the events leading to an accidental injury should be excluded, and that was all this question called for, as it had come from the sufferer's lips, and when fresh in his recollection. It is, rather, more consonant with the requirements of justice that no witness should be prevented from giving such evidence. The burden was upon the plaintiff, in seeking to exclude this evidence of Dr. Moorhead, to bring the case within the provision of the statute (*People v. Koerner*, 154 N. Y. 355, 48 N. E. 730), and he did not do so. It was proper to exclude testimony as to any information acquired which was of a nature to enable a surgeon to treat the plaintiff, but it is unreasonable to say that information of how the accident happened was such as must or might have affected the surgical treatment required. Surely, there must be a line, which reason indicates as that where the statutory inhibition ceases. The plaintiff lost his leg by being run over by the car, and the question of defendant's legal liability was a narrow one, as presented by the trial court, in view of its assumption that the plaintiff was guilty of contributory negligence; hence all the light possible to exhibit how the injury was occasioned should have been per-

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mitted upon the case. It seems to me that the exclusion of this evidence was an application of the Code provision beyond all legitimate and reasonable limits, and was not in accord with the recent decision of this court in *Griffiths v. Railway Co.*, 171 N. Y. 106, 63 N. E. 808.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

WERNER, J. I cannot concur in the opinion about to be adopted herein. The appellant's counsel contends that this judgment should be reversed for errors in the ruling of the trial court in excluding the evidence of Dr. Moorhead as to conversations he claims to have had with the plaintiff. This physician was called as a witness for the defendant, and testified that he was connected with the J. Hood Wright Memorial Hospital, that he responded with the hospital ambulance to the call to attend the plaintiff, and that after the boy had been placed in his custody he had several conversations with him. Being examined by the counsel for the plaintiff, he testified: "It was my duty as surgeon to take statements for the purpose of prescribing for patients and giving them aid, and having it entered in the books of the institution. Whatever I said to Willie Green and he said to me was in reference to his condition. I obtained that information for the purpose of prescribing for him. Now I am employed by the Metropolitan Street Railway Company." In response to questions by counsel for the defendant, he testified: "Aside from prescribing for him, or ascertaining anything concerning his ailment, I don't know as I asked him any questions concerning the way in which the accident occurred, for the purpose of getting information, but patients sometimes volunteer a great deal of information which is not essential to treat them. I had several conversations with him. I asked him how the accident occurred." He further stated, in answer to the questions of the plaintiff's counsel, that the rules of the hospital required him to ask questions to find out how an accident occurred, and the circumstances, for the purpose of recording the information thus acquired in a book; and, in response to the defendant's attorney, he added that, in the course of his duties as an ambulance surgeon, he ascertained the causes of accidents. He was then asked to state what the plaintiff said to him, if anything, as to how the accident happened. This was objected to by counsel for the plaintiff, and the court sustained the objection, as calling for information within the prohibition of section 834 of the Code of Civil Procedure. To this ruling the counsel for the defendant duly excepted. Section 834 has recently been under consideration by this court in the case of *Griffiths v. Railway Co.*, 171 N. Y. 106, 63 N. E. 808, where the same physician was a witness, and we held that his testimony as to conversations with the plaintiff was improperly ruled out.

We think, however, that the Griffiths Case is clearly distinguishable from the one at bar. In that case there was not only considerable doubt whether the relation of physician and patient had ever existed, or, if it had, whether it continued down to the time of the conversation which was excluded, but the physician expressly stated that the information which he acquired as to the occurrence of the accident was distinct from any relation existing between himself and the plaintiff as physician and patient, and the plaintiff proved no facts showing that this was not true. In the case before us the physician distinctly asserted that whatever information he acquired from the patient was in reference to his condition, and for the purpose of prescribing for him. He did interject the observation that patients sometimes volunteer a great deal of information that is not essential to their treatment, but, in spite of this, it plainly appears that the information which he acquired from the defendant was obtained while the relation of physician and patient existed, that it was received by him in his professional capacity, and that he regarded it as necessary to enable him to act in that capacity. It may be admitted that, as a general rule, the assertion or admission of the physician as to the purpose for which he obtained information from the patient is not the most reliable test to apply in the admission or exclusion of such evidence. There are cases in which the evidence itself can furnish the only reliable guide. This is not one of those cases. The doctor asserts that all the information he obtained from the plaintiff was necessary for purposes of professional treatment. While it is true that the question which was objected to and ruled out simply called for statements made by the plaintiff as to how the accident happened, it is equally true that we cannot say, as matter of law, that the statements thus made were not necessary to enable the doctor to prescribe for and treat the plaintiff. The injury to the plaintiff's leg was visible. No statement was necessary to determine the proper treatment for that. But the plaintiff had been dragged for a distance of about 100 feet. His appearance, aside from his wounded leg, must have indicated that he had suffered a terrible ordeal. He was a boy of tender years, who could, perhaps, describe with greater accuracy what had happened to him than he could detail the subjective results or manifestations of the accident. Under just such conditions an intelligent and skillful physician might much more surely ascertain the probable or possible nature or extent of injury by getting at the facts of the accident than he could by the usual methods of the diagnostician. We think, upon the whole, that the plaintiff in this case has successfully sustained the burden of showing that the evidence excluded consisted of information which was necessary to enable the physician to treat the plaintiff professionally. *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951;

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People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Edington v. Insurance Co., 77 N. Y. 564; Nelson v. Village of Oneida, 156 N. Y. 219, 50 N. E. 802, 66 Am. St. Rep. 556.

The judgment of the appellate division should be affirmed, with costs.

PARKER, C. J., and O'BRIEN and CULLEN, JJ., concur with GRAY, J. MARTIN and VANN, JJ., concur with WERNER, J.

Judgment reversed, etc.

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(Court of Appeals of New York, May 13, 1902.)

[63 N. E. Rep. 808.]

Privileged Communications—Testimony of Physician.

The burden rests on plaintiff in an action to recover for personal injuries to show, when he seeks to exclude the testimony of a physician under Code Civ. Proc. § 834, prohibiting a physician from disclosing any information acquired while attending a patient in a professional character, necessary to enable him to act as a physician, to show that the relation existed; and where there is no evidence of that fact, or that the testimony had any relation to professional treatment, it is improperly excluded.

Appeal from supreme court, appellate division, First department.

Action by Harry Griffiths, by Henry W. Griffiths, guardian ad litem, against the Metropolitan Street Railway Company. From a judgment of the appellate division (71 N. Y. Supp. 406) reversing a judgment dismissing the complaint, and reinstating a verdict in favor of plaintiff, defendant appeals. Reversed.

On the 17th day of April, 1899, the plaintiff, a boy between seven and eight years of age, was struck by one of the defendant's north-bound cable cars on Columbus avenue, between Ninety-Third and Ninety-Fourth streets, in the city of New York. This action is brought to recover damages for the injuries he thus received. The accident occurred between 5 and 6 o'clock in the afternoon. The day was clear and bright. The plaintiff lived with his parents at the north-west corner of Columbus avenue and Ninety-Third street. Just before the accident he had been sent by his mother on some errands. Having made some purchases at a store on the west side of the avenue, just below Ninety-Fourth street, he started to cross the street directly in front of the store. He stood at the curb, watching some men at a manhole for a short time, and then proceeded into the street as far as the easterly or up-town track of the defendant's road, where he waited for an up car to pass. Then he looked north and south, and stepped upon the "up track." While upon the track, and, as he says, waiting for two south-bound cars to pass, he was struck by

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an up-bound car. As a result of this collision, one of his arms was fractured, and one of his legs was so badly crushed that it had to be amputated just above the ankle. There was a sharp conflict in the evidence as to the distance between the car and the plaintiff when he stepped upon the track. The plaintiff testified that when he attempted to cross the track there was no up-bound car in sight as far south as the corner of Ninety-Third street, which was about 150 feet distant; that he did not see it until it was two or three houses from him; that he then attempted to get off the track, but the car was coming so fast he could not get out of the way in time to avoid the accident. Other witnesses corroborated the plaintiff's story. There was some evidence upon which the jury had the right to find that the car could have been stopped in time to have avoided the accident, although it was going at full speed, and there was conflicting evidence as to whether the warning gong was sounded or not. The plaintiff was a bright, intelligent boy, who, according to his mother's testimony, was capable of taking care of himself upon the street. No motion to dismiss the complaint or for a nonsuit seems to have been made at the close of plaintiff's testimony. After all the evidence was in, counsel for the defendant moved "to dismiss the complaint upon the ground that the plaintiff has not shown by a preponderance of proof that he was free from contributory negligence, and that the accident was caused solely by the negligence of the defendant." The trial court reserved decision upon this motion pending the submission to the jury of certain specific questions, in accordance with the practice authorized by section 1187 of the Code of Civil Procedure. The answers which the jury returned to these questions disclose that they found that the gripman of the car saw the plaintiff in time to have avoided the accident, that the defendant was guilty of negligence which caused the injury, and that neither the plaintiff nor his parents were guilty of contributory negligence. Plaintiff's damages were fixed at \$5,000. After the jury had rendered this verdict, the defendant renewed the motion to dismiss, and also moved for a new trial. No exception was taken by the defendant to the action of the trial court in submitting to the jury the questions whether plaintiff was free from contributory negligence, and whether the defendant was negligent. The trial court subsequently set aside the verdict, and dismissed the complaint, without granting a new trial. The plaintiff then appealed to the appellate division from the judgment entered upon the order of the trial court setting aside the verdict and dismissing the complaint. The appellate division reversed the order dismissing the complaint, and reinstated the verdict, also without ordering a new trial.

David B. Hill, Charles F. Brown, Theodore H. Lord, and Henry A. Robinson, for appellant.

Ferdinand E. M. Bullowa, for respondent.

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WERNER, J. (after stating the facts). The form of defendant's motion to dismiss the complaint seems to concede that there was some evidence of defendant's negligence, as well as plaintiff's freedom from contributory negligence. The motion was based upon plaintiff's alleged failure to establish by "preponderance of proof that he was free from contributory negligence, and that the accident was caused solely by the negligence of the defendant." However that may be, the facts involved in the inquiry have been disposed of by the learned appellate division in favor of the plaintiff, and this court is bound by that decision. The only question presented by the record which is open for our consideration arises upon an exception taken to a ruling of the learned trial court in excluding certain evidence of a physician called as a witness for the defendant. This evidence was excluded because it was thought to be within the prohibition of section 834 of the Code of Civil Procedure, which provides, "A person duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." One Dr. Moorehead, called as a witness for the defendant, testified that he was at the scene of the accident when the ambulance arrived, but, aside from the fact that he rendered first aid to the plaintiff in the drug store immediately after the accident, he had no relation with him. The record discloses that Dr. Moorehead was an attending physician at the J. Hood Wright Memorial Hospital, where the boy was taken, and had ridden with the boy in the ambulance about three blocks of the way to the hospital; that he was also a surgeon in the employ of the defendant, but whether such employment commenced before or after the accident is not disclosed; that he next saw the boy about 10 days afterwards at the hospital, when he had a talk with him, as he says, as part of his duty towards the defendant. He was then asked by counsel for the defendant: "Can you state whether or not, from his conversation, he was suffering any pain, or whether he talked with you and understood you?" The court here interposed and said: "We will settle the question of the admissibility of his evidence." The witness was then permitted to continue, saying: "I then asked him to tell me the details of his accident, and I received some reply from him." At this point a discussion ensued between counsel and court, at the conclusion of which the court, after expressing doubt as to the admissibility of the testimony, said, "I will give you an exception," although up to that time no objection appears upon the record. The witness then stated: "I did not in the hospital at this time, ten days afterwards, go to treat him, in any sense, as a physician." The doctor was then interrogated by counsel for the defendant as follows: "Q. Did you have any talk with him as to that condition, or only as to the way in which the



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accident happened? A. It was entirely as to the method of the accident. Q. So that whatever he said to you was entirely distinct from any treatment or visit of a physician, or anything of that sort? A. Entirely so." The counsel for the defendant here said, "I now renew the question," whereupon the court further interrogated the witness, eliciting from him, in substance, that he did not think that the plaintiff knew that he was the physician who treated him at the drug-store and that he did not advise him of the fact until after the plaintiff had given him a statement. This ended the examination of the witness, and the court said: "It is rather a narrow question. But I think the doctor came there with the assumed authority that a doctor would have in such a place, and that any talk that he had with the boy was privileged." To this the counsel for the defendant excepted. It is to be observed that there is no exception which sharply points to the evidence excluded by the court, but we think there is enough in the record to indicate that the court ruled out all evidence of the witness as to any conversation he had with the plaintiff concerning the details of the accident, and how it occurred. To bring the evidence of a physician within the prohibition of the Code section above quoted, three elements must coincide: (1) The relation of physician and patient must exist; (2) the information must be acquired while attending the patient; (3) the information must be necessary to enable the physician to act in that capacity. Upon the evidence disclosed by the record, it is doubtful whether either of these requisites was established in the case at bar. It is true that Dr. Moorehead did render first aid to the plaintiff, and rode with him in the ambulance for a distance of three blocks. But the physician testified that thereafter he had no relation to the plaintiff, either as an official of the hospital or otherwise, until about 10 days after the accident, when, as a part of his duty to the defendant, he saw the plaintiff at the hospital. There is nothing in the record to disclose the nature and purpose of this visit, except the doctor's statement that it was made as part of his duty to the defendant, by whom he was then employed, and that the doctor did not go to the hospital to treat the plaintiff, "in any sense, as a physician."

It is the well-settled rule that the burden of showing that evidence sought to be excluded under this section is within the prohibition of the statute rests upon the party seeking to exclude it. *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783; *Edington v. Insurance Co.*, 77 N. Y. 564. In *People v. Koerner*, *supra*, we find the latest expression of the rule in this court, where it is laid down by Judge Martin as follows: "Where the testimony of the physician is sought to be excluded under the provisions of that section [834] of the Code, the burden is upon the party seeking to exclude it to bring the case within its provisions.

He must make it appear not only that the information which he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, but also that it was necessary to enable him to perform some professional act." Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion that the conversation which the doctor was about to give had any relation to professional treatment. There may be circumstances in which it is necessary for a physician to inquire of a patient how an accident happened, in order to properly treat him. But that is not true in all cases, and no such necessity was shown in the case at bar. In *People v. Schuyler*, supra, a jail physician was called to state his opinion as to the sanity of the defendant; and, notwithstanding the fact that the witness had examined the defendant in his professional capacity, he was allowed to testify, and this court sustained the ruling. In *Edington v. Insurance Co.*, supra, the physician had treated the assured professionally, but the relation had ceased some time before the death of the assured. He was asked if the assured was cured when he left the witness' hands, and what, generally, was his physical condition. These questions were excluded, and this court decided that the ruling was erroneous. In the case at bar the witness expressly stated that the information which he obtained from the plaintiff was distinct from any treatment as a physician, and that the conversation was simply as to the details of the accident. No fact was brought out tending in any way to contradict him. If it had appeared that the information was at all necessary to enable the witness to treat the plaintiff professionally, the trial judge would have been justified in excluding the evidence. Where the party seeking to exclude the evidence shows facts which indicate that the information was necessary for professional treatment, the trial judge is the sole judge of its admissibility, notwithstanding the physician's statement to the contrary. *Bacon v. Frisbie*, 80 N. Y. 399, 36 Am. Rep. 627. The decision of the question of fact which arises under such circumstances rests in the discretion of the trial judge, subject to review by the appellate division. Where, however, there is nothing to show that it was necessary for this purpose, it does not fall within the condemnation of the statute. The information sought need not be confidential in its nature (*Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770), but it must appear in some way that it was necessary to enable the physician to act in his professional capacity. It is true that in *Feeney v. Railroad Co.*, 116 N. Y. 375, 380, 22 N. E. 402, 403, 5 L. R. A. 544, Judge Vann quotes with approval the language of the opinion in *Edington v. Insurance Co.*, 67 N. Y. 185, 194, to the effect that where a physician has attended a patient professionally, and is called to testify as to information secured from the patient, "it must be assumed

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from the relationship existing that the information would not have been imparted, except for the purpose of aiding the physician in prescribing for the patient." But what was said in the Feeney Case was proper in both cases, in view of the facts there presented. In the Feeney Case the plaintiff had consulted the physician in his professional capacity the day after she was hurt. The physician was asked whether he had conversed with her about her injuries, and whether he made an examination of her at that time. Both questions were held to have been properly ruled out. In that case every element necessary to bring the questions within the prohibition of the statute was present. The relation of physician and patient was established, the witness was attending in his professional capacity, and the information which he obtained from the patient was plainly necessary to enable the witness to act in that behalf. In the Edington Case the information given to the physicians was plainly necessary to enable them to act in their professional capacity. In *Renihan v. Dennin*, 103 N. Y. 573, Judge Earl said: "It is not disputed, and could not well be, that the information obtained by the witness was necessary to enable him to act in his professional capacity." In *Grattan v. Insurance Co.*, 80 N. Y. 281, 296, 36 Am. Rep. 617, the questions excluded were plainly within the prohibition of the statute, and the court was careful to limit the rule there laid down to the particular circumstances of that case.

We think the plaintiff in the case at bar did not successfully sustain the burden of showing that the evidence excluded was within the prohibition of the statute. In arriving at this conclusion we are not laying down a general rule. The statute states the general rule, and we simply decide that the peculiar facts of this particular case do not come within its operation.

The judgment of the appellate division should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and BARTLETT, HAIGHT, MARTIN, and CULLEN, JJ., concur; VANN, J., not voting.

Judgment reversed, etc.

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BAINES v. COOS BAY, R. & E. R. & NAV. CO. *et al.*

(*Supreme Court of Oregon, March 24, 1902.*)

[68 Pac. Rep. 397.]

Admissions That Officer of Corporation Had Authority to Execute Note  
—Estoppel.

An allegation in the answer, in an action against a corporation on a note alleged to have been executed by the corporation, that the note was executed and delivered as alleged in the complaint, in pursuance of a fraudulent conspiracy between plaintiff and an officer of the corporation, is an admission that the officer executing the note had authority so to do, and precludes the corporation from urging the defense of his want of authority, though it is also alleged in the answer.

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**Officers—Compensation.**

Where the duties of an officer of a corporation are merely nominal, he is entitled to compensation for other services having no connection therewith, which he performs for the corporation at the request of its officers.

Appeal from circuit court, Coos county; J. W. Hamilton, Judge.

Action by W. E. Baines against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company and another. From a judgment in favor of the defendants, the plaintiff appeals. Reversed.

This is an action on two promissory notes, for \$4,000 each, dated April 18, 1894, alleged to have been made, executed, and delivered for a valuable consideration to the plaintiff by the defendant corporation. The complaint is in the usual form, setting out the notes in haec verba, from which it appears they were each signed, "The Coos Bay, Roseburg & Eastern Railroad & Navigation Company, by R. A. Graham, General Manager." The answer denies, upon information and belief, the execution of the notes by the corporation, and sets up, among other defenses, the following: "(1) That at the time the two promissory notes in complaint set forth were made, executed, and delivered, as in complaint alleged, the defendant corporation was not indebted to the plaintiff in any amount whatever, but that at said time the defendant R. A. Graham was indebted to the plaintiff in the amount stated in said two notes, and the said two notes in complaint mentioned were made, executed, and delivered in pursuance of a fraudulent conspiracy made and entered into by and between the plaintiff and the defendant R. A. Graham, in order that it might be made to appear that the amount of said two notes was a debt of the defendant corporation instead of a debt of the defendant R. A. Graham; that the plaintiff was duly elected, qualified, and acting director of the defendant corporation from the 19th day of August, 1890, the date when the defendant corporation was organized, until the 29th day of December, 1893, and well knew that the defendant corporation was not indebted to him in any amount whatever; and that the defendant R. A. Graham was indebted to him the amount of said two notes in complaint set forth, and in order to enable the defendant R. A. Graham to cheat and defraud the defendant corporation. (2) That from the 19th day of August, 1890, until about the 1st day of January, 1900, the defendant R. A. Graham was director and general manager of the defendant corporation, and while so acting as director and general manager of the defendant corporation the defendant R. A. Graham paid to the plaintiff upon said two notes in complaint set forth the amount of money in complaint alleged to have been made, and paid upon said two notes other sums of money not mentioned in complaint, but how much this defendant corporation does not know and is

unable to state, but whether or not said sums of money so paid by the defendant R. A. Graham upon said two notes was paid out of his own funds or paid with money belonging to this defendant corporation this defendant is unable to state. (3) The defendant corporation further alleges that, after the making of the two promissory notes in complaint set forth, the defendant R. A. Graham sold, assigned, and transferred to the plaintiff real and personal property as payments upon said two notes in complaint set forth, the description of which this defendant corporation does not know and is unable to give; but the defendant corporation states and alleges that the defendant R. A. Graham has fully paid, satisfied, and discharged the said two promissory notes in complaint set forth, by the payments in complaint alleged to have been made, and by other cash payments, and by real and personal property sold and transferred to plaintiff as aforesaid, and the said two notes have been fully paid, and there is nothing due the plaintiff thereon, and that this suit is instituted and prosecuted in aid of the fraudulent conspiracy above mentioned, made and entered into between the plaintiff and the defendant R. A. Graham, with the view to try and collect as much money as possible from this defendant upon said two notes for the benefit of the defendant R. A. Graham." A motion to strike out this separate defense, on the ground that it is inconsistent with the denials, together with a demurrer thereto, having been overruled, the plaintiff filed a reply denying the new matter in the answer, and upon the issues thus made a trial was had before a jury. At the close of the testimony, the jury, by direction of the court, returned a verdict in favor of the defendants, and from the judgment rendered thereon the plaintiff appeals.

J. W. Bennett and T. S. Minot, for appellant.

Geo. H. Williams and J. C. Flanders, for respondents.

BEAN, C. J. (after stating the facts). There were practically only two questions argued in this court: First, it was contended that Graham, as the general manager of the defendant corporation, had no power or authority to make or execute promissory notes in its name and on its behalf; and, second, that there was no consideration for the notes sued on, but they were made for Graham's individual indebtedness, and not that of the corporation.

The first question is concluded by the pleadings. The complaint alleges the execution of the notes by the defendant corporation. This averment is denied, but in its further and separate defense the defendant alleges affirmatively that the promissory notes in the complaint set forth were made, executed, and delivered as "in complaint alleged," and "in pursuance of a fraudulent conspiracy made and entered into" by and between plaintiff and Graham in order to make it appear that the notes were for the debt of the corporation instead of

**Graham.** These allegations of the execution of the note by the corporation are inconsistent with the denial, and, under the law, must be taken as true. It has been held by this court that when a defendant denies the execution and delivery of a promissory note, and in a separate defense alleges that it was made with a fraudulent intent, its execution is admitted because the two statements are inconsistent, and as between the denial of a fact alleged in the complaint and a direct admission of the same fact in the answer the admission, and not the denial, will be taken as true. *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661. We are therefore not called upon to inquire at this time whether or not Graham had authority to execute promissory notes for and on behalf of the defendant corporation. The execution by it of the particular notes sued on is admitted by the pleadings, and such admission is binding on the defendant, and precludes the necessity of proof.

The remaining question is whether there was any evidence tending to show, or from which the jury could reasonably have found, that the notes were given for a valuable consideration moving from the plaintiff to the defendant company. The defendant was organized in 1890, with a capital stock of \$2,000,000, all of which was subscribed by Graham, except enough to render the requisite number of persons qualified to serve as directors. At the first meeting of the board of directors in August, 1890, Graham was elected general manager, and given "the general management of the business of the company." At the same time the plaintiff was elected secretary and treasurer, but no resolution was ever adopted defining his duties. The testimony, however, is to the effect that his ordinary duties were to keep a record of the proceedings of the corporation and its directors, and to receive its funds. As soon as the corporation was organized and its officers chosen, it entered into a contract with Graham for the construction of a railroad from Marshfield, in Coos county, to Roseburg, in Douglas county, "to be standard gauge, and to be built in a substantial and proper manner, so as to be successfully operated when built," in consideration of the assignment to him of \$225,000 in subsidy subscriptions and guaranties, and a promise to issue and deliver to him, as fast as definite sections of the road should be located and built, its first mortgage bonds to the amount of \$25,000 per mile. In pursuance of this contract, Graham constructed the road from Marshfield to Myrtle Point, but his contract did not require him to secure the rights of way, depots, grounds, or terminal facilities. The plaintiff testifies that, in addition to his duties as secretary and treasurer, which were merely nominal, he acted for and represented the corporation in various other matters, and particularly in securing rights of way, supervising the operation and location of the road, and generally looking after its business, when Graham, the gen-

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eral manager, was not present; that these various matters, together with a trip to New York and London made at the request and by the direction of the general manager of the company, to assist in negotiating a sale of its bonds, occupied his undivided time and attention from September or October, 1890, until the fall of 1893. About the 1st of April, 1894, he filed a lien upon the roadbed, structures, and superstructures of the corporation to secure the payment of \$12,750, which he claimed to be still due him for services so rendered to it. A few days later he visited Coos Bay for the purpose of instituting proceedings to foreclose his lien, and while there a compromise was effected between him and Graham as the general manager of the defendant, by which he accepted the two promissory notes set out in the complaint, and satisfied of record the lien previously filed.

The testimony of the plaintiff, notwithstanding it is contradicted by other evidence, and that there are many circumstances indicating that the services rendered by him were for Graham, and not the defendant, was nevertheless sufficient to carry the case to the jury. As a general rule, an officer of a corporation cannot recover for services performed in the discharge of his official duties unless in pursuance of a resolution or by-law of the corporation to that effect. Where, however, the services are clearly outside the scope of his duties as such officer, he is entitled to recover on a quantum meruit. *Wood v. Manufacturing Co.*, 23 Or. 20, 23 Pac. 848, 37 Am. St. Rep. 651, and *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616.

Now, there was evidence tending to show that plaintiff's official duties as secretary and treasurer of the defendant were nominal, and that the services alleged to have been rendered by him, and which he testifies were performed for the corporation and at the request of its officers, did not pertain thereto. If this is true,—and of that fact the jury are exclusively the judges,—he would be entitled to a compensation for the reasonable value of the services rendered by him, and such claim would be a sufficient consideration for the notes sued upon if the settlement between him and Graham was made in good faith.

We are of the opinion, therefore, that, as the record stands, the judgment must be reversed, and the case remanded for such further proceedings as may be proper, not inconsistent with this opinion.

MOUNTZ *et al.* v. PHILADELPHIA, H. & P. R. Co.

(*Supreme Court of Pennsylvania, May 19, 1902.*)

[52 Atl. Rep. 15.]

Taking of Land by Railroad—Damages for Unlawful Entry—Remedies  
—Petition for Viewers.

A petition for viewers to assess damages for entry of railroad on lands cannot be used for a recovery for an unlawful entry, but only to recover compensation for a right with which the company becomes vested.

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**Name—Petition for Viewers—Parties.**

Proceeding for viewers to assess damages for entry of railroad on lands must be by the holder of the title as owner or lessee; it cannot be by an administrator.

Appeal from court of common pleas, Cumberland county.

Petition by Elias Mountz and another, administrators of Benjamin Kauffman, deceased, for rule on the Philadelphia, Harrisburg & Pittsburg Railroad Company to show cause why viewers should not be appointed to assess damages suffered by deceased by entry of the railroad company on his lands in his lifetime. Rule discharged, and petitioners appeal. Affirmed.

The opinion of the court below is as follows (BIDDLE, P. J.):

"The petition before us cannot properly be used for the recovery of damages for an unlawful entry, its legitimate purpose being to obtain compensation for a right with which the railroad company becomes vested. *McClinton v. Railroad Co.*, 66 Pa. 404. As Benjamin Kauffman died in 1887, and in 1889 his heirs conveyed the farm to W. H. Kunkle, and in 1901 the railroad company acquired in fee simple the strip of land which it occupies across said farm, it is clear that Benjamin Kauffman's administrators have no standing, nor has any one else, to have viewers appointed as prayed for. *McClinton v. Railroad Co.*, supra; *Keller v. Railroad Co.*, 151 Pa. 67, 25 Atl. 84, 19 Am. & Eng. R. Cas., N. S., 197. Further, a proceeding like the present must be instituted by the holder of the title, either as owner or lessee; it cannot be begun by an administrator. And now the rule is discharged."

D. Watson Rowe, F. E. Beltzhoover, and William S. Hoerner, for appellants.

Wetzel & Hambleton, for appellee.

PER CURIAM. The order appealed from is affirmed on the opinion of the learned judge of the common pleas.

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CONNOR v. TENNESSEE CENT. RY. CO.

(*Circuit Court of Appeals, Sixth Circuit, June 4, 1901.*)

[109 Fed. Rep. 931.]

**Process—When Service by Publication Is Authorized—Powers of States.**

It is within the powers of a state to provide by statute for bringing into its courts nonresidents having interests in real property situated within the state for the purpose of enforcing a lien, or clearing a title, or subjecting the property to the satisfaction of debts, and that jurisdiction in such cases may be obtained by publication of notice to such nonresidents.

**Railroad—Rights of Purchaser at Judicial Sale.\***

A purchaser of railroad property at a judicial sale succeeds to all the

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\*See *Thompson v. Northern Pac. Ry. Co.*, 13 Am. & Eng. R. Cas., N. S., 651, and note at end of case. See also, generally, 6 Rap. & Mack's Dig., 156 et seq., 313 et seq.



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rights of the former owner and of the holders of the liens and claims foreclosed, as against an unenclosed lien, and it may intervene in a suit to enforce such lien, and assert the equities and rights to which it has thus succeeded, and if they are such that a sale under such lien will not convey a good title, but merely cloud the title of the intervener, the sale should not be ordered.

**Same—Property Subject to Sale on Process—Sale Separate from Franchise.**

The property of a public corporation, such as a railroad company, cannot be sold under process separately and apart from its franchise, where such property is so indissolubly linked to the franchise and to the public functions of the corporation that without it the franchise will be rendered inoperative; and, under such rule, a decree directing the sale, to satisfy a debt, of a portion of the right of way and roadbed of a railroad, is inoperative, where the road has not been abandoned, nor the franchise under which it was built surrendered; and the court may properly refuse to award process for the enforcement of such decree, since the effect of a sale would be merely to cloud the title of the owner of the road and its franchise.

**Appeal from the Circuit Court of the United States for the Middle District of Tennessee.**

The Tennessee Central Railroad Company is a Tennessee corporation, authorized to construct and operate about 60 miles of railroad beginning at Monterey, in Putman county, Tenn., and extending to a junction with the Cincinnati Southern Railway at or near Glen Mary. In September, 1893, said railroad company entered into a contract with the appellant, J. H. Connor, for the complete construction of said railroad, including the ironing of its road and the construction of depots, water tanks, switches, etc.; Connor to furnish all materials and obtain necessary rights of way. For this he was to receive a fixed sum, partly in money and partly in first mortgage bonds, both payable in installments as the work progressed. After grading a section of about 10 miles, beginning at Monterey, and extending east, he threw up his contract in April, 1894, claiming that the company had made default in payments, and was insolvent. May 25, 1894, he filed an original bill in equity in the circuit court of the United States at Nashville against the railroad company, claiming a balance due him for work done, and a lien therefor under the Tennessee statute giving to contractors a lien for work done in construction of any railroad. That bill averred that the said company was proceeding with the construction under contracts with other contractors, and asserted a lien for the balance due, not only upon the roadbed, bridges, trestles, culverts, etc., constructed by the complainant, but a lien upon the entire railroad, that constructed as well as that under construction, its franchises and property of every description. The bill prayed that the said railroad, including its franchises, should be sold for the payment of his debt and the enforcement of his statutory lien. It was not filed as a creditors' bill, and the only defendant was the railroad company. The railroad company answered and defended, and such proceedings were had as resulted on May 28, 1896, in a

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decree fixing the liability of the railroad company at \$21,421.78. The decree then proceeded as follows: "The court is further of opinion that the foregoing judgment is a lien upon portion of the defendant railroad company commencing with the town of Monterey, in the county of Putnam, and continuing in a southeasterly direction for ten miles; said strip of land being one hundred feet wide, upon which there has been constructed a roadbed for said railroad, fourteen feet wide at its crest; and that there are also within and upon said property various cuts, trestles, and bridges,—upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment. It is therefore adjudged and decreed by the court that H. M. Doak, in his character as special commissioner under appointment heretofore made, will proceed at once to sell the above-described property after advertising the same as required by law or rule of this court. He will make said sale at the custom house in the city of Nashville, and will sell said property to the highest bidder for cash, free from any equity of redemption or repurchase. Said commissioner will make his report to the next term of this court how he has executed this decree." No step in execution of this decree was taken until October 28, 1899, when the order of sale was revived. On November 11, 1899, it was again revived, and the decree amended so as to require the property to be sold at the custom-house door in the town of Cookeville, in the county of Putnam, instead of at the custom house in Nashville. Before that decree of sale had been executed, the Tennessee Central Railway Company intervened, and by leave of the court filed a petition praying that the court would perpetually stay the execution of said order of sale, and protect its rights against the cloud which would thereby be thrown upon its title as the purchaser of the property and franchises of the Tennessee Central Railroad Company. A temporary injunction was granted, and Connor answered said petition, denying that he was ever a party to the Walker suit, and setting out that he was a nonresident of the state when that bill was filed, had never appeared in said suit, and was still a nonresident of Tennessee. He also took issue upon every material matter set up as a ground for restraining the execution of his decree. Upon the issues thus made up and the evidence the circuit court, upon final hearing, perpetually enjoined Connor from the enforcement of his lien by a sale of the roadbed described in his decree, but otherwise permitted the decree to stand unaffected. From this decree Connor has appealed.

The essential facts established and necessary to be regarded in the judgment to be pronounced are these:

Connor's bill was filed in the circuit court May 25, 1894. The bill was not a creditors' bill, and its sole purpose was to

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enforce the statutory lien of a railroad constructor for his exclusive benefit. While the bill prayed for the appointment of a receiver, none was in fact ever appointed, and the property against which he asserted his lien was never attached or otherwise taken into the actual custody of the court. On April 3, 1895, and before any final decree under Connor's bill, J. C. Walker and others, claiming to be creditors of the said railroad company, filed a general creditors' bill in the state chancery court for Cumberland county. The object of that suit was to set aside certain mortgages made by the company as fraudulent, and to have the company wound up as an insolvent corporation. The bill was filed for the benefit of all creditors, and sought to have all debts ascertained, all liens and priorities declared, and the property sold free from all liens and incumbrances, and the proceeds applied to the payment of debts in the order of their rank. October 23, 1895, the chancellor ordered the bill to stand as a creditors' bill, and that the clerk and master should make publication requiring all creditors to come in and make themselves parties on or before the first Monday in April, 1896, on penalty of being deprived of all the benefits of the suit. It was further ordered that the institution of any other suits against the said company be enjoined. On the same day a receiver was appointed, who was ordered to take into his possession all the property and effects of the said company. At the date of the filing of this creditors' bill about 23 miles of the roadway of said company had been graded, and it is inferable that some bridge and trestle work had been constructed. Aside from this incomplete roadway and some cross-ties, bridge timbers, and commissary stores, it does not appear that said company owned any other property whatever, save certain conditional subscriptions to the stock of the company, dependent upon the construction of the railroad into or through certain mountain counties. The defendants named in the caption of the bill, other than the railroad company, included J. H. Connor & Co., described as "contractors of the defendant" railroad company "operating in Cumberland county." A final decree was rendered in the suit of Connor, May 28, 1896. Connor stood by and took no step to enforce this decree for a period of more than three years. In the meantime the creditors' suit in the state court was proceeding. General publication for four successive weeks was made in November and December, 1895, requiring all creditors to file their claims by April 1, 1896. January 12, 1897, an alias subpoena to answer issued to the sheriff of Cumberland county, requiring him to summon J. H. Connor & Co. to appear and plead to the February rules. This was returned January 15, 1897, "Search made, and the defendant not to be found in my county." On the day of this return an order was made on the rule docket by the clerk and master in these words:

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"J. H. Walker et al. vs. Tennessee Central Railroad.

"In the Chancery Court at Crossville, Tennessee.

"In this cause it appearing by the sheriff's return that J. H. Connor & Co., one of the defendants, is not to be found in the county, and that search has been duly made by such sheriff, they are therefore hereby required to appear on or before the first Monday of March next before the clerk and master of said court at his office in Crossville, Tennessee, and make defense to the bill filed against them in said court by J. C. Walker et al., or otherwise the bill will be taken for confessed. It is further ordered that this notice be published for four consecutive weeks in the Crossville Chronicle.

"This January 15, 1897. H. G. Dunbar, C. & M."

Publication was duly made as required by this order, and in the mode and manner required by the statute of the state. It is further shown by the clear weight of evidence that the firm of J. H. Connor & Co. consisted of J. H. Connor and B. L. Jett. Whether Connor and Jett were partners at the date of the construction contract between the railroad company and J. H. Connor is not very clear. But it does appear that very shortly after that contract was signed Jett became jointly interested with Connor as a partner, and that the work was thereafter carried on by them as partners under the name of J. H. Connor & Co. The written contract stood in the name of J. H. Connor, and the suit in the circuit court was conducted in Connor's name alone, and the decree is in the name of J. H. Connor, but the decree is for and upon a partnership claim. The railroad company, in its answer, stated that B. L. Jett was associated with J. H. Connor, and should be a party. But no plea in abatement or bar was filed, and the issue seems to have been abandoned. April 17, 1897, an amended bill was filed by Walker and others, making more specific the objects and purposes of the suit, and specifically praying that all liens and priorities be ascertained, and the railroad sold free from liens or incumbrances, and the proceeds of sale applied to the payment of claims in their proper order and rank. In this amended bill J. H. Connor and B. L. Jett were named as defendants, composing the firm of J. H. Connor & Co. Jett was served with process. It does not appear that any further process issued for J. H. Connor, but a decree pro confesso was taken against him and Jett in these words: "In this cause it appearing to the court that publication has been made as provided by statute, requiring J. H. Connor to appear and make defense to the original bill filed in the cause of J. C. Walker et al. against the Tennessee Central Railroad et al., and has failed to plead, answer, or demur thereto within the time required by law, it is accordingly ordered and decreed that said original bill be taken for confessed as to said J. H. Connor, and set for hearing ex parte. It further appearing to the court that B. L. Jett has been duly served with process to answer under the amended bill in this

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cause, and has failed to plead, answer, or demur thereto, it is accordingly ordered and decreed that said amended bill be taken for confessed as to said B. L. Jett, and set for hearing *ex parte*." The answer of the railroad company to this amended bill included a schedule of the indebtedness of the company to J. H. Connor, and disclosed for the first time the liability of the company to J. H. Connor & Co., by stating that they had recovered a decree against the company in the circuit court of the United States for \$21,421.78 for construction work, and that said court had declared said sum "to be lien upon ten miles of the railroad of the said defendant, \* \* \* extending from Monterey to Johnson's stand." Under a reference to a special master, a report was filed as to the indebtedness of said company of every class. Among other lien debts, that to J. H. Connor & Co. was reported, though same does not appear to have ever been filed. A final decree was rendered May 10, 1897, which found the railroad company insolvent, and ordered the sale of its entire property free from all liens and mortgages. The decree settled the order of liens, and directed that, after paying costs and receiver's debts, the proceeds should be applied equally in payment of claims which were liens under the Tennessee statute. Among the claims thus preferred was included the decree in favor of J. H. Connor & Co. in the circuit court of the United States, which was referred to in these words: "The judgment obtained by J. H. Connor & Co. in the circuit court of the United States for the Middle district of Tennessee, for twenty-one thousand and forty-two dollars and seventy-eight cents, with interest from May 28, 1896, shall be entitled to the benefit of the foregoing provisions of this decree, and share ratably with the other judgments and decrees of the same character, and the special commissioner shall make distribution to said J. H. Connor & Co., or their assigns, upon said judgment, as fully as if they had intervened herein for the payment thereof." Next after these labor and material claims the mortgage bonds were preferred, for this embryo railroad had not only the dignity of receiver's certificates, but the added honor of a first-class mortgage. At the sale thus ordered the petitioner, the Tennessee Central Railway Company, became the purchaser of the entire property and franchises of the Tennessee Central Railroad Company. It has paid the entire amount of its bid of \$125,000, and has received a fee simple conveyance. Since said sale it has proceeded with the construction of said road, and for this purpose has made a mortgage to secure a large issue of bonds to be used in finishing and equipping its railroad. The proceeds of sale were nearly exhausted in paying costs and receiver's debts. The construction liens aggregated more than \$100,000, and the pro rata applicable to the Connor claim was only a few hundred dollars.

Upon this state of facts the court below rendered a decree

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in these words: "That in the proceedings in the chancery court of Cumberland county, Tennessee, that court acquired jurisdiction over the entire properties of the defendant, Tennessee Central Railroad, including that portion or section thereof upon which the original bill in this cause was filed to enforce the contractor's lien, and that the said complainant in the original bill in this cause, after the jurisdiction of said Cumberland chancery court attached, and Connor was brought into that cause by publication, was required by law to present his claim for a final disposition to the chancery court of Cumberland county, Tennessee, and had not the right to enforce the decree by the process of this court, regardless of that suit. It is therefore ordered, adjudged, and decreed by the court that the order of a sale heretofore issued by the clerk of this court in the original cause above stated be vacated and annulled, and the said J. H. Connor and his agents, solicitors, attorneys, and counsel, and every person claiming by or under or through said Connor, and each of them, are hereby restrained and perpetually enjoined from suing out of this court any process for the purpose of enforcing the lien of said decree against the section or portion of said railroad therein described, or any part thereof, and the costs of this proceeding to be taxed by the clerk are hereby adjudged and decreed against the said complainant, J. H. Connor, for which let execution issue as in actions at law; but the decree of this court is not otherwise affected than to prevent enforcement of the lien." From this decree Connor has appealed.

Jordan Stokes, for appellant:

Robert L. Morris and Geo. W. Easley, for appellee.

Before LURTON, DAY, and SEVERNS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. This court is not sitting as a court of error to review either the original decree of the circuit court in favor of J. H. Connor against the Tennessee Central Railroad Company, nor the decree of the state chancery court in the creditors' suit of J. C. Walker and others against the Tennessee Central Railroad Company, under which the present appellee, the Tennessee Central Railway Company, obtained its title. Those decrees are final. They are here only collaterally brought into question, and all the principles which relate to a collateral attack have application when we come to consider their force and effect. If they are not void, they must be given full effect and force, regardless of errors or irregularities which might have been remedied by a seasonable proceeding in error. The Tennessee Central Railroad Company was a corporation created by the state of Tennessee, and its entire projected line and all of its property was within the state of Tennessee. As an insolvent company, it was entirely competent that it should be wound up under a

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creditors' bill in a Tennessee court of equity as an insolvent corporation. Shannon's Code, §§ 5187, 6103, 6104; *Marr v. Bank*, 4 Cold. 471; *Gleaves v. Turnpike Co.*, 4 Baxt. 83; *Smith v. Insurance Co.*, 6 Lea, 564; *Baxter v. Turnpike Co.*, 10 Lea, 488, 491; *Tradesman Pub. Co. v. Knoxville Car-Wheel Co.*, 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. Rep. 943. The bill of J. C. Walker and others was filed and conducted according to the usual course of a general creditors' bill. The only nonresident creditor claiming to have any interest in the property of the company under the control of the court was the appellant, J. H. Connor, who, as a member of the firm of J. H. Connor & Co., composed of J. H. Connor and B. L. Jett, had at the time a bill pending in the circuit court of the United States for the Middle district of Tennessee, in which he was asserting a contractor's lien again the railroad under the Tennessee statute giving a lien upon any railroad in behalf of contractors engaged in construction work.

Aside from any questions arising out of a possible conflict of jurisdiction by reason of the prior pendency of Connor's bill for the enforcement of his contractor's statutory lien in the circuit court, it was entirely competent for the Tennessee chancery court to bring J. H. Connor & Co. or J. H. Connor before the court, as persons claiming a lien upon an interest in the railroad property in the possession of the court, by publication as a nonresident, or as a resident who evaded service of process. Shannon's Code, § 6162. The power of the state to provide by statute for bringing into court non-residents having interests in real property situated within the state, for the purpose of enforcing a lien, or clearing a title, or subjecting the property to the satisfaction of debts, can no longer be doubted. The whole subject has been thoroughly considered, and the limits of the jurisdiction defined, in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. Ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; and *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520. In *Arndt v. Griggs*, Justice Brewer, in delivering the opinion of the court, said:

"The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But

no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders, but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice. \* \* \* Mortgage liens, mechanics' liens, material men's liens, and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

The appellant has strenuously insisted that he was not made a party to the creditors' bill in the state court, and that he did not appear, and is therefore in no way concluded by the decree of that court setting the Tennessee Central Railroad free from all liens and incumbrances, and that the lien declared by the circuit court to exist in his favor against a portion of that railroad has not been cut off or foreclosed by the proceedings in the state court. The question of the conclusiveness of the decree of the state court in respect to Connor's lien involves a number of questions. Among them are these: (1) The effect of the pendency of Connor's suit in the circuit court upon the jurisdiction of the state court over the property of the railroad company against which Connor was in that bill asserting a lien at the date of the institution of the creditors' bill in the state court. (2) The sufficiency of the publication made for "J. H. Connor & Co." as constructive service upon J. H. Connor. (3) The sufficiency of the publication made upon a return of an alias subpœna, "Not to be found in my county," under Shannon's Code, § 6162, subsec. 3, authorizing publication upon a return of "leading process" of "not to be found." Each of these questions bristles with difficulties, which we find it unnecessary to solve; for, if they should all be solved according to the contention of the appellant, there would still remain an unsurmountable objection to the enforcement of the decree of sale awarded him by the circuit court. If we assume that J. H. Connor was not a party to the creditors' suit of J. C. Walker and others against the Tennessee Central Railroad Company, and that he is therefore unaffected by the decree which directed the property and franchises of the railroad company to be sold free from all liens and incumbrances, it would follow that the purchaser at the sale made in pursuance of the decree in



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that case has acquired the property and franchises of that company subject to the rights of J. H. Connor under the decree of the circuit court, whatever they may be. If we also assume that the circuit court had the constructive possession of the entire property and franchises of that corporation from the date of the filing of Connor's bill, and that it could not be properly deprived of that possession by a proceeding subsequently begun in the state court, it would at most follow that the possession by the receiver appointed under the order of the state court would be ineffectual to confer any rights upon a purchaser under the decree of that court, and equally ineffectual in its effect upon the jurisdiction of the circuit court over that property. The actual seizure of the property was wholly unimportant to the jurisdiction of the state court. An insolvent corporation may be proceeded against under a creditors' bill, and wound up, without appointing a receiver, and we may treat the fact that the state court appointed a receiver pending Connor's bill as a nullity. It is due, however, to the state court, to say that there was no intimation in the bill of Walker and others that there was any proceeding pending in the circuit court of any kind, and at no time was there ever made to that court any suggestion of a possible conflict of jurisdiction. The railroad consisted of a mere graded roadbed some 23 miles in length, so that there was at no time any such actual possession by the receiver as to oust the purely constructive possession of the circuit court. However extensive we may regard the constructive possession of the circuit court by reason of the relief prayed under Connor's bill, the hand of that court was withdrawn as a result of its final decree, which declared Connor's lien to extend only to a specific part of the property of said company, which the decree described as "that portion of the defendant railroad company commencing with the town of Monterey, in the county of Putnam, and continuing in a southeasterly direction for ten miles"; "said strip of land being one hundred feet wide, upon which there has been constructed a roadbed for said railroad fourteen feet wide at its crest; and that there is also within and upon said property various cuts, trestles, and bridges,—upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment." The necessary effect of this decree was to discharge the franchise and property of said railroad company from the possession and control of the circuit court, except in so far as Connor's lien was declared to extend. It was not until after this decree had been pronounced, and nearly a year had elapsed, that the state court ordered a sale of the property of said railroad company. The decree then made ordered the sale of the franchises and entire property of the railroad company. Twenty-three miles of railroad had then been graded. The railroad being ordered sold as an

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entirety included, of course, the 10 miles of roadbed upon which Connor's lien rested.

Having assumed that Connor was not a party to or concluded by this decree, we must also assume that neither the decree nor the sale were effectual to defeat any right, lien, or remedy he may have by virtue of the decree of the circuit court. After lying silent for more than three years after date of his order of sale, Connor obtained a revivor, and was about to have his decree of sale executed. In the meantime the purchaser under the decree in the creditors' suit has completed and put in operation about 40 miles of railroad. Acting upon the assumption of the validity of its title, it has made a first mortgage, and its bonds to a large amount have been negotiated. Under these circumstances it has intervened in the case of Connor against the Tennessee Central Railroad Company, and has set up the title so acquired under the chancery court sale as a bar to any proceeding to enforce the order of sale awarded to Connor for the enforcement of his lien. These assumptions put the Tennessee Central Railroad Company in the attitude of a purchaser which has acquired, subject only to the unforced lien of Connor, every right, title, and interest of the Tennessee Central Railroad Company and of its mortgagees and lienors foreclosed in the creditors' suit. *Columbus, S. & H. R. Co. Appeals* (C. C. A.; decided May session) 109 Fed. 177. In this attitude, and under these circumstances, it has intervened in the case of Connor against the Tennessee Central Railroad for the purpose of asserting the right and title thus acquired pending Connor's suit, and to prevent the dismemberment of its railroad by a sale which it claims will but cast a cloud upon its own title. We entertain no doubt that, if the appellee is entitled to be relieved from the threatened sale by which the unity of its railroad would be broken, the mode in which it has appealed to the circuit court to prevent the use of its power to its needless injury is appropriate. *Krippendorf v. Hyde*, 110 U. S. 276, 283, 4 Sup. Ct. 27, 28 L. Ed. 145; *Buck v. Colbath*, 3 Wall. 343, 18 L. Ed. 257; *Gumbel v. Pitkin*, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374. If the execution of the decree of sale awarded to Connor will not confer a valid title to a purchaser, and will only result in casting a cloud upon the title of the intervener, Connor should be restrained from such an abuse of the process of the court, and remitted to such other remedy as may be open to him for the collection of his claim and the enforcement of his lien. The statute under which Connor asserted a lien is one which gives a lien to every contractor, subcontractor, and material man who aids in the construction of a railroad. *Shannon's Code*, § 3570 et seq. That the statute, by prescribing a remedy at law and in the circuit court of the state, cannot defeat the jurisdiction of the federal circuit court, sitting as a court of equity, of its jurisdiction to enforce a statutory lien upon property, such as the lien of a

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mechanic or railroad contractor, is well settled. *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853. The lien given by this statute is given equally to all who contribute to such construction, and the lien of each extends to the whole railroad, and is not limited to the particular section, bridge, or other part of the work. The lien extends to the entire railroad. The language of the statute is, "there shall be a lien upon such railroad." Statutes giving liens to builders of houses or furnishers of materials are construed as giving the lien upon the entire house or distinct structure. *Steger v. Refrigerating Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580. Under like statutes in respect to railroad contractors the lien is held for even stronger reasons to extend to the entire railroad. *Brooks v. Railway Co.*, 101 U. S. 443, 25 L. Ed. 1057; *Knapp v. Railway Co.*, 74 Mo. 374; *Railway v. Wilcox*, 122 Ind. 84, 23 N. E. 506; 2 *Jones, Liens*, §§ 1619, 1620; *Elliott, R. R.* §§ 520, 1074. Connor's bill described the property as an unfinished railroad still in course of construction, and averred that the work was being carried on by other contractors. He properly prayed that he might be declared to have a lien upon the road finished and that in course of construction, and upon the franchises of the company. This the court denied by limiting his lien to "that portion of the defendant railroad company [sic] commencing with the town of Monterey, in the county of Putnam, and continuing in a southeasterly direction for ten miles"; "said strip of land being one hundred feet wide, upon which there has been constructed a roadbed for said railroad fourteen feet wide at its crest; and that there are also within and upon said property various cuts, trestles, and bridges, upon all of which said judgment constitutes a lien, the court being of opinion that complainant is entitled to have so much of said railroad sold for the satisfaction of the aforesaid judgment." The decree then proceeds by directing that the commissioner will, after advertising, etc., "sell said property to the highest bidder for cash free from the equity of redemption or repurchase." It is plain from this decree that the contractor's lien declared by the court extends only to a specific strip of property constituting the right of way and roadbed thereon, and that for the purpose of enforcing this lien the circuit court ordered a sale of this specific property. What would a purchaser acquire under this decree? The franchise to construct and operate a railroad for tolls was a franchise to construct the line as an entirety. The franchise is a unit. A part cannot remain with the company and a part pass to a purchaser of a section of its railroad. It is not a case of where the work was abandoned after a part of the line had been constructed. Connor's bill averred that the work of construction was being carried on by the company when he filed his bill, and the decree itself recognizes that the sale ordered is only of "a portion" of the railroad. Neither does the decree

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of sale direct or authorize the sale of the franchise of the company, and it is clear that a franchise will not pass as appurtenant to a part of a roadbed. *Ward v. Turnpike Co.*, 24 Cal. 474. It follows that the commissioner could not convey or deliver to the purchaser at his sale anything more than the right and interest of the railroad company in that portion of its right of way and roadbed described in the decree. That title and right is a mere easement acquired for the purpose of maintaining and operating a railroad thereon.

But if it be assumed, for the purposes of this case, that the fee to the described strip of land was in the company, the situation of a purchaser not owning the franchises would be no better. The general rule is that the physical property of a private corporation is as subject to be sold at judicial sale for the enforcement of a lien, or for the satisfaction of a judgment or decree for debt, as the property of an individual. But an exception exists, upon principles of public policy, in respect to the property of a quasi public corporation which is essential to the enjoyment of its franchises for the discharge of those public duties for which it was created. Property acquired and held as essential to the operation of quasi public franchises cannot be seized and sold separate and apart from the franchises, without which the latter would be inoperative. Thus, in Tennessee, without regard to the character of the title, the toll houses and roadway of a turnpike company are not the subject of execution, levy, and sale. "The weight of authority is," said Justice Cooper, speaking for the supreme court of Tennessee, "that the exemption of the franchise from levy will protect all property essentially necessary to its exercise, for the obvious reason that the franchise was conferred for a public purpose, and that there ought not to be any disposition of the property except in a mode which secures a continuance of the use of the franchise for the benefit of the public. The rights of creditors are sufficiently secured by the right to attach or impound the tolls, and, if necessary, to sell the property and franchises together." *Baxter v. Turnpike Co.*, 10 Lea, 488, 493. This doctrine has received very general sanction. *Elliott*, R. R. §§ 520, 1074; *Mor. Priv. Corp.* § 1125; *Gue v. Canal Co.*, 24 How. 257, 16 L. Ed. 635; *Railway Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 860, 29 L. Ed. 136; *Ammant v. President, etc.*, 13 Serg. & R. 210, 15 Am. Dec. 593; *Railroad Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; *Wood v. Turnpike Co.*, 24 Cal. 474; *Railroad Co. v. Lewton*, 20 Ohio St. 401; *Bridge Co. v. Means*, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514; *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558; *Gardner v. Railroad Co.*, 102 Ala. 635, 645, 15 South. 271, 48 Am. St. Rep. 84. The case of *Gue v. Canal Co.*, 24 How. 257, 16 L. Ed. 635, is closely in point. An execution had been levied upon "a homestead lot, sundry canal locks, a wharf, and sundry other lots," all of which property, the court in its opin-

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ion said, was admitted to belong "to the canal company in fee." The canal company enjoined the sale under the *ieri facias*, and on final hearing the injunction was made perpetual. It was admitted that the property so levied upon was essential to the proper and useful operation and working of the canal, and that without same the franchise would be valueless. Upon appeal the decree was affirmed, the court, speaking by Mr. Chief Justice Taney, saying:

"The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and, if sold under this *ieri facias* without the franchise, would bring scarcely anything, but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless. Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *ieri facias*. If it can be done in any of the states, it must be under a statutory provision of the states; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized; and, consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them. The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential to its useful existence."

In *Railroad Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136, the facts were that a judgment creditor levied an execution on the right of way of a railroad company, and it was sold and conveyed to the execution creditor by the sheriff. The court held that a right of way could not be sold under execution or otherwise to a purchaser who did not own the franchise. It is true that the court found that the right of way was a mere easement, and that the franchise had not been and could not be levied upon, being a mere incorporeal hereditament. But the court, among other things, said:

"The sheriff's deed purported to convey, in words, 'the said tract of land or railroad bed, to wit, the right of way of the Opelika & Oxford Railroad, so far as the right of way has

been obtained, from Lafayette to the edge of Lee county.' If the deed undertook to convey any land, or soil, or roadbed, it conveyed with it the right of way. The deed, in reciting the levy, states that it was made 'on the following tract or lot of land, as the property of the said railroad company, to wit, the right of way'; and, if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it. \* \* \* This court decided in *Gue v. Canal Co.*, 24 How. 257, 16 L. Ed. 635, that a corporate franchise to take tolls on a canal could not be seized and sold under a fieri facias, unless authorized by a statute of the state which granted the act of incorporation; and that neither the lands nor the works essential to the enjoyment of the franchise could be separated from it and sold under such a writ, so as to destroy or impair the value of the franchise. This decision was put on the ground that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under the execution on a judgment at law against the corporation, because it was an incorporeal hereditament, and upon the settled principles of the common law could not be seized on a fieri facias, and was made in a case where the corporation owned in fee the real estate, toll houses, canal locks, and wharf seized, all of which were necessary for the uses and working of the canal."

The principle running all through these cases is that the property of a public corporation, such as a railroad, cannot be sold separately and apart from its franchise if the property is so indissolubly linked to the franchise and to its public functions as that without it the franchise will be rendered inoperative. The remedy of a creditor who has exhausted property not necessary to the exercise of the franchise is to obtain a receiver, and sequester the tolls or income, or a decree subjecting the property and its franchises to sale as an entirety. *Mor. Priv. Corp.* § 1126; *Baxter v. Turnpike Co.*, 10 Lea, 488; *Gleaves v. Turnpike Co.*, 4 Baxt. 83; *Drawbridge Co. v. Shepherd*, 21 How. 112, 16 L. Ed. 38; *Gue v. Canal Co.*, 24 How. 268, 16 L. Ed. 635.

The decree directing a sale of a portion of the roadbed of the Tennessee Central Railroad Company separate and apart from the franchises of the company is ineffective. The purchaser will acquire no right or title. To execute the decree will but cast a cloud upon the title of the Tennessee Central Railway Company, and operate only as an abuse of the process of the circuit court. The decree perpetually enjoining the commissioner from proceeding is therefore affirmed, with costs.

POSTAL TEL. CABLE CO. OF MONTANA *v.* OREGON SHORT  
LINE R. CO.

(*Circuit Court, D. Montana, March 22, 1902.*)

[114 Fed. Rep. 787.]

**Eminent Domain—Powers of Telegraph Company—Corporation De Facto.**

Where the proper formal steps have been taken to organize a telegraph corporation under the laws of a state, it becomes such a corporation de facto; and its right to exercise the power of eminent domain, conferred on such companies by the statutes of the state, cannot be denied by the defendant in a suit instituted for the condemnation of right of way on the ground that it is only a pretended, and not a real, corporation, that being a question which can only be raised by the state.

**Same—Use of Railroad Right of Way.\***

A telegraph company which has accepted the conditions imposed by Rev. St. §§ 5263–5269 is entitled to construct its line over the right of way of a railroad which by section 3964 is declared to be a post road of the United States and to have the damages assessed in any court of competent jurisdiction, where such line may be so constructed as not to interfere with the operation of the railroad.

**Same—Montana Statute.**

Under the statute of Montana (Code Civ. Proc. p. 3, tit. 7) which confers on certain corporations, among which are telegraph companies, power to exercise the right of eminent domain, subject to the limitation that the court must find that the use sought to be made of the property condemned is a public use, and, if the property has already been appropriated to a public use, that the second is a more necessary public use, it must be held that the use of land for a telegraph line is a public use, and that the appropriation for telegraph purposes of a portion of the right of way of a railroad not occupied for railroad purposes is for a more necessary public use than that of the railroad company.

**Same—Compensation—Measure of Damages.**

Where the construction of a telegraph line over the right of way of a railroad will not appreciably diminish the value of the use of such right of way for railroad purposes, the telegraph company is required to pay only nominal damages on condemnation of a right of way for its line.

**Proceeding to Condemn Right of Way.**

J. R. McIntosh and Orlando W. Powers, for plaintiff.

P. L. Williams and J. G. Willis, for defendant.

KNOWLES, District Judge. The plaintiff in this suit desires to have condemnation, for the purpose of a telegraph line, over and along certain portions of the right of way of the Oregon Short Line Railroad Company in Montana. Originally three suits were instituted for this purpose,—one in Beaverhead county, one in Madison county, and another in Silver Bow county. These suits were all consolidated in pursuance of a stipulation between the parties, and removed to this court upon the application of the defendant. It appears

\*See *Mobile & O. R. Co. v. Postal Tel. Cable Co.* (Tenn.), 10 Am. & Eng. R. Cas., N. S., 867; *Postal Tel. Cable Co. v. Oregon S. L. R. Co.* (Utah), 22 Am. & Eng. R. Cas., N. S., 273. See also, generally, *Whipple v. New York, etc., R. Co.* (R. I.), 5 Am. & Eng. R. Cas., N. S., 517; *Crandall v. New York, etc., R. Co.* (R. I.), 5 Am. & Eng. R. Cas., N. S., 543; 7 Rap. & Mack's Dig., 1026 et seq.

Postal Tel. Cable Co. of Montana *v.* Oregon Short Line R. Co

from the pleadings that the plaintiff is a corporation organized under the laws of Montana, and the defendant a corporation organized under the laws of Utah.

There is an objection made that the plaintiff is not entitled to be classed as a corporation *de jure*. It appears, however, that certain parties who were residents and citizens of the state of Montana, complied with the laws of said state in filing the proper certificate and in making the proper records to create a corporation under the laws of said state. *Prima facie*, this would create the corporation named as the plaintiff herein. There were certain meetings of the officers of the plaintiff corporation, and, among other proceedings, a resolution was offered and passed looking to the acquirement of a right of way over and along the defendant's railroad right of way in Montana, for the purpose of establishing a telegraph line. It would appear that under these conditions the defendant could not raise the question as to whether the plaintiff is in fact a corporation, or only a pretended or "fake" corporation. That would be the prerogative of the state of Montana, in a proper suit instituted for that purpose by and through its proper officers. In *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho*, 49 C. C. A. 663, 111 Fed. 842, it was held by the circuit court of appeals of this circuit, while considering a similar statute of Idaho, and in passing upon an objection identical with the one raised in this case, that such a corporation was a corporation *de facto*, and, as such, entitled to all the rights and privileges of a corporation, including the exercise of the power of eminent domain.

Plaintiff, on the argument before this court, claimed a grant of the right of way over and along the defendant's railroad right of way under and by virtue of the provision of section 5263 of the Revised Statutes of the United States. Evidence was introduced to show that plaintiff had accepted the conditions named in the aforesaid statutes. Section 5263 of the statutes *supra* reads as follows:

"Sec. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

It will be seen, by this statute, that the right is given to any telegraph corporation organized under the laws of any state to construct and maintain its telegraph line over and along any of the military or post roads of the United States which



have been, or may hereafter be, declared such by law. Such line must not interfere with the ordinary travel on such military or post roads. By section 3964 of the Revised Statutes of the United States, all railroads such as that operated by the defendant in this state have been and are declared to be post roads. If this statute is applicable to this case, then the act of congress itself determines whether the power of eminent domain should be put in motion for the purposes named, and whether the exigencies of the occasion and the public welfare required or justified its exercise. In the case of Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the supreme court, speaking by Mr. Justice Field, said:

“\* \* \* When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. \* \* \*”

Although congress had put its right of eminent domain in motion by granting to the telegraph companies who complied with the foregoing provisions of the statute the right of way over and along post roads, and determined the necessity for using said ways for telegraph purposes, it at the same time imposed the condition that such use should not interfere with the ordinary travel thereon; but there was a further constitutional limitation that, before such right of way could be so utilized, just compensation should be awarded therefore to the owners or proprietors thereof. There would not appear to be any doubt, from the evidence presented in this case, but that the telegraph line as proposed by the plaintiff may be constructed over and along defendant's said right of way, so as not to interfere with the ordinary travel thereon. In this grant to the telegraph companies, congress, however, made no provision for the assessment of the damages arising out of the taking. In the case of Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449, the supreme court held that an action could be maintained as a civil action at law to fix the damages arising from the taking of any property for a public use. The court there said:

“\* \* \* It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. \* \* \*”

In that case, after adverting to the fact that congress had made no provision for the assessing of damages for property taken under the power of eminent domain, the court said:

“\* \* \* But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law. \* \* \*”

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The views expressed in this opinion were affirmed in the above case of *Boom Co. v. Patterson*.

It would seem, then, that the plaintiff company had the right to proceed either in the state court or in the federal court to ascertain the just compensation to which the defendant would be entitled for the amount of its railroad right of way taken for the plaintiff's telegraph line; and I might stop here, and proceed to determine the just compensation to which the defendant is entitled, were it not that it would seem in the suit brought here that plaintiff appeals for its right, not to the power of eminent domain vested in the national government, but to that power inherent in the state government. The state government, by a general law, has granted the power to exercise its eminent domain to certain corporations,—among them, to telegraph companies. In this general law it is left to the courts to determine whether the use to which the property is sought to be condemned is a public use, and, if it sought to condemn property that has already been appropriated to a public use, then to determine whether such further condemnation and appropriation is for a more necessary public use than the one to which it is devoted, and for which it was first condemned.

It is alleged in the complaint in this case that the right of condemnation is asked in virtue of the provisions of the statutes of Montana. Paragraph 4 of the complaint, *inter alia*, contains the following:

"That said plaintiff claims and asserts the power to exercise the right of eminent domain by this proceeding under and by virtue and authority of part 3, tit. 7, of the Code of Civil Procedure of Montana (page 917)."

The right of eminent domain exercised by the national government must be for national purposes. The right of the state government to exercise such power must be for state purposes. It is evident that both governments seek to foster the building of telegraph lines,—one for national purposes, and the other for local purposes. Under section 2211 of the Code of Civil Procedure of Montana, it is provided that the power of eminent domain may be exercised in behalf of the government of the United States for any public use it authorizes. It would appear, however, from the whole scope of the proceedings in this case, that only the state power is invoked. It becomes necessary, therefore, for this court to determine whether the construction of the telegraph line, and whether the use to which the plaintiff would appropriate the railroad right of way of the defendant, is a more necessary public use than that to which the defendant has devoted and is devoting it. In considering the evidence presented in the case, the conclusion is reached that it is desirable that the plaintiff should have the right to construct its line of telegraph over and along the right of way of the defendant's railway. In determining the question as to whether this use

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is a more necessary public use than that to which the defendant has devoted the right of way under consideration, we may consider the opinions of others. We find, in a case where a corporation bearing the same name as the plaintiff brought a similar suit against this same defendant in the state of Idaho, having for its object the condemnation of a portion of the defendant's railroad right of way, Judge Beatty, before whom the case was tried, held that the appropriation for telegraph purposes of the portion of the defendant's right of way not occupied by its railway tracks is a more necessary public use than its use for a right of way by the railroad company. *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 104 Fed. 623. In this opinion Judge Beatty says:

"\* \* \* It cannot for a moment be doubted that the use to which plaintiff proposes to put that portion of the defendant's right of way would be of greater public utility than that for which it is now used. \* \* \*"

This case was taken to the circuit court of appeals for this circuit on a writ of error, and the above ruling by Judge Beatty was there considered. 49 C. C. A. 663, 111 Fed. 843. The statute in Idaho is the same as the Montana statute, and provides for the taking of property already devoted to a public use for a more necessary public use. In construing this statute, the circuit court of appeals says:

"\* \* \* Considering the words used, and the general tenor of the law controlling the devotion of private property to public use, we think the statute was intended to provide that property already devoted to a public use might, whenever deemed necessary for the use of a corporation having the authority to exercise the right of eminent domain, be devoted to a second use which will not interfere with the first. It was not intended to require that absolute necessity should exist for the devotion of the property to the second use. \* \* \* The defendant in error in this case has alleged that this property is necessary for its use, and that it is not necessary for the use of the plaintiff in error. The court has found that these allegations are true, and has found that the second use is more necessary than the first. As we construe the statutes of Idaho, we find no error in this conclusion. \* \* \*"

The supreme court of Utah, in the case of *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah) 65 Pac. 735, said:

"\* \* \* The appropriation of the right of way of a railroad, not essential to the enjoyment of its franchise and property, to the construction of a telegraph line, is to and for a more necessary public use. \* \* \*"

And in pursuance of this view it was held that it was proper for the telegraph company to appropriate a portion of the right of way of the Oregon Short Line Railroad Company in the state of Utah.

In considering the act of congress before quoted, it is evi-

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dent that congress was of the opinion that it would be right to appropriate portions of any post road for a telegraph line, when such appropriation did not interfere with the ordinary travel thereon. Guided by these opinions, I find in this case that the portions of the railroad right of way of the Oregon Short Line Railroad Company, in Montana, sought to be appropriated by the plaintiff to the uses named, is a proper appropriation, and a more necessary public use than that to which the defendant is devoting the same. This appropriation by the telegraph company of the right of way of the defendant must be confined, however, to that portion of the same not now actually used and required for railway purposes, and along a line which will not interfere with the ordinary use thereof for railway purposes.

As to the question of damages, I find, from a careful examination and consideration of the decisions, that what may be considered as nominal damages only should be awarded defendant. *St. Louis & C. R. Co. v. Postal Tel. Cable Co.*, 173 Ill. 508, 51 N. E. 382; *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78; *Id.*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978; *Railway Co. v. Catholic Bishop*, 119 Ill. 529, 10 N. E. 372; *Allen v. City of Boston*, 137 Mass. 319; *Mobile & O. R. Co. v. Postal Tel. Cable Co. (Miss.)* 26 South. 370. The evidence in this case does not establish clearly that the defendant would suffer any peculiar or special damage by the taking, and hence what is considered a nominal damage, merely, can be awarded. The damages to the defendant are hereby fixed in the sum of \$1 per mile, amounting in the aggregate to \$127.

It is substantially agreed that the right of way of the defendant varies in width; that at some points on the line it is 200 feet in width, at other portions 100 feet, and at other portions only 66 feet in width. I hold that, upon such portions of the aforesaid right of way where it is 200 feet wide, the poles and wires of the plaintiff should not be placed nearer than 75 feet to the outer line of the track or rail; at such portions thereof where it is 100 feet wide, the line of telegraph should not be nearer to the outer edge of the defendant's track than 40 feet; and at all such portions where it is only 66 feet in width, the telegraph poles of the plaintiff should not be nearer than 30 feet to the track.

Let a decree be prepared in consonance with these views.

LITTLE RIVER TP., RENO COUNTY, v. BOARD OF COM'RS OF  
RENO COUNTY.

(*Supreme Court of Kansas, Division No. 1, May 10, 1902.*)

[68 Pac. Rep. 1105.]

**Statutes—Amendment.**

Chapter 77, Laws 1887, neither amends nor repeals section 13, c. 107, Laws 1876. Both provisions stand, and both are operative.

## Little River Tp. v. Board of Com'rs

**Railroad Aid Bonds—Vested Rights—Impairment of Contract Obligations.**

A public corporation can acquire no vested contract rights as to the time of maturity or payment of bonds held by it against another public corporation. Public debts are matters of public concern, and as between debtor and creditor, both being public corporations, the legislature may, by proper enactment, compel the creditor corporation to accept payment even before maturity of the obligation held by it. Such acts do not, as between public corporations, impair the obligation of contracts. (Syllabus by the Court.)

Application by Little River township, Reno county, for a writ of mandamus to the board of commissioners of Reno county. Writ granted.

Argued before SMITH, CUNNINGHAM, GREENE, and POLLOCK, JJ.

Kelly & Foote, James McKinstry, and Overmyer, Mulvane & Gault, for plaintiff.

Carr W. Taylor, Co. Atty., and Geo. A. Vandever (F. L. Martin and J. U. Brown, of counsel), for defendant.

GREENE, J. This is an original proceeding in mandamus by Little River township, Reno county, Kan., against John A. Myers, Irving Rutledge, and H. C. Barrett, members of the board of county commissioners of Reno county, the board of county commissioners of Reno county, and C. A. Ryker, the treasurer thereof, to surrender and deliver for payment and cancellation to the National Bank of Republic, the Kansas state fiscal agency in New York, 46 bonds in the sum of \$500 each, issued by the township of Little River on the 1st day of December, 1887, to the Kansas Midland Railway Company. The subscription was made September 3, 1886, and the only statute in force at that time bearing upon the payment is section 13, c. 107, Laws 1876, which reads: "The principal of the bonds of such county, township or city shall be made payable at any time that may be fixed in the proposition voted upon, not exceeding 30 years from their date; and may be issued in sums of not less than one hundred dollars nor more than one thousand dollars. In 1887, intervening the subscription and delivery of the bonds, the legislature passed chapter 77, Laws 1887, section 1 of which reads: "All bonds hereafter issued by the boards of county commissioners, township board, or by the authorities of incorporated cities, to railroad corporations, shall be redeemable at the pleasure of the board of county commissioners, or authorities issuing the same, at any time after 10 years from the date of their issue." The bonds recite that they are issued pursuant to the subscription, and are payable in 30 years. The defendants contend: (1) That the act of 1887 is violative of section 16, art. 2, of the constitution, in that it undertakes to amend said section 13, c. 107, Laws 1876, and does not contain the section so amended, or any proper reference thereto; (2) that the subscription is the contract between the parties, and, as

it was made prior to the passage of the act of 1887, that act can have no application, but, if intended to apply to this case, it is unconstitutional, in that it impairs the obligations of the contract. There are some other questions presented by defendants, such as the insufficiency of notice of the intention of the township to redeem, and the source from which it derived its funds. These, however, are not material or controlling in the case, are not of public importance, and are not sufficiently material to require further notice than to say that upon examination they are overruled. With the view the court has taken of this case, there are but two questions for determination: (1) Is the law of 1887 in contravention of section 16, art. 2, of the constitution? (2) As applied to this controversy, does it impair the obligation of contracts?

We think there is no reason for the first contention. The act of 1887 does not, directly or by implication, repeal section 13, c. 107, Laws 1876. The latter act is separate from and independent of the former. It was intended that both should stand, and both be operative. Section 13 provides only for the means and methods of determining the time when the bonds may be made payable, not exceeding 30 years; while section 1 of the act of 1887 authorizes municipalities to redeem their outstanding obligations at their option any time after the expiration of 10 years. We think the latter act falls fully within the statements made in *State v. Cross*, 38 Kan. 700, 17 Pac. 190, 191, where it is said: "At least, the objects of the acts have relation and connections with each other, and therefore we think they are capable of being united in one act." This contention must be decided against the defendants.

The second proposition is the important and controlling question in this case. The policy of the state, as expressed in the act of 1887, is to enable its several municipalities to reduce their bonded indebtedness, even before maturity. If the county, the defendant in interest in this case, as the holder of the unmatured bonds of the relator, is exempt therefrom, it must be because of some obvious and well-defined reason. The parties to this action are both public corporations, and are both governmental departments of the state. Their relations to one another are matters of state policy, and their powers and duties are under the control and general supervision of the state, and are determined by the legislature. Their duties are public. In the present instance the county has no private rights to protect. As stated in its answer, it invested the sinking funds then in its treasury in the bonds. This fund did not belong to the county, but to the various public corporations within its jurisdiction. It could only do this by authority of the legislature, and in performing this act it was only doing what the policy of the state had determined to be beneficial to the people. The indebtedness of municipalities is a matter of public concern, and a proper subject of

legislation, and in adjusting the relations between two municipalities within the state, and providing for the payment of municipal debts, the legislature has unlimited and absolute control. One municipality can acquire no vested contract right as to the time of payment of the indebtedness of another, free from the subsequently expressed will of the legislature. Mr. Beach, in his work on Public Corporations (section 723), says: "The power of appropriation which a legislature can exercise over the revenues of the state for any purpose, which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town for any purpose connected with the present or past condition, except as such revenues may, by the law creating them, be devoted to special purposes." Municipalities are creatures of the legislature. It can make or destroy them at pleasure. It may prohibit them from creating an indebtedness of any kind. It has the power to determine the kind, amount, and duration of their liabilities. It may compel them to levy a tax for the payment of outstanding liabilities, even before maturity; and, if their debts are represented by bonds in the hands of another municipality, it may compel such corporation to accept payment even before maturity. As between public corporations, this takes away no vested rights, neither does it impair the obligation of contracts. *State v. St. Louis Co. Ct.*, 34 Mo. 546. When the county, under the authority conferred upon it, invests the sinking fund in its treasury, which belonged to the various township and school districts within its limits, it does so not only subject to the law then in existence, but subject as well to any law that may be passed subsequently thereto with reference to the payment of such indebtedness. In performing such acts, it acted as the agent of the state, created for the purpose of carrying out the objects of state policy. Mr. Beach (*Pub. Corp.* § 722) says: "The revenues of a county are not the property of the county in the sense in which the revenue of a private corporation is regarded, and the power of the legislature to direct its application is plenary. A county being a public corporation, which exists only for public purposes, connected with the administration of the state government, it follows that such a corporation, and, of course, its revenue, is subject to the control of the legislature; and when the legislature directs the application of its revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created upon the county." All apparent difficulties disappear when we make a proper distinction between public municipal corporations and private corporations or individuals. It is said in *State v. Shawnee Co.*, 28 Kan. 431, 434: "And, finally, we remark that counties are purely the creation of state authority. They are political organizations, whose powers and duties are within the control of the legislature. That body defines the limits of their powers, and

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prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy, and to what public purpose each shall devote the moneys thus obtained. It may require one county to build a certain number of bridges at certain specified places, and of a particular size and quality. It may require another to open roads in given localities, and another to build a court house, and to levy a tax to a prescribed amount for the purpose of paying therefor. In short, as a general proposition, all the powers and duties of a county are subject to legislative control; and, provided the purpose be a public one, and a special benefit to the county, it may direct the appropriation of the county funds therefor in such manner and to such amount as it shall deem best." It is said in *State v. Atkin*, 67 Pac. 519, 520, 63 Kan. —, quoting from Judge Dillon: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporations could not prevent it. We know of no limitations of this right, so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature." What would be the rights of the railroad company, or of an individual holding these bonds, as against the township, are matters that have no application, and are not of consequence in this case. It follows, therefore, that, since the parties to this action are both public corporations, and neither can have a vested contract right in the time of payment of the indebtedness of the other, which may not be interfered with by the supreme power, the legislature, and since the policy of the state, as expressed in the act of 1887, is that its public corporations may pay their indebtedness before maturity, this act does not impair the obligation of the defendant's contract.

It is the decision of this court that the relator have judgment for costs; that the defendants deliver the bonds in question for payment and cancellation to the Kansas state fiscal agency in the city of New York, as prayed for in the application. All the justices concurring.

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BRAMLETTE v. LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, May 9, 1902.*)

[68 S. W. Rep. 145.]

**Injury to Adjacent Property from Prudent Operation of Stock Pens.**

Under Const. § 242, providing that corporations and individuals invested with the privilege of taking private property for public use shall



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make just compensation for property taken, injured, or destroyed by them, a railroad company, though bound by law to furnish suitable stock pens, is liable for injuries to adjacent property resulting from the construction and operation of such pens, though it has been guilty of no negligence whatever.

**Same—Res Judicata.**

A judgment for plaintiff in an action against a railroad company to recover damages for injuries resulting solely from the negligent construction and operation of stock pens is not a bar to a subsequent action by plaintiff to recover damages for the permanent depreciation in value of his property resulting from the prudent construction and operation of such pens.

**Same—Same.**

The fact that it appears from plaintiff's petition in an action to recover damages for the permanent depreciation in value of his property from the prudent construction and operation of stock pens that there was a judgment for him in a former action to recover damages for injuries "in consequence of said pens" and their condition prior to a certain date, does not render the petition bad on demurrer, as defendant must, if the question of permanent depreciation in value necessarily resulting from prudent construction and operation was involved in the former litigation, affirmatively show that fact by way of defense, it not appearing from the petition.

Appeal from circuit court, Hardin county.

"To be officially reported."

Action by Maggie Bramlette against the Louisville & Nashville Railroad Company to recover damages for injury to property. Judgment for defendant, and plaintiff appeals. Reversed.

S. M. Payton and W. A. Barry, for appellant.

W. H. Marriott and E. W. Hines, for appellee.

**BURNAM, J.** The appellant, Maggie Bramlette, brought this suit against the appellee, the Louisville & Nashville Railroad Company, to recover damages for the erection and negligent maintenance of live-stock pens near her residence at Sonora, in Hardin county, Ky. Her petition is in two paragraphs. In the first she alleged that she was the owner of a lot containing one-fourth of an acre of ground adjacent to the defendant's right of way, on which she resided with her family; and that the defendant was the owner of a lot of about the same size adjacent to hers, on which they had erected stock pens and chutes, and which are used for the reception, detention, loading, and unloading of live stock, and which were continually filled with cattle, sheep, and hogs; and that, in consequence of the close proximity of these pens to her residence, the atmosphere was polluted, and her house rendered uncomfortable, and unfit for a residence, and that in consequence thereof it has been injured in the sum of \$500. In the second paragraph of her petition she alleges that since the 21st of May, 1900, the defendant has permitted excrement, urine, and other filth discharged by the live stock confined in these pens to remain there, and that offensive and deleterious odors had arisen therefrom, and polluted the atmosphere in and around her home to such an extent that she

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could not sleep at night, and that her health had been seriously impaired and injured thereby; and on this account she asked damages in the sum of \$3,000. A general demurrer was sustained to the first paragraph of the petition, and a traverse filed to the second, and a jury trial resulted in a verdict and judgment for the defendant, and plaintiff has appealed from the action of the trial court in sustaining a demurrer to the first paragraph of her petition, and also from the judgment based upon the verdict of the jury as to the second paragraph.

This court, in frequent adjudication since the adoption of our present constitution, has held that under section 242 a recovery might be had in all cases where private property had sustained substantial damage by the construction and operation of a railroad or other improvement, public in character, and that it was not necessary to recovery that the damage should be caused by a trespass or other actual physical invasion of such real estate. See *City of Henderson v. McClain*, 43 S. W. 700; *City of Ludlow v. Detweller*, 47 S. W. 881. And the fact that a railroad is bound by law to furnish suitable stock pens and other facilities for loading and unloading stock does not of itself exonerate it from liability for injuries to adjacent property, which is the result of the prudent construction and operation of such pens. Counsel for appellee call our attention to the following averment contained in the first paragraph of appellant's petition: "Prior to May 21, 1900, she brought an action for injury to her property by the defendant on account of the filthy condition of their pens prior to May 21, 1900, but before doing so she gave defendant written notice to remove said pens and abate the nuisance thereof; but she says that no evidence was allowed to be received on the trial of said action as to the injury to her property by defendant in consequence of said pens and their condition prior to May 21, 1900, and no recovery was allowed in said action, or in any action, for injury to her said property by defendant in consequence of said pens, or the manner in which they were kept, and she has never at any time had any recovery for the damage to her property by the defendant in consequence of said pens or their condition," and very earnestly insist that, as they are required by law to maintain these pens for the use of the public, and they are permanent in character, it was the duty of appellant to have embraced this alleged injury in the former suit instituted by her against the defendant, as a party should not be permitted to split a cause of action and sue upon one part at one time and the remainder at another. There are two classes of actions for damages against railroad companies,—one for permanent injuries, within the meaning of section 242 of the constitution, and the other for injuries which result from mere negligence. The claim in such cases is in the nature of a tort, and may be brought at any time for injuries temporary in their charac-

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ter which result from either neglect or design; and the fact that appellant may have, previous to the institution of this suit, instituted an action against the defendants for negligently suffering their pens to become filthy to such an extent as to interfere with the use and occupancy of her residence would not estop her from the maintenance of a suit for permanent depreciation in the value of her property which necessarily resulted from the proper construction and operation of stock pens. Of course, if this question was involved in the former litigation, it would be a bar to the institution of any suit based upon this claim. We are, however, unable to determine this fact from the allegation of the petition referred to. This would be a matter of defense. It is also claimed by appellee that the averments of the first paragraph only amounted to a claim for negligently and carelessly permitting offensive matter to accumulate in the stock pens and pollute the atmosphere. But when we strip the first paragraph of the petition of the verbiage with which it is encumbered, it amounts to claim for depreciation for value to the real estate, necessarily resulting from the construction and operation of the stock pens, whether they are kept in good condition or not. In the trial based upon the averments of the second paragraph of the answer, in which the defendant was charged with having permitted the premises to become offensive by negligently failing to remove the filth caused by stock confined therein, we perceive no error. The instruction fairly presented the law to the jury, and the verdict was abundantly supported by the proof. But for the error of the trial court in sustaining the demurrer to the first paragraph of the petition the judgment is reversed, and cause remanded for a new trial as to the cause of action stated in that paragraph.

CHESAPEAKE & WESTERN RAILROAD COMPANY v. WASHINGTON,  
CINCINNATI & ST. LOUIS RAILWAY COMPANY.

(*Supreme Court of Appeals of Virginia, Nov. 21, 1901.*)

**Judgments\*—Collateral Attack—Notice.**

In a collateral attack upon a judgment of a court of general jurisdiction, the recital in the judgment that the defendant was duly served with notice as required by law is conclusive of that fact, unless there is something in the record which plainly shows that the defendant did not have notice, or the character of the proceeding is such as to make it necessary that the evidence of notice should affirmatively appear in the record.

**Condemnation Proceedings—Collateral Attack—Notice.**

In a collateral attack upon a condemnation proceeding before a county court it is not necessary to the validity of its judgment that it should appear on the face of the proceedings how the defendant was notified. It is sufficient that it appears that the defendant was duly notified.

**Condemnation Proceedings—Effort to Settle—Notice—Sufficiency.**

In a condemnation proceeding it is not necessary that it should appear

\*See notes at end of case.

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on the face of the proceedings that any attempt was made by the plaintiff to purchase the land sought to be condemned. The proceeding is by motion upon notice, and the notice is viewed with great indulgence by the courts, as it is presumed to be act of the parties, and not of lawyers.

**County Courts—Jurisdiction—Judgments—Collateral Attack.**

County courts, with respect to purely judicial powers, are courts of general jurisdiction, and their judgments are presumed to be right, and cannot be attacked collaterally, however erroneous they may be.

**Condemnation Proceedings — Questions Concluded by—Collateral Attack—Railroads.**

As one railroad company may under some circumstances condemn the land of another for its purpose, the right to so condemn is determined by the adjudication in the condemnation proceedings, and such determination cannot be collaterally attacked. The judgment in the condemnation proceedings concludes all questions that could have been therein raised or determined.

**Condemnation Proceedings.**

One of the objects of the summary proceedings to condemn land by an internal improvement company is to enable it to acquire title to the land and proceed with its work at once, and leave the parties to litigate their rights over the fund paid into court, without in any way affecting the title acquired in the manner required by the statute.

**Condemnation Proceedings—What May Be Contested.**

In a condemnation proceeding the land-owner may contest the corporate existence of the plaintiff, or its authority to condemn the particular property for its use, or its compliance with conditions which are prerequisites to its right to condemn. The law favors the settlement in one suit of all matters arising out of one controversy.

**Stare Decisis—Opinion Not Concurred in.**

This court is not bound by a prior opinion delivered in another case, where it appears that the court was composed of four judges, two of whom concurred only in results, and one dissented. *Alexandria, &c. R. Co. v. Alexandria, &c. R. Co.*, 75 Va. 780, disapproved.

**Corporations—Corporate Existence—How Shown.**

The corporate existence of a corporation may be shown by the introduction of its charter, and of the minute book of the corporation showing organization under the charter.

Error to a judgment of the Circuit Court of Rockingham county, rendered at its April term, 1901, in an action of ejectment wherein the defendant in error was the plaintiff and the plaintiff in error was the defendant. Reversed.

The opinion states the case.

Alexander & Green, Edgar Madden, and Sipe & Harris, for the plaintiff in error.

Conrad Kownslar, John E. Roller, D. O. Dechert, Marshall McCormick, and U. Lawrence Boyce, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court of Rockingham county in an action of ejectment brought by the Washington, Cincinnati and St. Louis Railroad Company against the Chesapeake and Western Railroad Company.

During the progress of the trial, which resulted in a verdict and judgment in favor of the plaintiff, numerous excep-

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tions to the rulings of the court were taken by the defendant, which are the basis of the errors assigned here.

Among these was the refusal of the court to permit the defendant to introduce in evidence certain condemnation proceedings had in the County Court of that county, by which the defendant claimed to have obtained title to and the right to the possession of the land in controversy. The grounds of objection to this evidence were:

"First. That it does not appear upon the face of the record that the County Court of Rockingham county had jurisdiction to entertain the motion of the Chesapeake and Western Railroad Company for the condemnation of the property in question; it not appearing on the face of the proceedings that any attempt was made to purchase the land, or had been made to agree with the owners of the land as to the purchase price; and

"Second. For the further reason that the general law and the charter of the Chesapeake and Shendun and Western Railroad Company (under which charter the Chesapeake and Western Railroad Company was organized), did not by express terms or by necessary implication, grant to said company authority to apply to the County Court for the condemnation of the property, franchises, and rights of the plaintiff company; or, by any other method, to take the same."

In the briefs and oral argument here it is insisted that these proceedings were not admissible for an additional reason, viz., that they were had without notice to the plaintiff (the defendant in error). This last objection will be first considered.

The proceedings to condemn were had under chapter 46 of the Code. Section 1074 of the Code provides that "If the president and directors of a company incorporated for a work of internal improvement \* \* \* \* \* cannot agree on the terms of purchase with those entitled to lands wanted for the purposes of such company, \* \* \* \* \* five disinterested freeholders shall be appointed by the court of the county or corporation in which such land, or the greater part of it, lies, for the purposes of ascertaining a just compensation for such land."

Section 1075 provides that when it is intended to apply for such appointment of commissioners, ten days previous notice thereof shall be served on the tenant of the freehold, or his guardian or committee. If there be no such person within the county or corporation, the notice, instead of being thus served, may be published once a week, four successive weeks, in some convenient paper, and posted at the front door of the court-house of the county or corporation on the first day of the term next preceding the application.

Section 1076 provides that "upon it appearing that such notice has been given, the court shall appoint such commissioners. \* \* \* \* \*"

The first order of the court in the proceedings for condem-

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nation states that "On motion of the Chesapeake and Western Railroad Company, and it appearing to the court that the above-named defendant" (The Washington and St. Louis Railroad Company) "has been duly served with notice of this motion as by law is required, it is ordered that" certain persons who are appointed commissioners for that purpose shall ascertain the compensation provided for in such cases.

The next order in the cause which was made upon the coming in of the report of the commissioners states that "on motion of said Chesapeake and Western Railroad Company and G. W. Berlin, counsel for said Washington, Cincinnati and St. Louis Railroad Company, consenting, it is ordered that said report of the commissioners be confirmed and approved, \* \* \* and appoints a commissioner to ascertain to whom the compensation should be paid.

The order of the court declaring that the defendant had "been duly served with notice of this motion as by law is required," is conclusive of the fact that the defendant had notice of the motion, unless there be something in the record which plainly shows that it did not have notice, or the character of the proceeding is such that the facts, upon which the court based its decision that there was notice, must affirmatively appear in the record.

Two notices of the motion which was to be and was made on Monday, the 15th day of July, the first day of the July term, 1895, of the court, are found in the record. One is dated May 22, 1895, and has upon it the following endorsement: "Legal and timely service of the within notice accepted this 24th day of May, 1895. Washington, Cincinnati and St. Louis Railroad Company, by G. W. Berlin, attorney for said company."

The other is dated June 10, 1895, and to it is attached the certificate of Miller and Snively, publishers, of Harrisonburg Free Press, stating that the notice had been published once a week for four successive weeks in that paper, beginning with its issue of June 13, 1895, and ending in its issue of July 11, 1895, and the affidavit of John T. Harris, that on the first day of the June term, 1895, of the court, he posted a printed copy of the notice at the front door of the court-house of the county.

Neither of these notices are referred to in the order of the court which declares that legal notice of the motion had been given the defendant. Nor is there anything in the statute which requires that the facts or evidence upon which the adjudication of notice is based shall appear in the record.

If it were conceded, as is argued, that neither of the notices were sufficient, it does not follow that the defendant did not have legal notice of the motion, for the court may have based its judgment upon evidence in addition to or even independent of the facts disclosed by the record.

In *Moore v. Holt*, 10 Gratt., 284, 291, which was a foreign

attachment, it was said that "there was no proof to show that the order of publication against the alleged absent defendant had been duly executed as the law requires. The decree, however, states that the order of publication against Joseph Holt had been duly published, and as due publication requires both the insertion of the order in a newspaper for the prescribed period, and the posting of it at the court-house door in due time, the decree must be construed to import that both were done. And it has been decided by this court on several occasions, that where the decree states that publication had been made, it will be sufficient, and this court will not look into the record for the evidence of the fact, citing among other cases, *Craig v. Sebrell*, 9 Gratt., 131.

In that case, which was a suit in which there was an absent defendant, the decree recited that the cause was heard on the bill, &c., and the order of publication returned duly executed. On appeal, this court held that "the decree must be regarded as solemnly affirming that there was an order of publication duly taken against the defendant, and that it was duly published and posted as the law directs; otherwise it could in no sense be said to have been duly executed; and the verity of the record upon that point is not to be called into question by any averment or proof to the contrary."

In *Sergeant v. The State Bank*, 12 How. 371, Judge Daniel delivering the opinion of the court in a case in which the judgment stated that the decision was pronounced after proper and legal service, said: "The real veritable record informs us that legal and sufficient notice was given to the heirs of Samuel Sergeant, but whether by this paper, or in what other mode, except that it was legal and sufficient, we are not told and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings, that whatever may be the powers of a supreme court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not sitting in the exercise of appellate power. To permit the converse of this principle in practice would unsettle nine-tenths of the rights in any community, and lead to infinite confusion and wrong."

The next objection to the introduction of that evidence is, that it does not appear upon the face of the condemnation proceedings that any attempt was made by the plaintiff to purchase the land sought to be condemned. This was not necessary. Proceedings to condemn land is by motion upon notice. The rule governing notices is that they are presumed to be the acts of the parties and not of lawyers, and are viewed with great indulgence by the courts. Formal pleadings are not required in such cases. If they were, little, if anything, would be gained by such proceedings over the

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ordinary action at law or suit in chancery. If the notice be such that the defendant cannot mistake its object it is sufficient. *Supervisors v. Dunn*, 27 Gratt., 608; *Union Life Ins. Co. v. Pollard*, 94 Va., 146, 153.

The evidence deduced does not ordinarily become a part of the record unless made so by bill of exceptions. The county court having jurisdiction over this class of cases, and the defendant having had notice of the motion, the presumption is that all the facts necessary to give it jurisdiction in the case appeared.

With respect to powers vested in the county courts, which are purely judicial in their nature, as was said by Judge Staples in delivering the opinion of the court in *Pennybacker v. Switzer*, 75 Va., 671, 685, whether exercised according to the course of the common law or by statute, they are courts of general jurisdiction to the same extent as the circuit courts. In both instances the presumption arises with respect to the conclusiveness of all the proceedings and judgments of the court. Upon this subject we refer to the case of *Harvey v. Tyler*, 2 Wall., 328, and *Ballard et als. v. Thomas & Ammon*, 19 Gratt., 14. In the latter case it was held that an order of the county court laying a levy is an adjudication of the facts necessary to authorize the proceeding, and that adjudication cannot be called in question in any collateral proceeding, however erroneous it may be. See also *Lancaster v. Wilson*, 27 Gratt., 629; *Hutcheson, &c., v. Priddy*, 12 Gratt., 90; *Ferguson v. Teel*, 82 Va., 690; *Hill v. Woodward*, 78 Va., 765; *Applegate v. Lexington*, 117 U. S., 255, 270.

The remaining objection to the admissibility of the condemnation proceedings in evidence is, that neither the general law nor the charter of the defendant company by express terms nor by necessary implication granted to that company authority to apply to the county court for the condemnation of the property of the plaintiff.

It is not denied that under some circumstances, unless expressly prohibited, one railroad company may condemn the land of another for its purposes, but it is denied that such circumstances existed in this case. It may be that this is true, but that was one of the questions involved in the condemnation proceedings.

The case of *Alexandria, &c. R. Co. v. Alexandria &c. R. Co.*, 75 Va., 780, is relied on to show that the only jurisdiction which a county court has in condemnation proceedings is to appoint commissioners to ascertain and report what compensation and damages the owner of the property is entitled to receive where he and the company cannot agree, and to determine the question of compensation. The judge delivering the opinion in the case does so state, but he was also of opinion that the condemnation proceedings were void upon the further ground that the charter of the condemning company expressly provided that



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it should in no way interfere with the chartered rights or franchises of any railroad between Alexandria and Washington city, except the right of crossing. This opinion was not the opinion of the court. Judges Staples and Burks concurred in the results, Judge Christian dissented, and Judge Moncure did not sit. That case cannot be regarded as a decision of this court, that in condemnation proceedings the court has no jurisdiction of any other question than the appointment of commissioners and the determination of what will be a just compensation to the landowner.

One of the objects in providing a summary proceeding for the condemnation of land by an internal improvement company where it cannot agree with the owner, or where he is under disability, is to enable it to acquire good title to the land wanted for its purposes, and to proceed with its work upon making payment of the compensation allowed as provided by statute, leaving the parties where there is a controversy to litigate their rights over the fund paid into court without affecting the title to the property which the statute expressly provides shall vest in the company upon paying the compensation allowed in the manner marked out by the statute. Code, secs. 1079, 1083.

The statute does not specifically provide what issues may be raised upon the motion to condemn, but it is utterly unreasonable to say that the defendant must be notified when the motion to condemn his land will be made, and yet when he appears he cannot be heard to show that the plaintiff has no corporate existence, or that it has no authority to condemn the particular property for its use, or that it can only condemn upon certain conditions, which have not been complied with, or under certain circumstances which do not exist. The policy of the law generally is to have all matters arising out of one controversy settled in a single suit, and this ought to be so, especially in a proceeding the effect of which is to take the defendant's land against his will and invest the plaintiff with a fee-simple title to it. If this be not the case, railroad companies would have no assurance that the steps taken by them to procure rights of way or property wanted for their purposes, would conclude any one, and they would be constantly subject to vexatious litigation.

This view is not only in accordance with the better reason, but is sustained by the weight of authority. See 2 Mills on Eminent Domain (2nd ed.), secs. 388, 389, and 391; *B. & O. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va., 844, and cases there cited; *St. Joseph R. R. Co. v. Hannibal, &c. R. R. Co.* (Mo., 6 S. W. Rep., 691); *Secombe v. R. R. Co.*, 23 Wall., 109, 119; 1 Red. on Railways (5th ed.), 271.

The proceeding in the County Court may have been erroneous, but it was not void. Not being void, the propriety or validity of its judgment can no more be impeached in a collateral proceeding than can the judgment of any other court

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of general jurisdiction having jurisdiction over the subject matter and the parties.

The condemnation proceedings are therefore conclusive upon the parties, however erroneous they may be, until set aside or reversed in the manner provided by law. *L. & N. R. Co. v. Taylor*, 93 Va., 226; *Foster v. City of Manchester*, 89 Va., 92; *Black on Judgments*, sec. 246.

They were not only admissible in evidence, but until set aside by some appropriate proceeding, they were a complete bar to the plaintiff's right of recovery so far as they embraced the lands sued for.

The other propositions of law which the plaintiff insists the court violated in its rulings in admitting and excluding evidence, and in giving and refusing instruction are as follows:

"First. Under the provisions of the act of February 25, 1892, the corporate rights and franchises of the defendant in error were ipso facto forfeited, and no act of the State, judicial or otherwise, was necessary to complete the forfeiture. Its right of way was therefore subject to appropriation by the plaintiff in error in the method prescribed by law.

"Second. That even if it was necessary for the State by some affirmative action to declare the forfeiture effective, nevertheless, the right of way of the defendant in error, if in point of fact the same had been abandoned, rendered the same subject to appropriation by the plaintiff in error, in the method prescribed by law.

"Third. That the property of one railroad, whether a going concern or not, is subject to appropriation by another railroad, provided the same is not needed or its use had been abandoned.

"Fourth. That knowledge on the part of a person or corporation that their real estate is being appropriated by a railroad company, estops them from recovering the locus in quo in ejectment, their remedy being by action at law for damages."

If, as we hold, the condemnation proceedings are conclusive of the rights of the parties in this collateral proceeding, and their effect was to invest the plaintiff in error with the fee-simple title to the land embraced by them, the questions involved in the first, second and third of these propositions cannot arise upon the next trial, for those questions could, and if relied on ought to have been raised in the condemnation proceedings, and are concluded by them.

Whether the fourth proposition quoted be the law or not will also be immaterial upon the next trial. For if the effect of the condemnation proceedings was to invest the plaintiff in error with title to the land, it is a bar to the recovery of the defendant in error, and no question of estoppel by conduct can arise.

What has been said disposes of the questions raised by the assignments of error based upon bills of exceptions numbered

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three, four, five, six, seven, eight, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen.

The only other error assigned that it is necessary to consider is as to the manner in which the defendant in error was permitted to prove its corporate existence, which was put in issue by the pleadings.

The rulings of the court upon that question seem to be fully sustained by the cases of *Grays v. Turnpike Co.*, 4 Rand., 578, 580, &c., and *Crump v. Mining Company*, 7 Gratt., 352.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

## NOTES.

## EMINENT DOMAIN—JUDGMENT OR AWARD.

1. Form and Requisites.
2. Sufficiency of Record to Support Judgment.
3. Duty of Court to Render Judgment on Verdict or Report.
4. Propriety of Rendering Personal Judgment for Damages.
5. Conforming to Relief Demanded in Petition.
6. Collateral Attack.
  - a. General Rule as to Permissibility.
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  - c. Limitation of Rule.
7. Conclusiveness and Effect of Award or Judgment.
8. Persons Concluded.
9. Right to Possession of Property as Affected by Award or Judgment.
10. Possession Pending Appeal from Award or Judgment.
11. Requirements as to Security.
12. Restraining Interference with Possession.
13. Proceedings to Obtain Possession.
14. Right to Compensation.
15. Interest on Award.
  - a. In General.
  - b. Date from Which Interest Runs.
  - c. Amount of Award Increased or Decreased.
  - d. Amount of Award Deposited—Effect.
  - e. Deducting Rents and Profits Enjoyed by Owner.
16. The Lien.
17. Foreclosure of Lien.
18. Necessity and Place of Recordation.
19. Necessity of Payment to the Passing of Title.
20. Enforcement of Award or Judgment.
21. Amendment.

## I. FORM AND REQUISITES.

## In General.

The jury, in a proceeding to condemn land for the use of a railroad, should properly assess the compensation to be paid the owner in a gross sum, which should be entered as the judgment of the court. *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174. And the verdict finding a gross sum for the landowner, instead of describing the land, and finding the compensation and the damages separately, is sufficient, in the absence of statutory requirements to the contrary. *Wabash, St. L. P. Ry. Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291. In *Asher v. Louisville & N. R. Co.*, 87 Ky. 391, 8 S. W. 854, it is held that the Acts of Ky. of April 11, 1882, which provide that the value of land and material taken must be awarded separately from any damages that may result to the adjacent lands, do not require that the value of land taken

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from a small tract on which the dwelling, barns, orchard, etc., of the owner stand, be awarded separately from the damages to the adjacent land and the same tract, resulting from the injury to the dwelling, barn and orchard. And in Kansas where the jury made special findings as to evidence of damage, estimating inconvenience, disfigurement, and damage, and stating the amount of each, it was held that they were not required to make the special finding as to the damage more definite, or to recite and estimate other elements than those two mentioned. *Missouri Pac. R. Co. v. Dulaney*, 38 Kan. 246, 16 Pac. 343. But upon the question of including the finding of the special damage, it was held in *Gulf, C. & S. F. Ry. Co. v. Poindexter*, 76 Tex. 98, 7 S. W. 316,—an action to recover lands taken by a railroad company for its roadbed and four acres for the section house, and for damages to the residue,—that where the jury made special findings that the damage to the residue was \$1,700, and that the damage for the four acres was \$200, it was error for the court in rendering judgment to include both amounts, as it was evident that the jury intended the \$1,700 as full compensation. And upon an appeal from an award of commissioners it is sufficient that the judgment follow the verdict in adjudging a gross sum to plaintiffs, the entry of judgment for the amount assessed by the verdict being all that is required by the charter of the railroad company. *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127. But see *Conter v. St. Paul & S. C. R. Co.*, 24 Minn. 313. The court is authorized to render judgment appropriating the lands, upon the payment into court of the damages assessed by the jury; nor can the court render any other than the particular kind of judgment the statute authorizes. *Oregonian R. Co. v. Hill*, 9 Ore. 397. As held in *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174, the judgment must be an order authorizing the petitioner to enter upon the land and use the same, upon payment of the compensation found by the jury, but there should be no award for execution therefor. See *Oregon R. Co. v. Bridwell*, 11 Ore. 282, 3 Pac. 684.

If the judgment is upon an award made by commissioners it should be in the nature of an award of damages such as was made by the commissioners. *Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857. As to the form of the commissioners' report it is held that the provisions of the Code of North Carolina, § 1946, that, in special proceedings against a railroad company to assess damages for a right of way, the commissioners shall make their report under seal, are merely directory. *Hanes v. N. C. R. Co.*, 109 N. Car. 490, 13 S. E. 896. Commissioners having met and assessed damages and benefits, it will be presumed that they followed the correct rule; and their report will not be set aside because the item reported for benefits does not show in what the benefits assessed consist, where no objection was made when the report was submitted. *Wilmington & W. R. Co. v. Smith*, 99 N. Car. 131, 5 S. E. 237.

Under the law of West Virginia, the court enters no other judgment in condemnation proceedings than such as to determine the legal right to take the land, and, after the commissioners have acted, to confirm the report. From this judgment, without other sentence or condemnation, emanates the rights of the applicants within twelve months from the date of the report, to pay the sum ascertained, and thereupon to become invested with the title to the land. *Chesapeake & O. R. Co. v. Pack*, 6 W. Va. 397.

#### Providing Payment of Compensation.

A condemnation of land for railroad purposes, which does not provide for compensation for the land taken, is not rendered invalid thereby. *Shute v. Chicago & M. R. Co.*, 26 Ill. 436.

#### When Payment of Costs Should Not Be Made a Condition Precedent to Vesting of Interest.

The statute providing that, upon payment of damages assessed, the interest in the land shall vest in the railroad corporation, who shall pay costs, a judgment making payment of costs also a condition precedent

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purposes defined in Rev. St. art. 4216. *Ft. Worth Ice Co. v. Chicago, R. I. & S. Ry. Co.*, 11 Tex. Civ. App. 600, 33 S. W. 159.

**Judgment Should Be for Each Mile of Actual Distance between Stated Points along Road.**

In a proceeding to condemn land for the construction of a telegraph line along the right of way of a railroad company the petition claimed expropriation for the whole distance between two points which were designated, and the verdict of the jury awarded compensation at \$50 per mile. It was held that the judgment should be for \$50 for each mile of actual distance along the defendant's road between the points stated, and not for \$50 "for each mile that the petitioner shall take of said property." *Postal Tel. Cable Co. v. Louisville N. O. & T. Ry. Co.*, 43 La. Ann. 522, 9 So. 119.

**Value Found Generally in Dollars and Cents—Judgment in Gold Coin.**

In California, if the court finds the value of the land taken, generally, in dollars and cents, without saying that the estimated value is in gold coin, it cannot render a judgment in gold coin. *Northern Pac. R. Co. v. Reynolds*, 50 Cal. 280.

**Award of Damages to One of Several Defendants.**

A judgment in condemnation proceedings, awarding to one defendant all the damages, cannot be sustained where plaintiff's evidence that the land belonged to the other defendant was rejected, and the only thing to show that the other defendants were served with legal notice in the proceedings and were therefore bound by the judgment, is the recital in the report of the commissioners that notice was given to all the parties, and that none appeared except the defendant to whom the damages were awarded, while the judgment of the county court only recites the appearance of such defendant, and says nothing as to service having been made on the others. *Dallas, P. & S. E. R. Co. v. Day* (Tex. 1893), 22 S. W. 538.

**Provision to Enforce Award and Costs by Execution.**

The judgment in condemnation proceedings being always conditional, so that petitioner may pay the award and take title to the property, or may abandon the proceedings and incur no liability for the same awarded as its value, under the statute providing how the judgment shall be enforced, the petitioner being compelled before title passes or possession is secured, to pay the compensation awarded including his reasonable costs, or, if he takes preliminary possession, to make a deposit to cover the award and costs, a judgment for the award and costs is erroneous if it provides for its enforcement by execution.

*Colorado*.—*Dolores, No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378.

*Kansas*.—*Florence E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857.

See post, "Personal Judgment for Damages."

**When Order to Enter Necessary—Conditions.**

Where the petitioner has not already entered upon the land sought to be condemned the judgment should order that the petitioner enter upon and use the property condemned upon payment of the compensation found by the jury. But where the petitioner has given the requisite bond and has entered, such an order is unnecessary. *Rockford, R. I. & St. L. R. Co. v. Coppinger*, 66 Ill. 510.

**2. SUFFICIENCY OF RECORD TO SUPPORT JUDGMENT.**

**Not Essential That Record Affirmatively Show That Appraisers Qualified.**

In the absence of any specific averment to the contrary it will be presumed, on appeal, that the appraisers, in proceedings to appropriate lands for railroad purposes, possessed the necessary qualifications. The record need not affirmatively show that they qualified. *American Cannal Coal Co. v. Huntingburg, T. C. & C. R. Co.*, 130 Ind. 98, 29 N. E. 566.

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**Record Not Stating That Commissioners Were "Disinterested."**

Under a charter, authorizing a company to begin condemnation proceedings in vacation of a chancery court, by application to the clerk thereof, which proceedings could be consummated without judicial action, a strict compliance with the charter must appear from the record; and the proceedings are void where it nowhere appears that the commissioners appointed were "disinterested," as required by the charter. *Madden v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 258, 6 So. 181; *White v. Memphis, B. & A. R. Co.*, 64 Miss. 566, 1 So. 730.

**Recitals in Record as Evidence to Show Conformity of Application to Notice.**

A recital in the record in condemnation proceedings, "it appearing to the court that the said defendants had due notice of the filing of said petition and of its application in accordance with the statute in such case made and provided," is evidence of the fact that the application was made in conformity with the notice. *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333.

**Effect upon Judgment Where Record Fails to Show That Company Instituted Proceedings, Was a Party, Had Notice or Was Served with Summons.**

Where a judgment, purporting to be for the condemnation of the right of way of a railway company, was rendered against the company, and it did not appear from the record that proceedings were instituted by the company, or that it was a party to them, or had notice thereof, or was served with summons, it was held that such judgment was without jurisdiction and void. *Junction City Ft. K. Ry. Co. v. Silver*, 37 Kan. 741.

**Failure of the Record to Affirmatively Show Statutory Prerequisites.**

The failure of parties to agree as to the value of the material taken is a jurisdictional fact, necessary to empower the justice to appoint householders to ascertain the damages, and, in suit upon the award made by the appraisers, the failure of the record of the justice to recite such nonagreement is an omission fatal to recovery. This for the reason that the method of procedure for ascertaining damages due the owner by taking material from his land for the construction of a railroad under the statute is a summary one, and must be strictly pursued and the essential prerequisites called for by this statute must affirmatively appear on the face of the proceedings in order to give them validity. See *Missouri Rev. Code 1835*, ch. 139, § 22; *Wag. St.* pp. 302, 303, § 11. See also, *Cunningham v. Pac. R. B. Co.*, 61 Mo. 33.

**Effort to Agree with Owner—Recital.**

Under the act to incorporate the Morris and Essex Railroad Company passed Jan. 9, 1835, Pam. L. p. 25, it was held that before commissioners could be appointed there must be an inability of the company to agree with the owners of the land, and this must appear on the proceedings. *Vail v. Morris & Essex R. Co.*, 21 N. J. Law (1 Zab.) 189. And in Pennsylvania under Act March 17, 1869, providing for the assessment of damages by condemnation "where the owners cannot agree with the company," the record must show that an effort to agree with the owner has been made. In *re Philadelphia W. & B. R. Co.*, 7 Phila. 451, 27 Leg. Int. 405.

**Validity of Proceedings to Approve Bond Which Secures Compensation as Affected by Failure of Record to Show Notice to Landowner.**

It is not essential to the validity of proceedings for the approval of a bond to secure compensation to the landowner for land taken by a railroad company under Act April 9, 1856, which requires notice to the landowner, that the record should show that such notice was given. The decree is *prima facie* evidence that omnia rite acta, and throws the burden of proving the contrary on the landowner. *Bryant v. New Castle Northern R. Co.*, 6 Pennsylvania Co. Ct. R. 53.

**Sufficiency of Showing as to Quality of Land.**

□ Where land taken by a railroad company was described by the viewers as in the town of Columbia and used for a lumber yard, the

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quality of the land is sufficiently set forth, within Act March 29, 1848, requiring a record as to land taken to set forth the quality thereof. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. (5 P. F. Smith) 318.

**Record of City Council as Showing Qualification of Jurors.**

As to the qualification of jurors the affidavit of the viewers was offered to supply the omission in the record of the council. It was held that the record of the council must show the facts of qualification, and the persons appointed cannot be the judges of their own qualification, nor are they authorized to furnish proofs of their qualification, after their appointment. *Northern Pac. Terminal Co. v. City of Portland*, 14 Ore. 24, 13 Pac. 705.

**Description of Property and Interests Taken.**

In order to give a court jurisdiction to condemn land for the purpose of a railroad the land sought should be mentioned in the several orders, and the judgment in relation thereto. *Galena C. Union R. Co. v. Pound*, 22 Ill. (12 Peck.) 399. And a judgment in condemnation proceedings is erroneous under Rev. St. art. 4208, which does not describe the land condemned, and vest in the railroad the right of way therein. *Fort Worth D. C. R. Co. v. Lampher*, 1 White & W. Civ. App. Cas. Ct. App. § 308. As to the certainty of the description of the property by the judgment, if it describes the land condemned for a pipe line by lines running certain courses and distances, "or as near said section as practicable," such description is insufficient. *Adams v. San Angelo Waterworks Co.*, 86 Tex. 485, 25 S. W. 605. However, a judgment against a railroad company on appeal from an assessment of damages of land taken by it, which refers to the verdict wherein the land taken is properly described, is sufficiently definite and certain as to the land for the taking of which the judgment is rendered. *Peoria & R. I. Ry. Co. v. Mitchell*, 74 Ill. 374. And though the fact that, in condemnation proceedings, the location of the railroad was fixed only by the center line, without statements as to its width, were, as a rule, a fatal defect, it is immaterial where the parties understood the location of the line and the width of the road, and in the award the land taken is fully described. *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 52 Conn. 274.

Where a judgment specifically refers to and confirms the report of the commissioners, it is not necessary to the description that the judgment recite the names of the landowners who are mentioned in the report. *Thompson v. Chicago, S. F. & C. R. Co.*, 110 Mo. 147, 19 S. W. 77. In Colorado the General Laws 1883, ch. 21, § 242, provide that the decree in condemnation proceedings shall describe the lands, and state the payment or deposits of compensation, a certified copy of which shall be regarded in like manner and with like effect as a deed, and on the entry of such rule "petitioner shall become seized in fee, except as herein-after provided, of all such lands," and may take possession of the same for the purposes specified in the petition. In *San Luis Canal & Imp. Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244, 32 Pac. 860, it was held, that a decree which stated that the lands described "are hereby vested in" petitioner for the use and purposes specified in the petition and that for such purposes petitioner "be seized of said lands," and is authorized to take possession of and use the same for the "purposes specified herein and in such petition," is not objectionable on the ground that it gives the petitioner a greater interest in the land taken.

**3. DUTY OF COURT TO RENDER JUDGMENT ON VERDICT OR REPORT.**

In proceedings by a railroad corporation to appropriate private property, there must be a judgment confirming the verdict of the jury before the corporation is entitled, by a deposit of the amount of such verdict, to possession of the property appropriated. *Wagner v. New York, C. & St. L. R. Co.*, 10 Am. & Eng. R. Cas. 380, 38 Ohio St. 32. In *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633, it is held that where a second assessment of damages is made, the court must render

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judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment which has since been set aside at the instance of the landowner, it cannot be treated as a payment or allowed as a credit on the judgment. So, if a lot is condemned by a railroad company, the money deposited with the county judge, an appeal taken to the district court, and a verdict rendered in favor of the lot owner, it is the duty of the district court to render judgment on such verdict, and an execution may be issued thereon. *Drath v. Burlington & M. R. R. Co.*, 20 Am. & Eng. R. Cas. 385, 15 Neb. 367, 18 N. W. 717, following *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225, 10 N. W. 718. And where the jury return a verdict for a less sum than that awarded by the commissioners, judgment should be entered on the verdict, not on the award. *Ennis v. Wood River Branch R. Co.*, 12 R. I. 73.

The final judgment of confirmation of an award by viewers in proceedings under Fla. Rev. Stat. §§ 1544-1550, 1554, may be entered as of course by the judge in vacation, without notice to the landowner, after the expiration of the time allowed within which to demand a jury trial and his failure to make such a demand. *Heermans v. Jacksonville, St. A. & I. R. Co.*, 40 Fla. 85, 23 So. 587.

#### 4. PROPRIETY OF RENDERING PERSONAL JUDGMENT FOR DAMAGES.

In a proceeding by a railroad company to take lands for the use of its road against the owner of the land, it is error for a court upon confirming the report of the commissioners, and ordering the same to be recorded, to render judgment against the applicant for the amount of damages ascertained by the report. *Chesapeake & O. R. Co. v. Bradford*, 6 W. Va. 220.

*Colorado*.—*Dolores, No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378.

*Kansas*.—*Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857.

*West Virginia*.—*Chesapeake & O. R. Co. v. Bradford*, 6 W. Va. 220. And in *Kansas* it is regarded as an error on appeal to the district court in condemnation proceedings to render personal judgment against the party asking the condemnation for the damages assessed, to be collected by execution, since the judgment should be in the nature of an award. *St. Louis L. & B. R. Co. v. Wilder*, 17 Kan. 239; *Lawrence & T. Ry. Co. v. Moore*, 24 Kan. 323; *Kansas City W. & N. W. R. Co. v. Kennedy*, 49 Kan. 19, 30 Pac. 126; *Florence, E. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588, 43 Pac. 857.

However, under the provisions of *Minnesota Gen. St.* 1866, ch. 34, tit. 1, it is held in *Curtis v. St. Paul S. & T. F. Co.*, 21 Minn. 497, that the owner of lands condemned for the use of a railroad company, is entitled to personal judgment for the damages awarded against the company or party instituting such proceedings, under § 23 of such chapter, which requires a company to give a bond conditional to pay as compensation for the property taken, "whatever amount may be required by the judgment of the court therein." See *Robbins v. St. P. S. & T. F. R. Co.*, 21 Minn. 191.

So where plaintiff in condemnation proceedings has waived its right to abandon the proceedings, defendant is entitled to judgment with execution for his damages. *Bellingham Bay & B. C. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140.

But where the charter of a railroad company provides for the assessment of damages for land "taken, or to be taken" on payment of which "the premises shall be condemned to be taken by the company," and after an appeal by either party, which "shall not interfere with the right of such company to enter," the company appeals from an award, and takes possession after paying the amount thereof, it is erroneous to enter a personal decree on a verdict against the company, as it might abandon the land taken leaving the owner to his action for the unlaw-



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ful entry. *Louisville N. O. & T. R. Co. v. Ryan*, 64 Miss. 399, 8 So. 173.

### 5. CONFORMING TO RELIEF DEMANDED IN PETITION.

#### Acquirement of Easement in Excess of Statutory Limit as Affected by Prayer of Petition.

Although a railroad company may, for certain purposes, acquire an easement in lands beyond the limit allowed by the statute for the right of way, such extra condemnation cannot be allowed in a petition praying only for the right of way, nor unless the petition specify the purposes for which the excess over 100 feet is prayed, and to what portion of the line it applies. *Brown v. Rome & D. R. Co.*, 86 Ala. 206, 5 So. 195.

#### Recovery Confined to Tract of Land Described in Petition.

Where a petition for the condemnation of land for railroad purposes describes the land to be taken as a strip 100 feet wide, through a larger tract alleged to belong to the defendant, and the defendant's answer claims damages to the identical parcels of land described in the petition and none other, the defendants cannot recover damages for another tract of land not described in the pleadings, and not touched by the proposed right of way, although such other tract adjoins the tract described in the petition, and constitutes part of the same farm. *Northern Pac. & P. S. S. R. Co. v. Coleman*, 3 Wash. St. 228, 28 Pac. 514.

#### Judgment More Extensive Than Prayer of Petition.

A petition for condemnation of land for the purpose of a "right of way, and other necessary railway purposes," does not authorize a judgment of condemnation for "use as right of way, depot grounds, terminal grounds, and all other necessary railway purposes." *Barnes v. Chicago, R. I. & T. Ry. Co.* (Tex. Civ. App. 1895), 33 S. W. 601.

#### Judgment Erroneous Which Condemns Lands Different from That Described in Petition.

Under *Starr & C. St. Ill. ch. 24, art. 9, § 5*, which requires that a petition for the condemnation of land shall contain a description of the land to be taken, a judgment which condemns different land from that described in the petition is erroneous. *Chicago & N. W. Ry. Co. v. City of Chicago*, 132 Ill. 372, 23 N. E. 1036.

#### When Allegation as to Description of Land Insufficient to Support Land Condemned in Judgment.

In proceedings to condemn land, an allegation that the strip to be taken enters a certain tract on its east line 500 feet from its southeast corner, and leaves it at a point 600 feet distant on its west line, from the northwest corner, is not sufficient to support a judgment condemning a strip entering the tract 537 feet north of the southeast corner, and leaving it at the north line, 535 feet east of the northwest corner. *Lester v. Fort Worth & A. R. Co.* (Tex. Civ. App.), 26 S. W. 166.

#### Amount of Damages Limited to Application for Appointment of Appraisers.

On the award by appraisers and compensation for private property taken by the corporation, more damages cannot be allowed than are claimed by the owner in his application for the appointment of appraisers to determine his damages. *Houston Tap & D. Ry. Co. v. Milbourne*, 32 Tex. 224.

#### Necessity for Map, Which Designates Route, as Required by Statute, to Show Width between Tracks.

In a proceeding to acquire the right to construct a railroad along a street it is not necessary that the map required by How. St., § 3332, designating the proposed route, should show the width between the tracks, the central line being shown, and the article of incorporation declaring the purpose to be to construct a road of "standard gauge." *Bay City Belt-Line R. Co. v. Hitchcock*, 90 Mich. 533, 51 N. W. 808.

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## 6. COLLATERAL ATTACK.

## a. General Rule as to Permissibility.

As a general rule, after land has been condemned for the use of a railroad, the adjudication cannot be impeached in any collateral proceedings; and it will be presumed conclusively, that the party whose land has been taken has received not only just compensation for land taken but for such incidental loss, inconvenience, and damage as might reasonably be expected to result from such construction and use of the way or crossing, in a legal, proper manner, and the judgment will afford a complete justification to the party exercising the right to be acquired.

*Illinois*.—*Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142.

*Maryland*.—*Hamilton v. Annapolis E. & E. R. Co.*, 1 Md. Ch. 107; *Baltimore, etc., R. Co. v. Compton*, 2 Gill (Md.) 20.

*Michigan*.—*Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378, 11 N. W. 271.

*Missouri*.—*Burke v. City of Kansas*, 118 Mo. 309, 24 S. W. 48; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118; *Cory v. Chicago, etc., R. Co.*, 100 Mo. 282, 13 S. W. 346.

*New Jersey*.—See *Nat. Docks & N. J. J. C. Ry. Co. v. Pa. R. Co.*, 52 N. J. Eq. 58, 28 Atl. 71; *Van Schoick v. Delaware, etc., Canal Co.*, 20 N. J. L. 29.

*Pennsylvania*.—*Pennsylvania R. Co. v. Gorsuch*, 84 Pa. St. 411.

*Texas*.—*Muhle v. New York, Tex. & Mex. R. Co.*, 57 Am. & Eng. R. Cas. 591.

*Virginia*.—*Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013; *Chesapeake, etc., R. Co. v. Washington, etc., R. Co.*, 99 Va. 715.

As stated in *Indiana Oolitic Limestone Co. v. Louisville, N. A. & C. R. Co.*, 107 Ind. 301, 7 N. E. 244, every reasonable presumption will be indulged in favor of the regularity of such proceedings, in the absence of any showing to the contrary.

A judgment of this character rendered by a competent court charged with a statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. And as to these summary proceedings, the courts of general jurisdiction stand upon the same footing as those tribunals whose jurisdiction is special and limited.

*Missouri*.—*Sedalia v. Missouri, K. & T. R. Co.*, 17 Mo. App. 105.

*United States*.—*Secombe v. Milwaukee & St. P. R. Co.*, 90 U. S. (23 Wall.) 108, 23 L. Ed. 67.

Where, however, a statute in such proceedings does not declare that a judgment shall be final, the judgment of the inferior courts must stand as all judgments, and the aggrieved party is entitled to the benefit of the general law regulating writs of error or supersedeas. *Baltimore & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

Such judgment is not only conclusive as to all matters actually litigated, but also as to all matters necessarily within the issues joined, and which may have been but were not formally litigated. *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842.

Numerous cases abound in which this rule has been applied denying the right to question in independent causes the conclusiveness of the judgment rendered in condemnation proceedings. As illustrative of which, the facts of some of such cases, in so far as they bear upon the defect, upon which is based the right to attack collaterally, are given.

## b. Illustrative Cases.

## Failure of Record to Show Evidence Bearing on Qualification of Commissioners.

The fact that the record of the condemnation proceedings does not show that any evidence was offered establishing the qualifications of the commissioners appointed to make an appraisal and an assessment of damages cannot be taken advantage of in collateral proceed-

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ings. *Chicago, K. & N. Ry. Co. v. Griesser*, 48 Kan. 663, 29 Pac. 1082. See also, *Gulf, C. & S. F. Ry. Co. v. Fort Worth & R. G. Ry. Co.*, 86 Tex. 537, 26 S. W. 54.

**Omission to Recite That Commissioners Are Disinterested.**

So condemnation proceedings cannot be collaterally attacked for omission to recite, in the order appointing commissioners, that they are disinterested, since these matters are not jurisdictional. *Thompson v. Chicago, S. F. & C. Ry. Co.*, 110 Mo. 147, 19 S. W. 77.

**Misjoinder of Parties Defendant.**

And for misjoinder of parties defendant the judgment cannot be collaterally attacked. *Thompson v. Chicago, S. F. & C. Ry. Co.*, 110 Mo. 147, 18 S. W. 77. Neither can the validity of the proceedings be collaterally attacked on the ground that one of the commissioners therein was not qualified to act, the proper time to take such objection being at the time of his appointment or during the condemnation proceedings. *Huling v. Kaw Valley R. & I. Co.*, 39 Am. & Eng. R. Cas. 52, 130 U. S. 559, 9 Sup. Ct. 603.

**Failure to Serve Copy of Petition on Landowner.**

Nor is such a judgment subject to attack on the ground of failure to serve a copy of the petition on the landowner—a copy of the summons and a notice of the commissioners' report having been served. *Thompson v. Chicago, S. F. & C. R. Co.*, 110 Mo. 147, 19 S. W. 77.

**Imperfect Description in Instrument of Appropriation.**

Where a judgment has been entered approving the assessment of damages for land taken for railroad purposes, the landowner cannot, by an action of ejectment, collaterally attack the validity of the proceedings on the ground that the description in the instrument of appropriation was defective. *St. Joseph, etc., Co. v. Cincinnati, etc., R. Co.*, 109 Ind. 172, 9 N. E. 727.

**Damages Assessed in Round Sum Instead of Separately.**

Where there is jurisdiction of the subject-matter and of the parties, a judgment in condemnation proceedings is not subject to collateral attack on the ground that the damages to two separate parcels of land belonging to different parties were assessed in a round sum, instead of to each owner separately, as required by Gen. St. 1865, ch. 66, § 5, since such a judgment though erroneous, is not void. *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118.

**Judgment in Favor of Party Not Having Legal Capacity to Condemn Land.**

A judgment of condemnation of land rendered by a court having jurisdiction over the parties and power to condemn land in proper cases is not subject to collateral attack on the ground that it is rendered in favor of a party who had not the legal capacity to condemn land, since that is a matter to be determined by the court rendering the judgment. *Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 316.

**Claim That Condemnation on Second Inquisition Is Not Necessary.**

In *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553, it was held, that statutory authority to a railroad company "to have, use or occupy any lands, materials, or other property in order to the construction or repair of any part of said road, or their necessary buildings," authorizes the company to construct a building on the lands which it has condemned at a junction with another road, for the accommodation of passengers, as such building is deemed necessary, within the meaning of the statute; and the original landowner cannot claim the land on which the building is, on the ground that it is not necessary, and where in such case, the building was situated on land condemned under a second inquisition, taking additional lands, the landowner objected that such condemnation was not necessary, but the proceedings were returned to and ratified by the county court, which had exclusive and final jurisdiction, and from its decision there was no appeal. It was held, that the county court was the only place where the inquisition could be resisted, and not having been done there, could not be questioned in

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another proceeding; and the fact that a portion of the building was sometimes used for a tavern where intoxicating liquors were sold, would not work a forfeiture of the land, so as to revert to the original owner.

**Error in Description of Land Appropriated.**

A condemnation proceeding will not be declared void in a subsequent action by a landowner who had notice thereof in the manner provided by law, on the sole ground that the property described in the petition is the tract through which the road is located, and not a particular part thereof appropriated for right of way purposes. *Fremont, E. & M. V. R. Co. v. Mattheis*, 39 Neb. 98, 57 N. W. 987.

**c. Limitation of Rule.**

While the general rule as to judgments of the character under discussion, as well as judgments in other proceedings, forbids attack, as above shown in an independent proceeding, yet there are instances in which a judgment rendered in a condemnation proceeding may be attacked collaterally. As to questions of jurisdiction, it is held in *Weinckie v. New York, C. & H. R. Co.*, 15 N. Y. Supp. 689, that such proceedings may be collaterally attacked. But where the court has already acquired jurisdiction of such proceedings, a failure to give notice of a motion to confirm the report of the commissioners will not deprive the court of jurisdiction so as to allow a collateral attack. *Allen v. Utica, I. & B. R. Co.*, 15 Hun (N. Y.) 80. As to attack on the grounds of fraud or mistake, see *Swann v. Chicago, etc.*, R. Co., 38 Mo. App. 588. Also, it may be attacked for want of notice. *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725. Thus, it is held in *Kanne v. Minneapolis, St. L. R. Co.*, 33 Minn. 419, 23 N. W. 854, that in proceedings to condemn land under Sp. Law 1870, ch. 57, the assessment of damages by the commissioners being void for want of notice of the time and place of their meeting, the landowner is not bound to move to set aside the award, but may attack it collaterally in any action in which rights are claimed under it.

However, where the court has found in eminent domain proceedings "that notices have been served on the several owners described in the said petition," the sufficiency of the notices and services thereof cannot be questioned in any collateral proceedings. *Galena & C. W. R. Co. v. Pound*, 22 Ill. 399.

In absence of proof otherwise, a recital in the judgment of condemnation under the Texas statute that due notice had been given is conclusive, although the manner of service be not shown nor appear in the record. *Ackerman v. Huff*, 71 Tex. 317, 9 S. W. 236, 36 Am. & Eng. R. Cas. 589. See also, *Atchison, etc.*, R. Co. *v. Forney*, 35 Neb. 607, 53 N. W. 585. And the judgment may be questioned collaterally for irregularities connected with the appointment of commissioners. *Kanne v. Minneapolis, etc.*, R. Co., 33 Minn. 419, 23 N. W. 854, 23 Am. & Eng. R. Cas. 127; *Lewis v. St. P., etc.*, R. Co., 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612. This right follows, also, where the verdict is invalid. *West v. West, etc.*, R. Co., 61 Miss. 536; *Visscher v. Hudson River R. Co.*, 15 Barb. (N. Y.) 37. See also, *Swann v. Chicago, S. F. & C. R. Co.*, 38 Mo. App. 588.

And in *Ely v. Norfolk Southern R. Co.*, 102 N. Car. 42, 8 S. E. 779, it is held that a railroad company which has instituted condemnation proceedings against three persons to take land, and has paid the money therefor into court, is not estopped from disputing in a collateral action, the title of one of such persons, as Code N. Car. sec. 1944, requires that all persons whose interests are to be affected shall be made parties to condemnation proceedings, and § 1947 authorizes payment of money into court when there are adverse and conflicting claimants.

**7. CONCLUSIVENESS AND EFFECT OF AWARD OR JUDGMENT.****In General.**

As a general rule in condemnation cases the court has jurisdiction, usually under statutory provisions, of the subject-matter and parties. And, whenever, in proceedings of this character, jurisdiction has once

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attached by due service of the requisite petition and notice upon all parties having or claiming any estate or interest in the property thereby affected, and award is regularly made by the commissioners as to each claimant, the rights of the respective parties become definitely fixed, and such award, until modified or changed, on appeal, is conclusive and binding not only upon the parties of record, but upon their privies and grantees.

*Minnesota*.—*Trogden v. Winona & St. P. R. Co.*, 22 Minn. 198. □ See *Custis v. St. Paul, S. & F. R. Co.*, 21 Minn. 497.

*Nebraska*.—*Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842.

*Pennsylvania*.—*Pennsylvania R. Co. v. Gorsuch*, 84 Pa. St. 411.

*Texas*.—*Muhle v. New York T. & M. R. Co.*, 86 Tex. 459, 25 S. W. 607, 57 Am. & Eng. R. Cas. 591.

*West Virginia*.—*Baltimore & O. R. Co. v. Pittsburg, W. & Ky. R. Co.*, 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444.

And the report of commissioners appointed to condemn lands and assess damages is, like the verdict of a jury, conclusive of the facts ascertained, until set aside on appeal.

*Illinois*.—*Townsend v. Chicago & A. R. Co.*, 91 Ill. 545.

*New Hampshire*.—*Aldrich v. Cheshire R. Co.*, 21 N. H. 359.

*North Carolina*.—*Norfolk So. Ry. Co. v. Ely*, 101 N. Car. 8, 7 S. E. 476.

It becomes final and conclusive upon the parties without it appearing that notice had been given by filing the report with the clerk; the presumption is that such notice was given.

*Illinois*.—*Chicago B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333.

So the finding that the taking is necessary is conclusive if there is evidence to support it.

*Michigan*.—*Port Huron & S. W. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882, 14 Am. & Eng. R. Cas. 227.

However, to have this effect the authorities making it should not misconceive the law nor fail to fully consider the essential elements of the injury done to the landholder.

*Michigan*.—*Port Huron & S. W. R. Co. v. Voorheis*, 50 Mich. 506, 15 N. W. 882, 14 Am. & Eng. R. Cas. 227.

But as held in *Butman v. Vermont C. R. Co.*, 27 Vt. 500, so long as the assessment of damages remains in force, no action will lie as at common law, for an increase of damages on the ground that the commissioners went on a mistaken basis in rendering their judgment.

In *Nebraska* a judgment of the district court on appeal from an award in a condemnation proceeding for a right of way is conclusive upon the parties thereto as to all matters actually litigated therein, and also as to all matters necessarily within the issues joined, although not formally litigated. *Atchison & N. R. Co. v. Forney*, 35 Neb. 607, 53 N. W. 585.

In *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881, it is held that the judgment fixing the amount of compensation is not the final step in a condemnation proceeding, although an appeal is allowed by statute from such judgment. Even after such judgment is affirmed there may still be a refusal of payment and abandonment of the proposed improvement; and when payment is not made until after the affirmance of the judgment the order for possession, entered upon proof of the payment, is the final order in the proceeding.

It is made final and conclusive as to the damages which will be caused by the proposed improvement, but it is not final and conclusive upon the question whether those damages have been paid, so as to justify an entry into the possession of the property. Upon this question the order provided for in section 15 of article 9 of the Cities and Villages Act is the final order in the case, and in order to determine whether it is such a final order as may be appealed from it is necessary to determine whether it is entered merely to exclude the judgment fixing the amount of the damages. *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. 881.

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**Judgment of Dismissal—Finality.**

In *Minneapolis & N. W. R. Co. v. Woodworth*, 32 Minn. 452, 21 N. W. 476, a company appealed from the award made to the district court, and gave the security required by statute, and took possession of the land. Subsequently there was a dismissal of the appeal entered, followed by the entry of a judgment of dismissal. Upon the question as to the judgment of dismissal being a "final judgment" within the meaning of Minn. Act 1881, ch. 57, the court held in the affirmative, ruling that the company should be required to pay the award within 60 days thereafter, and if the company failed to pay the amount of the award within 60 days, the landowner, on motion, was entitled to judgment declaring the condemnation proceeding abandoned, and awarding him damages computed upon the amount of the award at the rate of 10 per cent. per annum as provided by the statute.

**Right of Purchaser of Road to Question Judgment Obtained against a Former Purchaser of Franchises.**

A railroad company being liable to pay or secure compensation to one whose land had been injured by another railroad company, which did not give bond, and whose franchises were sold to a former company, it was held, that the purchaser could not question condemnation proceedings in which the landowners obtained judgment against the former company. Such proceedings fixed the right of way and the compensation, and were conclusive upon all parties. *Martin v. Southern R. Co.*, 28 Pittsburgh Leg. J. 316.

**Conclusiveness Where Jurisdiction Attaches by Due Service of Petition and Notice, and Award Is Regularly Made.**

Where in proceedings for the condemnation of lands for railroad purposes, jurisdiction at once attaches by due service of the requisite petition and notice, and award is regularly made, the rights of respective parties become definitely fixed, and the award, until modified or changed on appeal, is conclusive and binding on all parties to the record, their privies and grantees. *Trogden v. Winona & St. P. R. Co.*, 22 Minn. 198.

**Conclusiveness of Assessment as to Damages.**

A judgment condemning land for the use of a railroad must be presumed conclusively to have included just compensation for the land taken and for all such incidental inconvenience, loss, and damage as might reasonably be expected to result from the construction and use of the way or crossing in a legal and proper manner, and hence affords a complete justification to the party, exercising the right so acquired. *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142; *Gilbert v. Savannah, G. & N. A. R. Co.*, 69 Ga. 396.

Thus, if farm crossings are a part of the plan of a railroad where its right of way crosses a farm, and are shown on the map and profile of the road on record, and are taken into consideration by the commissioners in making the award of damages, the court or jury, upon appeal, should assess the damages to the owner of the land with reference to such plan of construction, and the railroad company becomes bound thereby to construct such crossings. *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15.

In *Ville v. Troy & B. R. Co.*, 20 N. Y. 184, the value of farm lands appropriated to the use of a railroad company was submitted to arbitration. An award was made, and the company's operatives entered for the purposes of the road. In an action of specific performance against the company an offer of evidence was made to show that improper and unsubmitted items were included in the award. The court held, that the entry by the company was under the award, which was conclusive as to the value and damages, and that the rejection of evidence impeaching the award was proper.

**Effect upon Rights of Parties of a Failure to Comply with the Law in Recording Final Order of Confirmation.**

Where condemnation proceedings are instituted by an elevated railway company to acquire the property interests of a lot owner in the

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avenue in front thereof, in which a final order of confirmation is made, both parties are concluded by the determination therein of the value of such interests, though a certified copy of such order has not been filed in the county clerk's office, as required by law. *Oberfelder v. Met. El. Ry. Co.*, 138 N. Y. 181, 33 N. E. 937.

**Judgment Entered upon Award after Assessment and Filing of Exceptions—Finality.**

Where a report of reviewers to assess damages has been made, exceptions are filed by both parties, and the court has entered judgment upon the award, this judgment, until set aside or reversed, is a final adjudication of the controversy. *Penn. R. Co. v. Gorsuch*, 84 Pa. St. 411.

**Judgment Authorizing Construction of Dam—No Finding as to Lawfulness—Effect as Defeating Estoppel Arising from a Subsequent Judgment.**

The contention that a judgment in a condemnation proceeding, which authorized the construction of a dam, established the fact that the dam is lawful, which will defeat an estoppel arising from a subsequent judgment finding it to be illegal, cannot be sustained, where the former judgment only authorized its construction, and did not find that the dam actually constructed was lawful. *Chesapeake, etc., R. Co. v. Rison*, 2 Va. Sup. Ct. 648, 37 S. E. 320.

**Entry without Permission or Payment of Compensation—Judgment as Fixing Amount of Damages—Instruction as to Effect in Subsequent Proceeding.**

An action was brought in Indiana against a railway company for the wrongful appropriation of land, and the complainant alleged that plaintiff was owner of the property, and that defendant, without plaintiff's permission and without payment of compensation, appropriated the land, and held exclusive possession, depriving plaintiff of its use and occupation. It was held that it was proper to refuse defendant's requested instruction that the appropriation proceedings constituted a judgment fixing the amount to which plaintiff would be entitled on account of the appropriation, and she could not be heard to say in another action that the damages were greater than those awarded. *Chicago, I. & E. Ry. Co. v. Pattison*, 59 N. E. 688 (Ind. App. 1901).

**Order of Condemnation—Vesting of Title—Effect.**

Under statutory provisions in Alabama, regulating proceedings for the condemnation of a right of way by a railroad company (Ala. Code, sec. 3207-20; Sess. Acts 1888-89, p. 112; same 1890-91, p. 1134), the order of condemnation does not vest any title in the railroad company, unless the damages assessed are paid within six months; and payment not having been made within that period of time, the decree is not a bar to a subsequent proceeding seeking condemnation of the same land or a part thereof. *Alabama Midland R. Co. v. Newton*, 94 Ala. 443, 10 So. 89.

**Scope and Effect of Order Authorizing the Taking of Possession.**

An order authorizing a defendant to take possession of land in eminent domain proceedings is conclusive of all matters relied on by the plaintiff for a recovery of the land at the time such order was issued. *Muhle v. New York, T. & M. Ry. Co.* (Tex. Civ. App. 1893), 23 S. W. 809.

**Inquisition as to Value of Land—Scope and Effect.**

Where a railroad company institutes an inquisition by commissioners to determine the value of property along a proposed right of way, the effect of such inquisition is merely to fix the value of the land, and does not vest any right or fix any liability on the company. *Williams v. Odessa & M. Ry. Co.*, 44 Atl. 821, 7 Del. Ch. 303.

**Conclusiveness as Dependent upon Validity of Report, Award, or Judgment.**

**Validity of Report—Notice—Adjournment.**

A report by commissioners, which recites that they met at the time

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and place named in the notice, and proceeded to lay off a route; that a legal adjournment was had; and further states that they met at a later time and another place, in pursuance of adjournment, when they proceeded with the completion of their work,—does not show that the adjournment was without notice or illegal; neither does it show an abandonment of the proceedings under the original notice, nor a loss of jurisdiction; and such report is not void on its face. *Leavenworth, N. & S. Ry. Co. v. Meyer*, 50 Kan. 25, 31 Pac. 700.

*Condemnation under an Ordinance—Entry of Judgment for Damages to Land Not Adjoining Street—Validity.*

In a proceeding to condemn land under an ordinance for widening a certain street, it is erroneous to enter judgment for the taking of land which does not adjoin such street, but which, if taken, would constitute a new street, though judgment was so entered, because defendant claimed that part of his land was not subject to condemnation. *Chic. & N. W. Ry. Co. v. City of Chicago*, 132 Ill. 372, 23 N. E. 1036.

*Invalid Award—Validated by Judgment.*

A judgment in proceedings by an elevated railroad company to condemn lands which at the time the proceedings were instituted it could not condemn because of restrictions imposed by a city ordinance, should not after the removal of restrictions, validate the original invalid taking by giving the landowner interest upon the compensation fixed by the jury from the time when the company first went into occupation, as such owner's damages may have exceeded the interest. *Tudor v. Chic. & S. S. Rapid T. R. Co.*, 164 Ill. 73, 46 N. E. 446.

*Discontinuance—Erroneous Order.*

Where the record of condemnation proceedings by a city recites that on motion of plaintiff, by its attorney, "it is ordered that this cause be discontinued," as to one of the defendants,—the order being made before the finding of the jury, and before any judgment of condemnation was rendered,—such defendant is not bound by the outcome of the suit. *Dennis Long & Co. v. City of Louisville*, 98 Ky. 67, 32 S. W. 271.

*Estoppel—Waiver of Right of Eviction.*

Where condemnation proceedings have been conducted in strict conformity with the requirements of the law, and compensation for the land appropriated as right of way has been secured by the deposit of money with the county treasurer of the county where the land is situated, and the owner of the land fails to appeal or take any legal action in the matter until the completion and operation of the railroad, she is then estopped from maintaining an action in ejectment to evict the railroad company from the right thus acquired. *Chicago, K. & W. R. Co. v. Selders*, 4 Kan. App. 497, 44 Pac. 1012.

*Proceedings to Claim Damages for Subsequent Alteration—Award as Barring Recovery.*

A proceeding to appropriate land adjoining a highway for the purpose of building a bridge, where the landowner is awarded damages resulting to the remaining land, is not a bar to an action by such landowner, for damages to his property, caused by the subsequent alteration or occupation of the highway in constructing the bridge. *Schaible v. Lake Shore & M. S. Ry. Co.*, 10 Ohio Cir. Ct. R. 334, 3 Ohio Dec. 233.

## 8. PERSONS CONCLUDED.

*When Reversioner or Remainderman Bound.*

In the proceedings to condemn land for a canal, under Laws 1825, ch. 180, § 13, where, on an inquisition on the condemnation of lands in perpetuity, the jury gives damages as for the entire fee, but only the life tenant in possession was notified, the reversioner or remainderman is nevertheless bound, and may apply to chancery for the distribution of the award. *Tide-Water Canal Co. v. Archer*, 9 Gill & J. 479.

But where the charter of a railway company required notice, by publication, to the owner or occupier, or unknown owners, of land sought to be condemned, of the application to appoint commissioners,



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and the company published such notice as to the one who had held a life estate only, but who was dead, not naming the remainderman, subsequent proceedings condemning the land for right of way are not binding upon the remainderman. *Chicago & A. R. Co. v. Smith*, 78 Ill. 96.

**Parties Acquiring Rights in Land Pendente Lite.**

Parties acquiring rights in lands, pending proceedings for their condemnation for railroad purposes will be deemed to have notice thereof, and will take subject to the award. *Trogden v. Winona & St. P. R. Co.*, 22 Minn. 198.

**Effect upon Lessee When He Is Not a Party.**

A judgment condemning lands for public use does not affect a lessee's right of possession when he is not made a party. *Baltimore & O. R. Co. v. Parrette*, 55 Fed. 50.

**When Lessor's Reversionary Interest Not Bound Though Lessee Is Bound.**

A voluntary agreement by a lessee of the old road with the petitioning company, as to the opinions, manner, etc., binds the interest of the lessee, but does not bind the lessor as to the reversionary interest, and if, in such case, the lessee alone is made a party, the estate in reversion is not affected. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 69.

**When Mortgagee Not Bound by Proceedings.**

A railroad company condemned mortgaged lands without notice to the mortgagee, and the mortgagee foreclosed without making the railroad company a party. It was held, that since, under Comp. St. ch. 16, § 95 et seq., notice in condemnation proceedings must be given to all persons interested in the land the mortgagee's rights were not affected by the condemnation proceedings, and he could maintain a subsequent foreclosure suit against the railroad company. *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276, 29 N. W. 936.

**When Condemnation Binding Only upon Parties.**

Under Nix Dig. p. 863, § 55, confining a proceeding by the railroad company to get lands or materials condemned to those purposes to the persons made parties thereto, the condemnation is nugatory as against the persons omitted therein. *National R. Co. v. Eastern A. R. Co.*, 36 N. J. L. (7 Vroom) 181.

**Effect of Proceedings against Tenant upon Owner of Ground Rent.**

The owner of the ground rent is not affected by the proceedings of a railroad company against his tenant to take and occupy the ground for the purpose of either road, the landlord and tenant having distinct estates. *Voegtly v. Pittsburg & Ft. W. R. Co. (Pa.)*, 2 Grant. Cas. 245.

**9. RIGHT TO POSSESSION OF PROPERTY AS AFFECTED BY AWARD OR JUDGMENT.****Refusal of Landowner to Receive Money Awarded Does Not Affect Right of Possession.**

Where a chartered company authorized to condemn land for the purpose of a railroad, has pursued the course prescribed by the statute to obtain the right of way, the right of the company is perfect to the road though the proprietor of the land obstinately refuses to accept the money awarded by the jury. *Montgomery & W. P. R. Co. v. Walton*, 14 Ala. 207.

**Appeal Operating as a Supersedeas and Preventing Appropriation until Determination of Appeal and Either Payment or Tender.**

In proceedings by a railroad company to condemn a right of way, an appeal by the landowner from the award of commissioners operates as a supersedeas and deprives the condemning company of the right to appropriate the land until the appeal has been determined, and the sum awarded by the jury on appeal is either paid or tendered. *Jersey City, N. & W. Ry. Co. v. Central R. Co.*, 48 N. J. Eq. (3 Dick.) 379, 22 Atl. 728.

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The Rev. St. of Missouri, § 3710, gives the right of appeal to every person aggrieved by any final judgment or decision of any circuit court in any civil cause, and an appeal with a statutory bond operates as a supersedeas. This is construed to embrace the case of a railroad company which has paid into court what the company deems excessive damages in condemnation proceedings, the court having ordered the company's exceptions stricken out and the money paid to the landowner; and that a refusal to vacate the supersedeas does not contravene the constitutional prohibition against taking private property for public use without just compensation, or that against the disturbance of the property until the compensation shall have been paid to the owner or into court for him, although, pending the appeal, the company appropriates the land, and constructs its road. *St. Louis & S. F. Ry. Co. v. Evans & Howard Fire Brick Co.*, 85 Mo. 307.

**Landowner's Right of Possession Pending Appeal from Assessment by Householdors.**

Pending an appeal from an assessment by householders in a proceeding by a city to take the land for public use, the owner of the land has a right to take possession of his land. *City of Kansas v. Kansas Pac. Ry. Co.*, 18 Kan. 331.

**Expenses Attending Assessment Should Be Paid before Possession Is Taken.**

The expenses attending the assessment of damages for a right of way stand on the same footing as the damages awarded, for which execution does not issue, but they are to be paid before possession can be taken. *Chicago & M. R. Co. v. Bull*, 20 Ill. 218.

And where judgment is entered for one who seeks to condemn land under the statute of eminent domain, and he obtains possession of the property without payment of the costs awarded the owner, such possession is to that extent illegal. *Dolores, No. 2 Land and Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378.

In *Neale v. Sup. Court of San Diego Co.*, 77 Cal. 28, 18 Pac. 790, it is held, that under Code Civ. Proc. Cal. sec. 1254, relating to the taking of land for public use, which provides that at any time after judgment or pending an appeal, when the plaintiff shall have paid into court the amount of the judgment and costs, and such further sum as may be required by the court, a court may authorize plaintiff to take possession of the land condemned, when possession is taken without such an order the court may order possession to be restored to defendant.

**Agreement Pending Appeal as Affecting Right to Enter.**

An agreement entered into between a landowner and a railroad company, pending an appeal from an assessment of damages in an ad quod damnum proceeding under which judgment was entered in a circuit court for a specified amount, with stay of execution "or their proceedings to collect the judgment" for two years, did not amount to a sale of the right of way, nor confer authority to enter into possession. *Irish v. Burlington & S. W. R. Co.*, 44 Iowa 380.

**Consummation of Proceedings Entitles Company to Enter and Take Possession.**

Upon a consummation of the proceedings prescribed by the railroad act for the taking of lands for railroad purposes, the company is entitled to enter upon and take possession of the land, and all persons who have been made parties to the proceedings are divested and barred of all their interest therein. *Niagara Falls & L. O. R. Co. v. Hotchkiss*, 16 Barb. 270.

The judgment of the district court in the usual form of a judgment, in an ordinary action for debt, can have no other or greater effect than if it had been in the language conformable to the statute authorizing it. That is, it gives the company a right of way to enter on the land upon the payment of the sum assessed. The company is not required by such proceedings to take the land and pay the judgment. *Gear v. Dubuque & S. C. R. Co.*, 20 Iowa 523, 89 Am. Dec. 550.

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**Entry after Confirmation of Appraisal and Payment of Award into Court.**

Under the New York Laws 1854, ch. 282, authorizing the court before which condemnation proceedings are brought to make all orders necessary to carry such proceedings into effect, the court may make an order to put a railroad into possession of lands which it has caused to be appraised, after confirmation of the appraisal and payment of the amount awarded into court. *People v. New York Cent. & H. R. R. Co.*, 2 Hun 482, affirmed in 60 N. Y. 116.

**Entry as Affected by the Conclusiveness of the Compensation as Fixed by Jury.**

The verdict of the jury that tries an appeal from the award of commissioners fixes finally and conclusively the sum which in that particular case must be regarded as just compensation, so far as may be necessary to confer upon the condemning company the right, on the payment of the money, to appropriate the property condemned. *Jersey City, N. & W. Ry. Co. v. Cent. R. Co.*, 48 N. J. Eq. 379, 22 Atl. 728.

**Interest Vested by Judgment, Transmissibility.**

A judgment condemning lands for a right of way, under ad quod damnum proceedings after suit of a railroad company, vests in the company an estate and interest commensurate with its corporate existence; and this estate passes to purchasers at a sale under a mortgage executed by the company, who are afterwards incorporated as a railroad company, or to another company, corporation, or its assignee, so long as the contemplated use of the right of way is continued. *Davis v. Memphis & C. R. Co.*, 87 Ala. 633, 6 So. 140.

But in *Pomona Branch R. Co. v. Camden & A. R. Co.* (N. J. 1890), 20 Atl. 350, it is held, that, where condemnation proceedings are had under general railroad laws, the condemning company cannot tender and pay into court the amount of the award of the commissioners and enter into possession of the land sought, until the owner shall have had reasonable time to take an appeal from the commissioners' report. *Waite v. Port Reading Ry. Co.*, 48 N. J. Eq. 346, 22 Atl. 261.

**Effect upon Rights of Assignee of Damages of Company's Failure to Comply with Terms.**

Where a judgment is rendered by consent of the parties investing the company with title to the strip of land sought to be condemned upon condition that the company pay a certain sum in money and make certain improvements on the land and afterward keep them in repair, but the company fails to make the improvements, a claim that the landowner may have against the company for damages is not so far assignable as to pass to a subsequent purchaser of the land by virtue of the purchase, so as to allow him to demand a forfeiture or bring ejectment for the land. *Piper v. Union Pac. R. Co.*, 14 Kan. 574.

**Entry without Condemnation Does Not Affect Landowner's Title.**

A judgment in favor of a landowner, in an action against a railway company entering upon land without condemnation, to recover damages therefor, does not affect the landowner's title to the land, nor deprive him of his right to demand compensation therefor from another company which has succeeded to the rights of the first company and continues to use the property. *Rio Grande & E. P. R. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129.

**10. POSSESSION PENDING APPEAL FROM AWARD OR JUDGMENT.****Entry Dependent upon Charter Provisions.**

Where the charter of a railroad company requires the company to pay, or tender, the damages for land taken for their road to the owner, before they can break ground upon the same, and, if such damages cannot be agreed upon by the parties, provided for their assessment by commissioners, from whose decision an unconditional right of appeal is given, such company cannot, by tendering the

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amount of damages found by the commissioners, gain the right to break ground pending an appeal from the commissioners' award. *Browning v. Camden & W. R. & Transt. Co.*, 4 N. J. Eq. (3 H. W. Green) 47.

**Possession Dependent upon Payment.**

If on appeal the amount awarded the owner for land taken by a railroad in condemnation proceedings is greatly increased and final judgment rendered, an application for an appeal to the supreme court and a statement of the intention to prosecute the same, does not suspend the judgment, nor entitle the company to possession of the land, pending such appeal, without payment. *Lake Erie & W. Ry. Co. v. Kinney*, 87 Ind. 514.

Where the charter of a railroad company provides that it may proceed to construct its road as soon as the first verdict of the jury is returned in proceedings to condemn property for its use, whether the same be set aside and a new jury ordered or not, a supersedeas should not be granted on an appeal by the property owners awarded from an award of damages. *Tracy v. Elizabethtown L. & B. S. R. Co.*, 80 Ky. 259.

In pursuance of the provisions of an act authorizing railroad companies and regulating the same, which prescribes that upon the filing of the commissioners' report and payment of the amount awarded to the party entitled thereto, or on their refusal to accept it, upon payment thereof into the circuit court of the county where the lands lie, the company is privileged to enter at once and proceed with the construction of their road at any time before an appeal is taken from the report. And after entry by the company into possession of the condemned premises an appeal taken after the amount of the award has been paid to the court, does not deprive the company of the right to possession until after the trial of the appeal and payment or tender (and on refusal payment into court) of the amount of the verdict of the jury. *Mercer & S. Ry. Co. v. Delaware & B. K. Co.*, 26 N. J. Eq. (11 C. E. Green) 464.

**Right to Enter and Construct Road Pending Appeal after Payment or Tender of Compensation.**

It is held in Georgia, *Oliver v. Union Point & W. P. R. Co.*, 83 Ga. 257, 9 S. E. 1086, that a railroad corporation created under the general laws of 1881, may, after having paid or tendered to the landowner the compensation awarded by the assessors, prosecute the work of construction pending an appeal from the award to the superior court—the statute allowing the appeal providing expressly that the same shall not hinder or delay the progress of the work.

**Right to Enter Not Stayed by Writ of Error after Payment of Award.**

The right of a railroad company to enter upon condemned lands, conferred by the general railroad law (Revision, p. 925), upon payment of the amount found by the jury on the trial of an appeal from the report of the commissioner is not stayed by the suing out of a writ of error by the owner of the land. *National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co.* (N. J.), 30 Atl. 1102; *Packard v. Bergen Neck Ry. Co.*, 48 N. J. Eq. 281, 22 Atl. 227.

In New York the Code of Civil Proc. sec. 3375, provides in general terms for appeals from judgments and other proceedings under the Condemnation Act, and that such appeal shall be governed by ch. 12, tit. 4, regulating appeals to the general term in civil actions, but the proceedings of plaintiff shall not be stayed upon such an appeal except by order of the court, upon notice to him. Construing this provision in *Manhattan Ry. Co. v. Stroub*, 70 Hun 363, 24 N. Y. Supp. 68, it was held that on an appeal from a judgment in favor of one who held the fee to certain property, and against one who held the same under a lease from the former owner, and from an order confirming the award of commissioners assessing the latter's damages, the proceedings would not be stayed where appellant tendered no bond for damages resulting from such stay, and where it did not appear that the appellee was unable to pay all damages assessed.

Where the charter of a railroad company contained two contradictory provisions relating to condemnation proceedings, one that the company

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should be at liberty to proceed with the work of construction only upon giving the requisite bond, and the other prohibiting any injunction or supersedeas to stop the work,—the latter being a proviso was controlling. *White v. Nashville, etc., W. R. Co.*, 54 Tenn. (7 Heisk.) 518.

The provisions of the Georgia Code, sec. 1689 b, relative to award of assessors, and which authorizes a railroad company to prosecute work pending an appeal from the award, upon paying or tendering the amount of the award, is constitutional, as the method of ascertaining and securing the compensation is a matter for regulation by the legislature, the constitution of Georgia not extending the constitutional right of trial by jury to cases involving the right of eminent domain. *Oliver v. Union Point & W. P. R. Co.*, 83 Ga. 257, 9 S. E. 1086.

## II. REQUIREMENTS AS TO SECURITY.

**Failure to Deposit Renders Interference with Property a Trespass.**

A railroad company is liable in trespass for any interference with property before the determination of an appeal from the commissioners' report, where it fails to deposit with the clerk of the court the amount assessed as damages as required by Wag. St. p. 327, § 3. *Ring v. Mississippi Bridge Co.*, 57 Mo. 496.

**Entry after Giving Bond with Approved Security.**

Upon complying with the conditions of the Eminent Domain Act (Rev. St. ch. 47, § 13), which provides that, upon appeal by the landowner, the company shall be entitled to enter upon the use of the land by giving bonds to pay such compensation as may be finally adjudged, it is the right of the company to enter on the use of the land sought to be condemned pending the appeal; should the petitioner appeal it is required that he enter into like bonds with approved surety. *Chicago, S. F. & C. Ry. Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769; *Atchison, T. & S. F. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422.

**Payment of Deposit of Award Condition Precedent to Entry.**

Under Comp. St. ch. 16, §§ 97-100 providing that, if the owner of land which is desired for a railroad right of way refuses to grant the right of way, either party may apply to have damages assessed, and on payment of damages assessed, or, in case of appeal, a deposit of the award with the probate judge, a railroad may enter upon the lands, etc., and entry before appraisal and payment or deposit of damages is unlawful, and the railroad company in such case is liable for trespass. *Republican Val. R. Co. v. Fink*, 18 Neb. 82, 24 N. W. 439.

**After an Appeal Is Taken Damages Must Be Paid, Not Merely Secured.**

It is provided by the Gen. Laws of New Hampshire, ch. 160, §§ 22, 29 that, where a railroad is unable to obtain deeds to the right of way, they may appeal to the railroad commissioners for an appraisal of the damages to the landowner, and their report is final, unless either party aggrieved appeals therefrom, but, if an appeal is taken from the award of damages the appropriators may enter upon and use the land upon payment of the damages awarded to the owner, or on his refusal of the same, to the state treasurer, and filing in his office reasonable security, to the satisfaction of either of the county commissioners, for the payment of any further damages and costs which may be awarded to the landowner upon said appeal. This provision was construed in *Low v. Concord R. R.*, 63 N. H. 557, 3 Atl. 739, and it was held that the statute requires the railroad to pay the damages assessed, and not merely to secure their payment, before entering on the land after an appeal is taken.

**Tender after Appeal by Landowner Prevents Possession until Tender of Award Made by Jury.**

In New Jersey the general railroad law provides that an appeal by a landowner from the report of commissioners in condemnation proceedings shall not prevent the railroad company from taking the land on filing the report, but that the company shall in no case take possession of land until it has paid to the owner the amount assessed by commissioners as damages, or in case their report is appealed from the amount

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which shall be found by a jury; and that where the landowner refuses to accept a tender of the damages assessed by commissioners, or, in case of appeal the amount found by a jury, then the payment of the amount assessed in the circuit court shall be deemed a valid payment. Construing this provision in *Johnson v. Baltimore & N. Y. Ry. Co.*, 45 N. J. Eq. 454, 17 Atl. 574, the court held, that a railroad company which does not make a tender until after an appeal by the landowner cannot take possession of the land until a tender is made of the amount found by a jury. See *Revision (N. J.)*, p. 929, § 101.

As to what constitutes a tender before an appeal from an award it is held in *Pomona Branch R. Co. v. Camden & A. R. Co. (N. J. Ch.)*, 20 Atl. 350, that where a railroad company has failed to agree with the landowner as to the amount of damages to be paid by it for crossing his land, and commissioners are appointed under the New Jersey statute, a tender of the amount awarded by them before their award is filed in the office of the clerk is not such a tender before such appeal from the award as under the statute will protect the railroad company in entering on the land without waiting for the determination of the appeal taken from the award as soon as it is filed.

#### Affirmance of Judgment as Vesting Right of Way and Fixing Liability on Bond.

In *Centralia & C. R. Co. v. Henry*, 31 Ill. App. 456, proceedings were instituted by a railroad company to condemn a right of way through private property. A bond had been given by the company under *Starr & C. Ann. St. ch. 47, § 13*, after an appeal from the findings of the jury as to damages. The court held, that the entry of the company on the premises thereunder was proper, and that the subsequent affirmance of the judgment vested the right of way in the company, and fixed its liability on its bond in the amount of the judgment, with interest and costs.

#### When Company upon Giving Bond for Compensation Is Justified in Its Possession Even after Reversal of Judgment on Appeal.

Under the Eminent Domain Act, § 13, providing that, notwithstanding an appeal by the defendant in condemnation proceedings the petitioner may enter upon and use the property upon giving bond to pay such compensation as may be finally adjudged in the case, a railroad which has given such bond and, as here, actually paid the amount awarded by the judgment appealed from, is justified in the possession even after a reversal of the judgment on the appeal, no further proceedings having been taken in the case, and the defendant having lost by delay his right to take any further proceedings. *St. Louis, A. & F. H. R. Co. v. Karnes*, 101 Ill. 402.

#### Return of Security upon Reversal of Judgment by Reason of Proceedings Being Void.

Where, in condemnation proceedings, the judgment is, on appeal by the landowner, reversed, without a remandment (the proceedings being void on account of the purpose for which the land was condemned being unlawful), the court, on petition, may properly direct the clerk of the court to return to the party for whose use the land was condemned the security for payment of damages awarded the landowner, deposited by the party to enable him to take possession of the land pending the appeal; the remedy of the landowner (it not appearing that depositor was insolvent) for damages caused by the entry being an action for the trespass. *Ligare v. Chicago, M. & N. Ry. Co.*, 160 Ill. 530, 43 N. E. 734.

## 12. RESTRAINING INTERFERENCE WITH POSSESSION.

The New York Code Civ. Proc. sec. 3379, providing that at any stage of the proceedings the court may authorize the plaintiff, if in possession of the premises to continue therein, and may stay all actions and proceedings against him on account thereof upon giving security for the payment of the compensation which may be finally awarded to the owner, does not authorize the court, after an order of confirmation has

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been ordered, to grant an order restraining defendants from maintaining actions in respect to the property, but is merely designed to protect plaintiff's possession pending the condemnation proceedings. *Manhattan Ry. Co. v. Taber*, 78 Hun 424, 29 N. Y. Supp. 220.

Where, upon bond being given by a railroad company on an appeal from the report of viewers assessing damages for the land taken, the owners lease the coal under the land, the lessee will be restrained from mining such coal. He may, however, petition for viewers, if he has any interest not covered by the company's bond. *Philadelphia & Reading R. Co. v. Lawrence*, 31 Leg. Int. (Pa.) 79.

## 13. PROCEEDINGS TO OBTAIN POSSESSION.

**In Action for Land Condemned the Necessity for the Taking Does Not Have to Be Proven.**

A railroad company does not have to prove that the use of the land is necessary for its operation or that the defendant's possession interferes with its present use of the land, where it brings an action for land which it has condemned. *Pittsburg, Ft. W. & C. Ry. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467.

**Ex Parte Order Pending Appeal Permitting Occupancy.**

It is not within the power of a court of probate, pending an appeal in condemnation proceedings to the supreme court, to grant an ex parte order permitting the occupancy of the premises sought to be condemned during the proceedings. *Detroit, L. & N. R. Co. v. Probate Judge*, 63 Mich. 676, 30 N. W. 598.

**When Objections Regarding the Proper Amount of the Compensation Cannot Be Heard.**

In *Chicago & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. 881, it is declared that on a motion for an order for possession of land, after payment of the compensation awarded for its condemnation, objections which have reference to the proper amount of compensation cannot be heard.

**Order for Possession—Direction as to Payment of Compensation.**

An order for possession of land condemned by a city having a street need make no direction as to payment of the compensation awarded, where it recites that the payment has already been made. *Chicago & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. 881.

## 14. RIGHT TO COMPENSATION.

**Issue Joined upon Amount of Damages—Ownership Not Challenged—Unqualified Right of Owner to Damages.**

Under the Illinois Bill of Rights (Const. 1870, art. 2, sec. 13), and the Eminent Domain Act passed in pursuance thereof (Rev. St. 1874, ch. 47, p. 475), when the issue in condemnation proceedings is simply as to the damages resulting to a particular tract claimed by one whose ownership is in no way challenged, and who offers no evidence as to the nature or extent of his interest, the judgment should secure to him personally the entire damages awarded, and an order directing the same to be paid to the county treasurer "for the benefit of the owners and parties interested" in the lands is erroneous. *Convers v. Atchison, T. & S. F. R. Co.*, 142 U. S. 671, 12 Sup. Ct. 351.

**Owner's Right to Surrender Possession, and Demand Compensation—Effect of Commissioners' Award.**

An award of commissioners fixing at \$15,000 the value of real estate condemned by a railway company, and, also, fixing the value of improvements at \$3,500, and further finding that the owners will have sustained no damages by reason of the interruption of their business if they shall retain the improvements for three months, and fixing the damages of interruption at \$1,600 if they retain the possession two months, and at \$3,200 if they retain possession one month, does not entitle such owners to surrender the possession at any time and claim the amount then due by the terms of the award, but leaves it optional with the company whether or not it shall take possession within three

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months and pay the stipulated damages. *Glennon v. Chicago, M. & St. P. Ry. Co.*, 79 Ill. 501.

**Award Recorded by Mistake—Vesting of Title—Right to Payment of Award.**

Allowing an award of damages for a right of way to be recorded by mistake is not a tort and no title passes by reason thereof, so as to raise an implied contract to pay the amount of the award; nor would such contract be implied by failure of the company to correct the mistake, until the fact of the mistake had become known to the company, and until a reasonable time thereafter to correct it. *Dimmick v. Council Bluffs & St. L. Ry. Co.*, 58 Iowa 637, 12 N. W. 710.

**No Dispute as to Party Entitled to Compensation—Power of Court to Order Dispute of Sum Awarded—Appeal from Appraisal.**

Where there is no dispute as to the parties entitled to receive the compensation awarded by a commissioner for property sought to be taken, nor disability to receive it, the court has no power to order a deposit of the sum awarded, or any part thereof, during an appeal to be taken by the railroad company from such appraisal. *Saratoga & S. R. Co. v. Schnectady Stove Co.*, 66 How. Prac. 43.

**Merger of Award in Judgment—Amount to Be Paid Landowner.**

An award of damages by a commissioner is not merged in a judgment for a less amount or the verdict of a jury, so long as an appeal from the latter judgment is pending, but stands as the amount to be paid the landowner before possession can be taken. *St. Louis, K. & N. W. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. 157.

**Sale of Company's Plant and Franchise under Mortgage—Liability of Surety on Bond.**

The fact that a railroad company's plant and franchise have been sold out under a mortgage does not release it or its sureties from a bond to compensate for land taken for the right of way. *Keller v. Harrisonburg & P. R. Co.*, 161 Pa. St. 504, 29 Atl. 95.

**Compensation for Infant's Land—Payment to Guardian Ad Litem.**

A decree in condemnation proceedings should not order the damages to be paid to guardian ad litem of an infant owner; it should be kept in court until the appointment of a guardian, or until some one legally authorized appear to claim it. *Brown v. Rome & D. R. Co.*, 86 Ala. 206, 5 So. 195.

**Levee Commissioners—Admission of Ownership—Deduction for Street.**

In *New Orleans & C. R. Co. v. Levee Commissioners*, decided in 48 La. Ann. 1098, 20 So. 678, land was expropriated by a railroad company, and the board of levee commissioners admitted that it belonged to such railroad company, and fixed the value therefor, without deducting for a street claimed to run through the property. Upon appeal it was held that the railroad company would be decreed indebted for the property, in a subsequent action by the owners against it for compensation, without reference to the street.

**Payment into Court by Company of Award—Order to Show Why Payment Should Not Be Made to Certain Persons—Validity of Contention of Right to Land under Government Grant.**

Where a railroad company has proceeded to condemn a right of way over certain premises, and has paid into court for the owner the amount awarded therefor, it cannot, on an order to show cause why the funds should not be paid to a certain person claiming to be owner, contend that it was entitled to the land under its grant from the government of a right of way over the public land. *Northern Pacific R. Co. v. Jackman*, 6 Dak. 236, 50 N. W. 123.

## 15. INTEREST ON AWARD.

### a. In General.

**Effect of Damages for Delay in Payment of Compensation Being Denominated Interest.**

Under the Iowa Code 1873, § 1259, providing that, if the damages



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found by the commissioners in condemnation proceedings are decreased on the trial of an appeal, such amount only shall be paid to the landowners, the jury trying such appeal may award damages for the delay in making compensation, and it does not matter that such damages are denominated as "interest" on the principal sum of the award. *Noble v. Des Moines & St. L. R. Co.*, 61 Iowa, 637, 17 N. W. 26.

**Appeal—Motion of Dismissal—Effect of Sustaining without Payment of Interest.**

Where a railroad company makes a move to dismiss an appeal taken by it to the district court, from an award in the county court, it is error to sustain the motion without requiring the company to pay interest on the award, as such motion is equivalent to an admission of its correctness. The proper motion in such case is to affirm the award. *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb. 620, 37 N. W. 470.

**Award—Affirmance on Appeal—Payment of Compensation and Costs—Subsequent Application to Redocket—Allowance of Interest.**

Where, in condemnation proceedings, after an affirmance of the award on appeal to the supreme court, the owner receives from the sheriff the amount awarded, and the railroad company pays the costs in the case, a subsequent application in the trial court, by the owner, to have the case redocketed, and an allowance of interest made on the award, is properly denied. *Jamison v. Burlington & W. Ry. Co.*, 87 Iowa 265, 54 N. W. 242.

**Condemnation of a Portion of a Mortgaged Tract—Interest Dependent on Sufficiency of Residue to Pay Mortgage.**

Interest should not be computed upon the award where pending the foreclosure of a mortgage upon lands, a portion of which has been conveyed by the mortgagor to a railroad company, the company condemns the portion so conveyed by a proceeding to which the mortgagee is made a party, as in such case the company's obligation to pay any portion of the award in satisfaction of the mortgage is contingent upon the residue of the property being insufficient to satisfy the mortgage debt. *North Hudson R. Co. v. Booraen*, 28 N. J. Eq. (1 Stew.) 593.

**b. Date from Which Interest Runs.**

**Date of Possession.**

Under eminent domain proceedings, the amount due as compensation bears interest from the date of possession taken. *Illinois & St. L. R. Co. v. McClintic*, 68 Ill. 296; *Bellingham Bay & B. C. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140. And though the Pennsylvania Acts of March 27, 1848, relating to the report of viewers of damages in condemnation proceedings, declare that "execution may issue thereon as in other cases of debt," without saying anything about interest, one whose land has been taken for a railroad, from the time it is taken is in the position of a vendor of land, who is entitled to interest on the purchase money when the vendee has possession. *Pennsylvania R. Co. v. Cooper*, 58 Pa. St. 408. And where a railroad company condemns land and has the damages assessed, and the property owner makes no opposition, but relies on his right to have the damages paid within thirty days after the entry of judgment on the award in his favor, the failure of the railroad company to take possession of the land does not relieve them from the payment of interest on the award. *Davis v. North Penn. R. Co. v. Cooper*, 2 Phila. 146, 13 Leg. Int. 229.

**From Date of Final Confirmation of Award or Report.**

An award assessing damages for land taken for railroad purposes carries interest from the date of the decree confirming same, although the company, pending proceedings by certiorari in the supreme court, abstained from doing what it had a right to do, viz., take possession of the land when the award had been confirmed. *Davis v. North Pennsylvania R. Co.*, 13 Leg. Int. 229. And where viewers award damages to a landowner he is entitled to interest on the award from the date of the final confirmation of the report. *Harness v. Chesapeake & O. Canal Co.*, 1 Md. Ch. 248. In *Concord R. Co. v. Greely*, 23 N. H. 237, it is held that where the amount of damages for the right of way for a

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railroad has been fixed by an award, a court should allow interest from the time of the award, unless the corporation make a tender, or dispute the money in compliance with the Act of 1844. Where an award "to plaintiff, as owner, or to persons interested," was confirmed, but the damages assessed were, over plaintiff's objection, ordered to be deposited in bank, under section 17 of the General Railroad Act (Laws 1876, ch. 198), which was done, and on appeal plaintiff procured a modification of the order directing payment to himself as owner, the damages not having been paid, nor the order recorded, as required by section 18 of that act, plaintiff, on suing therefor, may recover interest from the date of the order of confirmation. *Eno v. Metropolitan El. Ry. Co.*, 56 N. Y. Super. Ct. 95, 1 N. Y. Supp. 521.

**Interest as Dependent upon Date of Filing Award.**

An award of viewers assessing damages for land taken for a railroad was delivered to counsel for the railroad company on May 3, 1881. He did not file it until June 18, 1881, and on Oct. 4, 1881, the company paid the amount awarded with interest from June 18, 1881. It was held that the owners were not entitled to interest from May 3 to June 18, 1881. *Hays v. Baltimore & O. R. Co.*, 29 Pittsburg Leg. J. 239. And in *Seefeld v. Chicago, M. & St. P. Ry. Co.*, 67 Wis. 96, 29 N. W. 904, it is held that a landowner is entitled to interest on the whole sum assessed by the jury as compensation for a right of way condemned by a railroad company from the date of the filing of award by commissioners. And in proceedings under the charter of the First Div. of the St. P. & Pac. R. Co. [Laws 1857 (Ex. Less. ch. 1)], to obtain private property for its use for railroad purposes, on appeal from an award of the commissioners the court should, to make the compensation just, enter judgment for the damages as assessed by the court or jury, with interest from the date of filing the award of the commissioners, though there is no express authority therefor in the charter. *Warren v. First Div. St. P. & P. R. Co.*, 21 Minn. 424; *Knaup v. St. P., S. & T. F. R. Co.*, 22 Minn. 173; *Wilkin v. Same, Id.* 177; *Whitacre v. St. Paul & S. C. R. Co.*, 24 Minn. 311.

**From Entry of Judgment, Not from Rendition of Verdict.**

Interest on the sum awarded for land taken by condemnation should be computed from the entry of the judgment, and not from the rendition of the verdict. *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142, 33 Atl. 860. See also, *Leiper v. Baltimore & O. R. Co.*, 3 Del. Co. R. 373.

**On Report of Viewers Interest Runs from Date of Filing.**

The report of viewers appointed to assess damages for the taking of land for a railroad company bears interest from the date of its filing and not from the date of its final confirmation over the objection of the company. *Pennsylvania R. Co. v. Cooper*, 58 Pa. St. 408.

**Stay of Execution—Allowance of Interest.**

Under 1 Smith's Laws, p. 7, allowing interest on judgments from their rendition, a landowner, in proceedings to assess damages, is entitled to interest on the award for the 30 days' stay of execution allowed by Act March 27, 1849. *Leiper v. Baltimore & O. R. Co.*, 5 Penn. Co. Ct. R. 60.

**Appeal by Landowner—Withdrawal—Date from Which Interest Runs.**

Where an owner appeals from a report of viewers awarding damages for his property taken by a railway company, he is not entitled to interest on such award from its date on subsequently withdrawing the appeal, since, by taking the appeal, he deprived the company of the power to settle before the time when it was withdrawn. *Ross v. Pennsylvania R. Co.*, 14 Wkly. Notes Cas. 143; *Donaldson v. Penn. R. Co.*, 15 Wkly. Notes Cas. 312.

**c. Amount of Award Increased or Decreased.**

Damages to land by a railroad being ascertained by the jury, on appeal, to be greater than the sum assessed by the jury of the vicinage, interest may be added to the damages. *Selma, R. & D. R. Co. v. Gamage*, 63 Ga. 604. And where, on appeal, the amount of damages,

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allowed and paid by the railroad into court, is increased, interest should be allowed on the amount from the date of the original award to the date of judgment.

*Iowa*.—*Hartshorn v. Burlington, C. R. & N. R. Co.*, 52 Iowa 613, 3 N. W. 648.

*Kansas*.—*Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75.

*Nebraska*.—*Sioux City R. Co. v. Brown*, 13 Neb. 317, 14 N. W. 407.

*Wisconsin*.—*Neilson v. Chicago & N. W. Ry. Co.*, 91 Wis. 557, 64 N. W. 849.

If, on appeal from commissioners assessing the damages the owner recovers a less amount, he is not entitled to interest on the money deposited by the company pending the appeal. *Reisner v. Atchison Union Depot & R. Co.*, 27 Kan. 382. A railroad having given security for damages awarded by commissioners, interest should be added to the whole amount of damages awarded, on appeal; but when the amount of damages has been deposited, and the verdict exceeds the award, interest should be given only on the amount the verdict exceeds the award. *Shattuck v. Wilton R. R.*, 23 N. H. (3 Fost.) 269.

In *Neilson v. Chicago & N. W. Ry. Co.*, 91 Wis. 557, 64 N. W. 849, it is held, that where an appeal from an award, which has been paid by the company into court, is prosecuted by only one of the owners of the land condemned, the fact that the amount of damages awarded him was decreased will not prevent him from recovering interest on the new amount allowed him from the date of the original award, if the damages allowed all the owners exceeded the original award. An instruction, in an appeal from an award of damages for a right of way to allow interest on the amount found, if it exceeds the amount of the award appealed from, is proper. *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75.

**d. Amount of Award Deposited—Effect.**

**Reassessment—Interest from Date of First Assessment.**

Where a railroad company pays into court the amount awarded by commissioners for land taken as soon as such award is made, a subsequent reassessment of such damages by a jury should be made on the basis of the value of the land at the time of the commissioners' report, since in such case the appropriation is made at the time of the first assessment. *St. Louis, O. H. & C. Ry. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069.

**Payment into Court—Owner Entitled Only to Interest Earned by Money While in Court's Custody.**

When a railroad company pays into court the amount of the commissioners' award for land condemned and the court orders it paid to the owner, the latter is not entitled to interest on the award from the time the company took the land, but only to such interest as the money may have earned while in the court's custody. *St. Louis, K. & N. W. Ry. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 26 L. R. A. 751.

Pending an appeal from an award in proceedings to condemn land for a railroad, even though the company has paid the money into court, and has not taken possession, the sum awarded bears interest from the date of the filing of the award, if the premises have been vacated by the tenant and have remained unoccupied and no rent accruing after the date of the filing has been received by the owner therefor. *Unmack v. Chicago, M. & St. P. Ry. Co.*, 67 Wis. 108, 29 N. W. 899.

But under Const. art. 2, sec. 21, and Rev. St. 1889, sec. 2736, providing that in condemnation proceedings the landowner's property shall not be disturbed till the award of commissioners is paid to him, or into court for him, where the railroad company, for whom the condemnation proceedings are had, pays the award into court, and takes possession of the land, the landowner has the right to immediately withdraw the money and therefore is not entitled to interest thereon, pending the determination of the railroad company's exceptions to the commissioners' report. *Chicago, S. F. & C. Ry. Co. v. Eubanks*, 130 Mo. 270, 32 S. W. 658.

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**Tender—Refusal—Payment into Court—Running of Interest Stopped.**

The General Railroad Act (Revision, p. 929, sec. 101), relative to condemnation proceedings, provides that if the party entitled to receive the amount found by the jury shall refuse to receive the same, then the payment of said amount into the circuit court shall be deemed a legal payment. In *National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142, 33 Atl. 860, it was held, that a tender of the principal sum with interest, followed, after a refusal to accept the same, by payment into court, stops the running of interest on an award for land taken by condemnation.

**e. Deducting Rents and Profits.**

Where, in the proceedings for the condemnation of lands for railroad purposes, an appeal from the award of commissioners is taken, and the land has, between the time of filing the award and assessment of the damages by the court or jury, been of actual value to the owner, such value should be ascertained by the court or jury, and deducted from the interest allowed. *Warren v. First Division St. P. & P. Ry. Co.*, 21 Minn. 424. See *In re Second Street*, 66 Pa. St. 132.

**16. THE LIEN.****What Constitutes a Waiver of Owner's Right to Equitable Damages.**

Consent by the owner of land to a railroad company entering thereon and constructing its road, an arrangement for the future adjustment of damages, and their appraisal by commissioners, is not a waiver of the owner's equitable lien for damages. *Kittell v. Missisquoi R. Co.*, 56 Vt. 96.

**Land Condemned and Compensation Unpaid—Lien after Operation of Road.**

The owner of land condemned for railroad purposes and not paid for has a lien for the price, against the company, after the road has gone into operation, and against all occupying it as lessees or otherwise. *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633.

**Charter Provision as Giving a Mortgage Lien.**

The charter of the Central Railway Co. of New Jersey, § 7 (P. L. 1849, p. 128), provides that the report of commissioners in condemnation proceedings, or a certified copy thereof, shall be plenary evidence of the landowner's right to recover the valuation of his land, with interest and costs, in an action of debt in any court of competent jurisdiction in a suit to be instituted against the company, if it neglects or refuses to pay for twenty days after demand, and shall from that time constitute a lien on property of the company in the nature of a mortgage. This is held to plainly give a mortgage lien for condemnation money. *Frelinghuysen v. Cent. R. Co.*, 28 N. J. Eq. (1 Stew.) 388.

**Mortgage of Road and Franchises—Condemnation and Award of Damages—Repeal of Charter and Subsequent Incorporation under New Name—Effect of Mortgage.**

A railroad executed a mortgage on its road, franchises, etc., and afterwards occupied land for its uses. Damages were assessed and judgment awarded for the occupancy of the land. The railroad was sold under the mortgage, and subsequently, the charter was repealed, and it was incorporated under another name. In *Western Penn. R. Co. v. Johnston*, 59 Pa. St. 290, it was held, that the mortgage did not operate upon the paramount claim of the landowner over the mortgage interest, because such interest was not a mere lien; the judgment in the process of assessment not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payments. His interest could be extinguished only by payment or release.

**Enforcement of Vendor's Lien—Effect of Recovery of Judgment for Value of Land Taken and Damages.**

The right to enforce a vendor's lien against a railroad company for land taken by it by reason of condemnation proceedings is not barred

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by recovery of judgment against the company for the value of the land taken and damages. *Coe v. New Jersey Midland Ry. Co.*, 31 N. J. Eq. 105.

**Failure of Company to Have Damages Appraised—Proceedings by Owner to Recover as Affecting His Lien upon Land.**

Proceedings, under R. L. § 3371, to recover damages for land taken by a railroad, upon the failure of the company to have the damages appraised by commissioners, do not affect the owner's lien on his land, and damages recovered therein may be adopted in a suit to enforce that lien. *Bridgman v. St. Johnsbury & L. C. R. Co.*, 58 Vt. 198, 2 Atl. 467.

### 17. FORECLOSURE OF LIEN.

**Forum.**

The court of chancery is the proper forum for the enforcement of a lien given by a railroad company's charter for condemnation money. *Frelinghuysen v. Cent. R. Co.*, 28 N. J. Eq. 388.

**Vendor's Lien—Effect of Recovery of Judgment.**

The recovery of judgment against a railroad company for the value of the land taken and damages, does not bar the right to enforce the vendor's lien against the company for land taken by it in condemnation proceedings. *Coe v. New Jersey Midland Ry. Co.*, 31 N. J. Eq. 105.

**Proper Parties Where Original Company Has Been Merged.**

In an action by the owners of land to enforce their lien by foreclosure against a railroad company for land damages, the company which constructed the road is not a necessary party, after being merged with other companies into the one against which the action is brought, and an heir who has sold his interest in the land need not be made a party plaintiff, nor need an administrator be appointed to represent a deceased heir in the suit where the complainants are the "sole owners of her estate." *Bridgman v. St. Johnsbury & L. C. R. Co.*, 58 Vt. 198, 2 Atl. 467.

### 18. NECESSITY AND PLACE OF RECORDATION.

The Rev. Statutes of New York (8th Ed.), p. 1745, sec. 18, providing that a certified copy of the order confirming the award of appraisers in condemnation proceedings shall be recorded "in the clerk's office of the county in which the land described in it is situated," does not require recording in the book of conveyance, but a recording in an office of the county clerk is a sufficient compliance. *Morgan v. New York & M. R. Y. Co.*, 55 Hun 606, 7 N. Y. Sup. 731.

And under the Texas Rev. St. art. 4332, which provides that "all bargains, sales, and other conveyances whatever, of any lands, \* \* \* be void as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they shall be acknowledged, or proved, and filed with the clerk to be recorded as required by law," a judgment in condemnation proceedings by a railroad company must be recorded in order to protect the company from the claims of a subsequent purchaser from the landowner. *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Estoppel to Claim That Recordation Should Have Been in Deed Book.**

Where the original order confirming an award in proceedings to condemn land for railroad purposes was delivered to the county clerk by the railroad company, who caused it to be recorded at full length in a separate book kept for such orders, the company, in an action on the award, will not be permitted to claim that the recording should have been in the book of the deeds, and of a certified copy instead of the original. *Morgan v. New York & M. Ry. Co.*, 130 N. Y. 692, 29 N. E. 990.

### 19. NECESSITY OF PAYMENT TO THE PASSING OF TITLE.

The right of the landowner to the damages awarded by commissioners is a correlative right to that of the company to the land. If the com-

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pany has no vested right to the land, the landowner has none to the price to be paid or the damages awarded to him for it. *Stacey v. Vermont C. R. Co.*, 27 Vt. 39.

As a general rule the judgment confirming proceedings condemning land and assessing damages therefor, does not fix absolutely the right of one party to the land condemned nor the right of the other to the damages awarded; but it is the payment or tender of payment on the one side, and yielding to a demand for possession on the other, which fix the respective rights of the parties as ascertained by the judgment.

If, in such case there has been no payment or tender of compensation, and no disturbance of the owner's possession, the one party has acquired nothing and the other lost nothing; except that if the owner has suffered damage by reason of the proceedings, either in the conduct of them or consequent upon them, as in the destruction of structures or the digging of earth in the one case, or the depreciation of values, the prevention of erections, the incurring of expense or change of plans and losses of sales in the other, he is entitled to full compensation therefor, though in the specific sum adjudged to him; but cases may arise where the condemning party will be estopped by some matter in pais from receding from the judgment rendered at his own instance; and this should, perhaps, always, be the rule where it is impossible otherwise to fully compensate the owner. *Williams v. New Orleans, M. & F. R. Co.*, 60 Miss. 689.

In *Gillison v. Savannah & C. R. Co.*, 7 S. Car. 173, it appeared that the provisions of a charter authorized the company to condemn lands, the title thereto "to vest in the said company in fee simple as soon as the value thereof may be paid or tendered and refused." A condemnation proceeding was instituted and the value on the land taken was fixed, but never paid; but the company went into possession and subsequently becoming insolvent, all of his property was sold to a new company, which took possession of the land. Some twelve years after the condemnation proceedings the landowner commenced a proceeding against the second company, to have the valuation paid or the land restored to him. It was held that he was entitled to the relief demanded.

In such case the transaction was in the nature of an executory contract for the sale of the land and no title passed until the valuation was either paid or tendered; and the second company purchased only the right to complete the contract and could not set up the defense of a purchase for a valuable consideration without notice. Neither could the second company hold a claim of adverse possession, nor be protected by the statute of limitations. The landowner had a lien on the land in the nature of a mortgage, and might enforce payment.

If the owner of land through which a company wishes to run a railroad agrees to refer to arbitrators the question of damages to be paid by the company for the right of way, and there is no express agreement that time shall be given for the payment of the damages awarded, they must be paid before the right of way can rest in the company. *Stewart v. Raymond R. Co.*, 15 Miss. 568.

Under sec. 15 of the Pa. Act of Feb. 17, 1831, incorporating the Philadelphia, Germantown & N. R. Co., if there is a report made by viewers ascertaining the damages to the owner by the occupation of land for the railroad, and an appeal therefrom, and verdict and judgment thereon, the company is bound to pay the amount fixed by the verdict and judgment before it can become seized in fee of the land. *Levering v. Phila. G. & N. R. Co.*, 8 Watts (Pa.) 459.

## 20. ENFORCEMENT OF AWARD OR JUDGMENT.

Validity of Execution without Order of Court, or Any Notice to the Company.

Where proceedings were instituted under Acts 1853, p. 357, sec. 8 and 9, and Acts 1860, p. 441, sec. 4, which were parts of the charter of a railroad company, to assess damages for land taken by said company, and

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a judgment was rendered in favor of the landowner upon the commissioners' report, execution may issue without an order of the court or any notice to the company, as required by Wag. St. p. 327, sec. 31. *Provolt v. Chicago, R. I. & P. Ry. Co.*, 69 Mo. 633.

**Company's Refusal to File Papers or Pay Award—Motion to Compel.**

Where, in proceedings by a railroad company, under the general railroad act (Laws 1850, ch. 140), to acquire land for its right of way, the company refused, after confirmation of the commissioners' report of appraisal and the making of an order as to payment of the award, as prescribed by section 17, to file the papers or enter the order or pay the award, the court may properly grant a motion of the landowners to compel the filing of the papers and order, and also, under prayer for "other and further relief" direct the company to pay or deposit the amount of the award as directed in the order of confirmation, and that a precept issue for its collection in default of payment for ten days. *In re Rhinebeck & C. R. Co.*, 67 N. Y. 242.

**Ascertainment of Damages by Report and Judgment—Right to Execution.**

When damages caused by locating a railroad across land have been ascertained by report and judgment thereon, the right of the landowner to such damages is completely settled, and he is entitled to execution. *Neale v. Pittsburg & C. R. Co.*, 2 Grant Cas. (Pa.) 137.

**Authority to Enter Judgment and Direct Execution.**

Upon the condemnation of a lot by a railroad company, followed by a deposit of the money with the county judge, and an appeal taken to the district court, and a verdict in favor of the lot owner, it is within the power of the district court to enter judgment, and direct execution to issue against the company, instead of treating the verdict as a mere award of damages which the company may pay at its pleasure. *Drath v. Burlington & M. R. R. Co.*, 15 Neb. 367, 18 N. W. 717.

**Decree Confirming Award, a Sufficient Compliance with Statutory Requirements.**

A decree of the court confirming an award assessing damages for land taken for railroad purposes, which has been entered upon the record, is a judgment of the court sufficient to meet the requirements of the Act of 1849, and execution may issue thereon. *Davis v. North Pennsylvania R. Co.*, 13 Leg. Int. 229. See also, *Neale v. Pittsburg & C. R. Co.*, 31 Pa. St. 19.

**Damages—Company's Right to Stay of Execution.**

A railroad company is not entitled in Pennsylvania to stay of execution under the provisions of the Act of June 16, 1837. The reason for this is that damages for the taking of property by a railroad company arise from an act of appropriation under the state power of eminent domain, and do not rest on contract express or implied. *Harrisburg & P. R. Co. v. Pepper*, 84 Pa. St. 295.

**Scire Facias Quare Executionem Non—Affidavit of Defence—Insufficiency—Refusal of Judgment.**

Where an affidavit of defence to a scire facias quare executionem non sets up that a railroad corporation which effected an entry on lands gave bonds with sureties, which were accepted by the owner as adequate security, and that the successors to the rights and franchises of such company never entered upon the land, but abandoned it, and that the judgment, for damages, obtained against the company after the acquisition of the road by its successors, was without notice to them, these facts, if proved, present a case to be passed on by a jury, and it is not error to refuse judgment for want of a sufficient affidavit of defence. *Potter v. Pittsburg S. Ry. Co. (Pa.)*, 2 Atl. 75.

**When It Is Improper to Award Execution for Damages.**

In a proceeding by a railroad company to condemn land for right of way for its road, under the Act of Illinois of 1852, it is error to award execution against the company for the damages assessed. *St. Louis & S. E. Ry. Co. v. Lux*, 63 Ill. 523; *Springfield & I. S. E. R. Co. v. Turner*,

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68 Ill. 127. But where the verdict of the jury on an appeal from the assessment of damages finds that the land has been taken by the company, and not merely that it is proposed to be taken, it is proper to award execution on the judgment. *Peoria & R. I. Ry. Co. v. Mitchell*, 74 Ill. 394. See ante, 4, "Personal Judgment for Damages."

**Verdict and Judgment Defective and Insufficient—Recovery of Condemnation Money—Estoppel to Deny Validity upon Acceptance.**

Where the verdict and judgment in a condemnation proceeding are defective, and insufficient as to all and every part of the property sought to be taken, so as not to vest any right in the petitioner in any part of the land, if the landowner should seek to recover the condemnation money, he would be bound to consent that the petitioner should take the entire property. In such case he cannot take the money and retain the property. Acceptance of the money would estop him from denying the validity of the condemnation. *Union Mutual Life Ins. Co. v. Slee*, 123 Ill. 57, 12 N. E. 543.

**Acquisition of Company's Franchises by Another Company—Entry and Occupation of Condemned Land—Liability of Purchasing Company under Original Appropriation Proceedings.**

Where the appellant acquired the property, rights and franchises of a railroad corporation which had condemned land for a right of way, and the appellant entered upon, used and occupied the land for the purposes for which it was condemned, it must be held to have adopted the original appropriation, and having adopted and ratified such appropriation, it is bound in equity to compensate the owners for the land thus taken, and it is bound by the judgment in condemnation proceedings against the corporation through which it takes its title. *New York, C. & St. L. R. Co. v. Hammond*, 132 Ind. 475, 32 N. E. 83.

**When Company Not Liable as for a Tort, or for Payment of Award.**

Where a railroad company condemned a right of way which lapped on plaintiff's lot at one point, and entered upon a right of way, but did not occupy the plaintiff's lot, and did not pay the damages awarded him, it cannot be held that the company has made such an appropriation of the property as to be guilty of a tort, or to make it liable to pay the award. And allowing an award to be recorded by mistake is not a tort, and no title passes by reason thereof, so as to raise an implied contract to pay the amount of the award, nor would such contract be implied by failure of the company to correct the mistake until the fact of the mistake had become known to the company, and until a reasonable time thereafter to correct it. *Dimmick v. Council Bluffs & St. L. R. Co.*, 58 Iowa 637, 12 N. W. 710.

**Assessment Dispensed with—Promise to Pay Damages—Recovery on Special Promise.**

A railroad company may dispense with the assessment of damages by commissioners for letting its track through private property, by promising to pay such damages; and the landowner may recover on the special promise. *Plott v. Western N. C. R. Co.*, 65 N. Car. 74.

**Default in Payment Dependent upon Demand.**

A demand for the payment of an award for land taken for railroad purposes must be made on the company before the company can be held in default. *New York N. S. & B. R. Co. v. Townsend*, 36 Hun 630.

## 21. AMENDMENT.

**Apparent Right to Damages—Failure of Evidence—Amendment of Judgment in Appellate Court.**

Where a landowner seems to be entitled to damages, but has failed to adduce sufficient evidence in support of his claim in a condemnation proceeding, his right to assert and prove such damages should be reserved to him by the appellate court by an amendment of the judgment. *Mississippi, T. & L. B. R. Co. v. Wooten*, 36 La. Ann. 441.

**Failure of Judgment to Comply with Statute in Vesting Title in Company—Proper Entry at Subsequent Term.**

In *Lexington and St. S. R. Co. v. Mockbee*, 63 Mo. 348, objections



## South Chicago City Ry. Co. v. City of Chicago

were filed to the report of commissioners assessing damages for land taken for a right of way, and a motion was made to set aside the report. The clerk made an entry on the docket, "objections overruled and judgment for defendant." The statute required that judgment in such proceedings be entered vesting the title to the land in the company, but the clerk made entry "that plaintiff take nothing by his action, and the defendant recover his costs." It was held, that the proper judgment might be entered nunc pro tunc at a subsequent term.

## Amount of Award Paid in Court—Jury Demanded—Verdict—Error in Rendering Judgment—Correction.

In *Ohio River R. Co. v. Harness*, 24 W. Va. 511, the commissioners reported \$225 as a sufficient compensation for the land proposed to be taken, and for damages to the residue, which sum the applicant paid into court, and the landowner demanded a jury, who by their verdict ascertained his compensation to be \$999. The court gave judgment in favor of the landowner for the whole amount of the verdict, with interest from date of the judgment, and costs, to which the applicant obtained a writ of error. It was held, that the judgment should have been rendered for \$774, the excess found by said verdict over the sum ascertained by said commissioners, with interest from the date of said judgment and costs; that the error in said judgment could have been amended in the manner prescribed by § 5, ch. 134, W. Va. Code, and that no motion having been made by the appellant to so amend the judgment, under § 6 of said chapter, will be amended by the court; and when so amended, will be affirmed with damages and costs to the appellee, as the party substantially prevailing.

## Allowance of Damage for Nonabutting Land.

Where a judgment for damages to the fee value of land by the construction of an elevated road along the street on which it abuts, by the description in the complaint, which included land which did not abut on the street, being, through inadvertence, adopted, allowed damages for the nonabutting land, but the findings of fact and conclusions of law on which the judgment was based expressly excluded damages for such land, the judgment should, on appeal, be amended so as to conform to the description of the finding of facts and conclusions of law. *Livingston v. Manhattan Ry. Co.*, 38 N. Y. S. 751, 4 App. Div. 165.

## Limiting Exercise of Easement to Purposes Defined.

A judgment vesting a right of way over land in a railroad company, "for all necessary railway purposes," should, in the interest of the owner be corrected, so as to limit the exercise of the easement to the purposes defined in Rev. St. art. 4216. *Ft. Worth Ice Co. v. Chicago R. I. & T. Ry. Co.*, 11 Tex. Civ. App. 600, 33 S. W. 159.

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SOUTH CHICAGO CITY RY. CO. *et al.* v. CITY OF CHICAGO.

(*Supreme Court of Illinois, April 16, 1902.*)

[63 N. E. Rep. 1046.]

## Eminent Domain—Supplementary Proceedings—Collateral Attack.

Where a judgment of condemnation has been entered it cannot be objected, on collateral attack, in a supplementary petition to pay the judgment, that the condemnation was not within the power of the city because only a part of the land for the condemnation of which the ordinance provided was actually proceeded against.

## Same—Jurisdiction.

There is jurisdiction to render a condemnation judgment, though only a part of the lands for the condemnation of which the ordinance provided is proceeded against.

## Same—Supplementary Proceedings—Statute.

City and Village Act 1872, § 53, providing for supplementary proceedings to pay condemnation judgments, enacts that every such cause shall

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be considered as pending in the court where commenced until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands are not taken. Laws 1897, relative to condemnation, enacted that proceedings pending when the act took effect should be governed by the laws under which they were commenced. A condemnation judgment was entered as to part of the land provided for in the ordinance, prior to the act of 1897, and, subsequent to the taking effect of such act, proceedings as to the balance of the lands were dismissed: *held*, that supplementary proceedings to pay the judgment, commenced prior to the dismissal, were not governed by the act of 1897.

**Same—Public Property.**

The question whether part of the land embraced in a condemnation judgment was public property cannot be litigated in supplementary proceedings to pay the judgment.

**Local Assessments—Description of Property.**

Property assessed to a railroad company for a special assessment was described as "right of way, right of occupancy, franchise, and interest of the South Chicago City Railway Company in and upon Ontario avenue from Seventy-Ninth street to Eighty-Third street": *held*, that the description was sufficient.

Error to superior court, Cook county; Theo. Brentano, Judge.

Action by the city of Chicago against the South Chicago City Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles C. Gilbert, for appellant South Chicago City Ry. Co.

K. K. Knapp, for appellant Illinois Steel Co.

William M. Pindell and Charles M. Walker, Corp. Counsel (Edgar Bronson Tolman, of counsel), for appellee.

**MAGRUDER, J.** This is an appeal from a judgment of confirmation entered by the superior court of Cook county on December 6, 1901, against the lands of the appellants, the South Chicago City Railway Company and the Illinois Steel Company, in a supplemental proceeding begun by the filing of a supplemental petition on July 24, 1901, to pay a judgment of condemnation, theretofore entered, awarding compensation for the taking of the lands of the appellants in a condemnation proceeding for the widening of Ontario avenue in the city of Chicago. The petition in the condemnation proceeding was filed on October 16, 1891, and the judgment of confirmation was entered on March 9, 1892. The supplemental petition was filed under section 53 of article 9 of part 1 of the city and village act of 1872, as amended in 1891. The ordinance, providing for the widening of Ontario avenue, which was passed on May 25, 1891, by the city council of Chicago, directed that it should be widened from Seventy-Ninth street to a point south of Eighty-Second street. By the verdict rendered in the condemnation proceeding, the jury found the just compensation to be paid to the owner or owners of the south 107 feet of the north 140 feet of the west 33 feet of the north half of fractional section 32, etc., sought to be taken by and for the proposed improve-

ment, to be the sum of \$2,475. It will thus be noticed, that the judgment rendered was a judgment condemning only a part of the lands which the ordinance directed to be condemned. The strip directed to be condemned by the ordinance was much longer in extent than the strip actually condemned by the judgment. In other words, the judgment did not condemn all of the lands which were directed to be condemned for the purpose of widening the street, but only a part of the same. The appellants, upon the trial below before the superior court, filed various objections to the confirmation of the assessment in the supplemental proceeding. All these objections were overruled.

1. The main objection now insisted upon by the appellants is that the city condemned a strip of land only 107 feet long, whereas the ordinance required the widening of the avenue by the condemnation of a strip much longer than 107 feet. It is claimed that in this way the city has not made the improvement directed by the ordinance, but, on the contrary, has abandoned such improvement, and that therefore it was error to confirm an assessment of benefits, if any, caused by the condemnation of 107 feet, based upon an ordinance requiring the condemnation of a strip much longer than 107 feet. Before filing the supplementary petition, the city obtained an order from the superior court dismissing the petition in the condemnation case, in so far as it related to all the property necessary to be condemned for the widening of the street, except the south 107 feet above mentioned. The question thus presented by the objection so made is whether it is within the power of a city to proceed against only a part of the land for the condemnation of which the ordinance provides. This question cannot be raised in the supplemental proceeding, begun for the purpose of raising the amount necessary to pay the compensation awarded by the condemnation judgment. The supplemental proceeding provided for in section 53 of article 9 of the city and village act of 1872 is collateral to the condemnation proceeding. The condemnation judgment is final and conclusive as to the parties thereto until it is reversed or vacated. Hence a question which properly arose in the condemnation proceeding cannot be litigated in the supplemental proceeding. *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053. The object of the latter proceeding is merely to raise funds to pay the judgment of condemnation already entered. It cannot be said that the court which rendered the condemnation judgment did not have jurisdiction to render such a judgment, even though it condemned only a part of the land described in the ordinance upon which the petition for condemnation was based. If the court had jurisdiction to render such judgment, then its validity cannot be attacked in a collateral proceeding. That the court did have such jurisdiction is a question which has already been decided. In *Pardridge v. Village of Hyde Park*, 131 Ill. 537,

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23 N. E. 345, which was a special assessment proceeding, an assessment roll had been filed, showing the compensation to be made for property taken for opening Forrestville avenue in Hyde Park from Forty-First street to Forty-Seventh street. The trial court, having ascertained by the verdict of a jury that the village of Hyde Park had taken possession of that part of Forrestville avenue lying between Forty-First and Forty-Second streets, entered a judgment dismissing the proceedings, except as to the property between Forty-First and Forty-Second streets. The judgment of condemnation therein entered awarded a certain amount as compensation for opening the street between Forty-First and Forty-Second streets only, and appointed commissioners to make a special assessment to raise that amount; and it was there claimed that a new assessment could not be made to raise money to pay the compensation for taking the land between Forty-First and Forty-Second streets without a new enabling ordinance. But we there held that the passage of a new ordinance was not necessary. It was contended by counsel in that case that a street must be opened as an entirety, and that if only a part of it was opened no assessment could be collected to pay for such part. But the decision in that case was adverse to the contention thus made. It was there said that the condemnation judgment could be paid by special assessment under the original ordinance. The same question arose in *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33, where it was said (page 123, 176 Ill., and page 35, 52 N. E.): "Neither is it necessary, to authorize the supplementary proceeding provided by section 53 as quoted, that the city should by condemnation have secured an easement in all the property necessary for the street. \* \* \* The objection taken by these appellants that, by the judgment of condemnation, the city had not acquired property of other defendants before the commencement of the supplemental proceeding, was no bar to this proceeding, and constituted no defense in this case. It was not error to overrule that objection." See, also, *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15; *People v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33; *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238.

It is claimed, on the part of appellants, that this proceeding is under the act of June 14, 1897, concerning local improvements; but such is not the case. Section 99 of the act of 1897 provides "that the laws subsisting at the passage of this act shall continue to apply to all proceedings for the condemnation of lands, or the confirmation of special assessments or special taxes for local improvements which are pending in any court in this state when this act shall take effect. \* \* \* Where ordinance for local improvements, to be made by special tax or special assessment, shall have been already passed when this act shall take effect, upon which no court proceedings shall have been then begun, the proceedings shall

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be as herein provided, with the same effect as if such ordinance had originated with the board of local improvements herein provided for." Laws 1897, p. 135. The condemnation proceeding to which the present assessment proceeding is supplemental was pending when the act of 1897 was passed, and, therefore, the city and village act of 1872 continued to apply to the proceedings instituted for the purpose of raising the amount necessary to pay the judgment in that condemnation proceeding. By an amendment to said section 53, passed in 1891, it is provided, among other things, as follows: "And every such cause shall be considered as pending in the court in which the same has been, or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken." 1 Starr & C. Ann. St. (2d Ed.) p. 779; *City of Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26. It is admitted by counsel for appellants, that the condemnation proceeding was still pending on July 23, 1901, so far as it related to the rest of the land described in the ordinance for the widening of Ontario avenue, except the 107 feet condemned by the judgment therein entered. It was in a pending proceeding that the order of dismissal, hereinbefore referred to, was entered on July 3, 1901.

2. It is urged, on the part of the appellants, that there had been, prior to the filing of the petition for condemnation, a dedication of the 107 feet in question by the owners thereof for street purposes, and that, therefore, the 107 feet being public property, and not private property, could not be condemned. This question cannot be raised in the present proceeding. The objection that there was a former dedication amounts to the assertion that the property condemned was not private property, but belonged to the city or public. The question whether the property condemned was private property or not was an issue involved in the condemnation proceeding. The judgment in condemnation, not being subject to collateral attack in the supplemental proceeding, must be regarded as a determination of the question whether there was or was not a dedication of the 107 feet in question. *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053. It appears, however, that the trial court allowed evidence to be heard upon this question of dedication, and, after hearing the same, found that there had been no dedication of the lands here in question before the entry of the judgment of condemnation.

3. The property assessed to the appellant the South Chicago City Railway Company is described as follows: "Right of way, right of occupancy, franchise, and interest of the South Chicago City Railway Company in and upon Ontario avenue from Seventy-Ninth street to Eighty-Third street." It is claimed that this description is too uncertain and indefinite to base any assessment upon it. It has, however, been held by this court in several cases that railway

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property as thus described is of such a character that a special assessment can be levied upon it. *Lake Street El. R. Co. v. City of Chicago*, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624; *Cicero & P. St. Ry. Co. v. City of Chicago*, 176 Ill. 501, 52 N. E. 866; *West Chicago St. R. Co. v. City of Chicago*, 178 Ill. 339, 53 N. E. 112. The objection is without force, and was properly overruled. The judgment of the superior court of Cook county is affirmed.

Judgment affirmed.

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(*Supreme Court of Georgia, April 25, 1902.*)

[41 S. E. Rep. 631.]

Torts—Lex Loci.

In the trial of an action in a court of this state for a negligent tort alleged to have been committed in another state, it is error for the court to tell the jury what facts do or do not constitute negligence, unless it appears from the evidence that there is a statute of the state in which the tort was committed, or a valid municipal ordinance, if the act complained of was done in a town or city, which in terms or in effect declares the act referred to to be negligence.

Same—Same.

In the trial of such a case a charge of the character above indicated would be objectionable, although it may have been a literal extract from a decision by the court of last resort in the state in which the cause of action originated.

Appeal—Review.

Several assignments of error in the present case refer to matters which probably will not occur on another trial; and if any errors, other than those above referred to, were committed, they will doubtless not be repeated when the case comes on for a second trial.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by Elizabeth Evans against the Savannah, Florida & Western Railway Company. There was judgment for plaintiff, and defendant brings error. Reversed.

Chisholm & Clay, Shelby Myrick, and W. G. Charlton, for plaintiff in error.

Twiggs & Oliver, for defendant in error.

COBB, J. The plaintiff brought suit against the railway company in the city court of Savannah for damages alleged to have resulted from the homicide of her husband. The petition alleged that the homicide occurred in the state of Florida, and was occasioned by the negligence of the servants and agents of the defendant. The trial resulted in a verdict in favor of the plaintiff, and the defendant complains that the court erred in refusing to grant her a new trial.

I. Error is assigned upon the following extracts from the charge of the court:

"It has been adjudged by the supreme court of Florida to be gross negligence on the part of a railroad company to back

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a train without a brakeman at the rear, and across the main thoroughfare of a village, when there is no flagman at the crossing, even when the train is moving a little faster than a person walks."

"You are instructed that, while it was the duty of the plaintiff's husband, while upon, around, or crossing the railroad track of the defendant, to look out and listen for approaching trains with such care as an ordinarily prudent man would have used, yet that failure on his part to do so, if you find that there was such failure on his part, was not such contributory negligence as would bar plaintiff's right of recovery, if you further find that the defendant, after seeing the plaintiff's husband, or after it should, in the exercise of due care, have seen the plaintiff's husband, on its tracks, or so near thereto as not to have space to pass safely, failed to exercise all proper measure to avoid the casualty."

"By the law of Florida, if the defendant is at fault and the plaintiff is at fault, the plaintiff is entitled to recover, but the jury must diminish the damages in proportion to the fault attributable to the plaintiff. If it be true, as contended by the plaintiff, that the deceased, when injured, was crossing defendant's track, oblivious of the approach of a train, and a lookout stationed upon the rear of the car, in the exercise of reasonable diligence, could and would have discovered the plaintiff's perilous situation in time to avert the collision by warning, application of brakes, or otherwise, then the failure to put a lookout on the rear of such train was negligence on defendant's part, contributing directly to the injury, and the plaintiff would be entitled to recover, the jury diminishing the damages in proportion to the default attributable to the deceased."

The objection to the charges above set forth was that the first and third stated what acts constituted negligence on the part of the defendant, and the second stated what would not amount to negligence on the part of the deceased. Under the law of this state, in the trial of cases of the character now under consideration, the question as to what acts do or not constitute negligence is exclusively for determination by the jury, except in those cases where a particular act is declared to be negligence, either by statute or by a valid ordinance of a municipal corporation. See *Railway Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350, and cases cited; *Railroad Co. v. Vaughan*, 113 Ga. 354, 38 S. E. 851. While the present case, so far as the right of the plaintiff to recover and the measure of damages in the event of a recovery were concerned, was to be tried according to the law of the state of Florida, and on these subjects the courts of this state would apply the law of Florida in exactly the same way it would be applied if the case were pending in one of the courts of that state, our laws would, of course, control in reference to the procedure to be followed. It is immaterial, therefore, for us

to consider what would be the practice under the law of Florida in such cases,—whether it would be proper for the court to determine what acts would or would not constitute negligence, or whether these matters would be for determination by the jury under the practice prevailing in that state. In the case of *Association v. Robinson*, 104 Ga. 256, 286, 30 S. E. 918, 930, 42 L. R. A. 261, where it was contended that in the trial of an action upon a policy of life insurance, which, under its terms, was to be controlled by the law of Massachusetts, the materiality of misrepresentations made by the insured was a question of law, to be decided by the court, for the reason that this was the rule of force in Massachusetts, this court held that, notwithstanding such was the practice in that state, the courts of this state, in enforcing a Massachusetts contract, would be governed by the law of that state so far as the validity, form, and effect of the contract was concerned, but that in a matter affecting merely the remedy or procedure to be followed the laws of this state would control; and that, therefore, in such a case the materiality of misrepresentations would be a question for the jury, as that was the rule under the established practice in this state. It was in that case said: "There are questions which each state is entitled to decide for itself, and to that end erect tribunals, and lay down rules of procedure therein. The law of Georgia can declare what questions shall be passed upon by the court, and what questions shall be passed upon by the jury. Persons seeking either to enforce or defeat contracts made in another state with citizens of this state, when they sue or are sued in the courts of this state, have no right to say that the tribunal fixed by its laws is not satisfactory to them, and to demand a tribunal erected in accordance with the law of the state in which the contract is made." The principle of that ruling is applicable in a case like the present. The law of Georgia absolutely prohibits a judge from telling a jury what acts do or do not constitute negligence, unless the act has been declared by law to be negligence; and a person who brings a suit in a court of this state for a tort committed in another state, alleged to have resulted from the negligence of the defendant, must not complain if the practice and procedure of this state is required to be followed in the trial of his case, which he has voluntarily brought before our courts. If there was a statute of the state of Florida, or a valid municipal ordinance of the city where the homicide in the present case is alleged to have occurred, which, in effect, declared the acts referred to in the charges complained of to be negligence, then the judge in the trial of the case in this state would be authorized to tell the jury that such acts were negligence, just as he would be authorized to do if he was trying a case which arose in this state, where the act claimed to amount to negligence was made so either by a statute or a valid ordinance. It does not, however, appear



from the record that there is any statute of the state of Florida or ordinance of the city in which the plaintiff's husband was killed which declared either that the acts referred to as constituting negligence on the part of the defendant did amount to negligence, or that the act of the deceased referred to as not amounting to negligence did not have such effect. Such being the case, the charges complained of were erroneous for the reasons assigned. While some of the other charges excepted to may not have been subject to the objections made thereto, there were portions of the charge other than those above quoted which were subject to the criticism that they instructed the jury that certain acts did or did not constitute negligence.

2. Some of the charges which were complained of in the present case seem to be literal copies of headnotes made by the supreme court of Florida in a case decided by that court. It is claimed that it was not error to use the language of the Florida court, for the reason that the case was to be tried according to the law of Florida, and anything which was declared to be the law of that state by its court of last resort was a proper subject of instruction to the jury. This position is not sound. There are many things said by this court, both in headnotes and opinions, that are sound law, but which nevertheless would be improper instructions to a jury. This court, as well as the supreme court of Florida, may use language which would be appropriate in a headnote or opinion, but which would be grossly improper when embodied in a charge to a jury. *Merritt v. State*, 107 Ga. 676, 34 S. E. 361 (4); *Railroad Co. v. Lucas*, 110 Ga. 127, 128, 35 S. E. 283. See, also, in this connection, *Manufacturing Co. v. Browne*, 58 Ga. 240; *Hudson v. Hudson*, 90 Ga. 581, 586, 16 S. E. 349 (3).

3. Error was assigned upon certain portions of the charge, for the reason that they, in effect, instructed the jury that, if the defendant was guilty of any negligence whatever, the plaintiff would be entitled to recover; it being contended that the effect of the instructions was to make the defendant liable although the negligence proven was entirely disconnected with the transaction resulting in the death of the plaintiff's husband. While the language in one of the extracts from the charge to which exception is taken might be susceptible of this construction, and it would be well upon another trial not to use the exact expression therein contained, still these charges would not, in the light of the entire charge, have been sufficient to cause a reversal of the judgment denying a new trial. Error is assigned upon the refusal of the court to give numerous requests to charge. Some of these requests were properly refused because they did not contain correct propositions of law, and we will not undertake to determine whether the other requests should have been given or not, for the reason that upon another trial they may not be adjusted

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to the facts of the case. As to the assignments of error which took exceptions to the charge as a whole, which complained that the court refused to read to the jury certain portions of the petition in connection with this charge, and of certain failures to charge, as well as of certain remarks made by the judge during the progress of the case, all that is necessary to say is that probably these things will not occur upon another hearing, and it is unnecessary that further allusion should be made to them at this time. In reference to the charge on the subject of the measure of damages, the court seems to have followed substantially the language of the supreme court of Florida in the case of *Railroad Co. v. Foxworth*, 25 South. 338, 79 Am. St. Rep. 149. So far as the exception that the charge was not adjusted to the facts of the case is concerned, if any error was committed in this respect it will probably not be repeated at another trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

## MEXICAN CENT. RY. CO. v. WILDER.

(*Circuit Court of Appeals, Fifth Circuit, March 4, 1902.*)

[114 Fed. Rep. 708.]

## Appeal—Review—Harmless Error.

Where a railroad company by plea tendered an issue as to the condition and inspection of its roadbed and track, and evidence on the subject was introduced by both parties without objection, it was not prejudicial error for the court, over defendant's objection, to permit an engineer who had been employed on the road at the time referred to to testify that it was common for him to receive orders at terminal stations to look out for broken rails.

## Same—Question Not Presented to Trial Court.

Defendant railroad company pleaded a release in defense to an action for a personal injury, and plaintiff in his replication admitted the signing of the same, but denied its validity. It did not appear from the record that the release was introduced in evidence, that any evidence was taken with reference to it, or that it was in any manner brought to the attention of the court: *held*, that in such state of the record the appellate court would not consider an assignment of error based on the failure of the trial court to make such release the basis of a special instruction directing a verdict for defendant.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Thomas J. Beall and Wyndham Kemp, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by Halbert Wilder to recover damages from the railway company for personal injuries sustained by him about March 17, 1900, through the

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derailment, near Puerto Hill, in the state of Chihuahua, republic of Mexico, of one of the railway company's freight trains on which Wilder was employed as a brakeman. It was charged that said train broke or struck a broken rail, about six feet of which was thrown out of place; that said rail was old and worn; that the cross-ties thereunder were old and out of repair, thereby causing the derailment aforesaid. The railway company answered with a general denial, and a plea to the effect that the plaintiff's injuries resulted through one of the risks incident to his employment, and that the railway company's track and roadbed were properly constructed, inspected, and maintained, and that the rails and cross-ties of said company's track were of good and suitable quality; that said rails were to all appearance good and sufficient for the purpose, and no inspection could have determined or discovered any vice or fault therein; that caution and prudence were exercised in keeping in condition and inspection; and that the accident was fortuitous, without fault or neglect on the part of the railway company. And for a further plea the railway company pleaded a written agreement entered into by Wilder whereby he relinquished all his right and claim to damages for a valuable consideration, and to the said plea annexed a copy of a written release, purporting to be signed by Wilder and witnessed by the surgeon in charge of the railway company's hospital, and executed the 21st of May, 1900, wherein it is recited as follows:

"For and in full release, discharge, and satisfaction of all claims, demands, or causes of action arising from or growing out of an accident occurring at kilometer 1,727 on the Chihuahua division of the Mexican Central Railway, March 17, 1900. While riding on caboose, car was derailed by broken rail, turning over, causing injuries to head, producing concussion of the brain. Received of the Mexican Central Railway Company, Limited, one dollar in full payment of above claim (\$1.00). In consideration of the payment of said sum of money, I, Harry Wilder, of Fairfield, state of Iowa, United States of America, hereby remise, release, and forever discharge the company of and from all manner of actions, causes of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had, or now have, against said company, by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort."

To this last-mentioned plea Wilder filed a replication, denying that the company's track and roadbed were properly inspected and maintained, and admitting his signature to the release, but alleging that at the time of— " \* \* \* the execution of said instrument he was suffering from the severe injuries which he had sustained through the negligence of the defendant company in his back and spine and head, and that he was so enfeebled in mind and body at

the time of the execution of instrument that he was incapable of understanding the contents of said instrument, if the same was read to him, which he does not now remember; that he is informed and believes, and so charges, that he was in a condition of unconsciousness for several weeks after he was injured, and while confined to his bed in the hospital of the defendant company in the city of Chihuahua, Mexico; that the said instrument of release referred to was presented to him by the company's physician, in whose charge he was a patient, being treated, as he is informed and believes, for concussion of the brain, from which he has not entirely recovered; and plaintiff charges and avers that the execution of said instrument at the time, in the manner and under the circumstances, was a fraud upon his rights, and was and is without any sufficient consideration to support it. Plaintiff avers that, owing to his enfeebled condition of mind on the date of the execution of said instrument, he did not know or realize the extent of his injuries, both physical and mental, and that the same were continuing and permanent. Wherefore plaintiff says that said instrument so signed by him under the conditions and circumstances aforesaid, was procured by fraud, as aforesaid, and ought not to be held to bar the plaintiff's action."

On the trial of the case, as shown by first bill of exceptions, several witnesses were examined on behalf of plaintiff and for the defendant in the court below touching the condition of the railway company's track at the place where the accident occurred, and as to the general condition of the track in the neighborhood, all apparently without objection. Among other witnesses called was one George A. Lambeth, for the plaintiff, who was examined, cross-examined, re-examined by the plaintiff, recross-examined, re-examined again by the plaintiff, and recross-examined, and subsequently was recalled and re-examined by the plaintiff, recross-examined, twice again re-examined, and again recross-examined. In his evidence he testified, apparently without objection, among other things, as follows:

"I had been running on the Mexican Central Railway as engineer between four and five years. I know where kilo 1,732 is on the Chihuahua division. It is about six kilometers this side of Puerto,—north of Puerto. I had been running over that piece of road as engineer, off and on, ever since I had been with the company,—between four and five years. I was well acquainted with the condition of the roadbed, ties, and track at that place,—that kilo,—I guess. I was no more familiar with kilo 1,732 than any other part of the road. I had been running over it off and on between four and five years. The rails that were on that kilo were steel rails, 56 pounds to the yard,—56 pounds steel. I do not know just how long those rails had been in use, except ever since the track was laid there. The rails on the line of the road at that place

were old ones. As to the condition of the ties just under that particular rail I could not say. I passed two or three days after the wreck, and it looked to be in a bad condition. The ties were badly decayed. I passed on the 20th, the third day after the wreck occurred. I saw where the wreck occurred, and the ties were pretty badly decayed. On every trip at terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. That was common, and included this kilo."

Cross-examination:

"I mean that I would get orders at the different terminals to look out for broken rail on 1,750, another time for kilo 1,872, etc.,—different kilos on the same section of the road,—not that this kilo was any worse than any others, but that the whole track from here to Chihuahua was in bad condition. They had the same kind of rails from here to the end of this division at that time,—56 pound rails. The rails for the whole division were apparently of the same age, in the same condition. I did not make any complaint about this kilo merely, but the whole division was in about the same condition. We would strike places where the ties were not so bad. This kilo (1,732) was no worse than any of the others,—all bad. I was not any more familiar with this kilo than any other kilo. When running over it I could not discern that it was any worse than any of the rest. If I ever got an order to look out for any broken rail on kilo 1,732, I cannot remember the date, but it was issued over the road master's signature. I do not know that I ever got an order to look out for a broken rail on that particular kilo. \* \* \*"

Recross-examination:

"I passed by there three days after the accident on an engine. They had put on new ties before I got there. The engine and cars had torn up the others,—ground them up considerably. The ties were crumbled up where they were decayed. I cannot say they had new rails in before I got there. Probably a different rail had been taken from a side track to repair it. I reduced speed down to a very slow walk—probably to three or four miles an hour—where the wreck had occurred. I did not stop to inspect the place,—but just what I could see from my engine."

Redirect examination:

"The ties that were there as I saw them were rotten. \* \* \* The ties that were thrown out from the place of this wreck were all rotten. They seemed to extend from where the wreck began to where it stopped. They repaired the track entirely all along, and put in new ties, but they seemed to be in about the condition it was, I could see. The ties seemed rotten all along the track. I could only see, as I passed over where they were taken out, where the good ones had been put in, but they seemed to be rotten where they were thrown out. Their condition was all rotten, it seemed to me. They had

a little crust over the top of them where the sun had shone on, but underneath that, say 1½ inches, they were all rotten at the ends. That extended the whole distance. I was traveling at a rate of speed that I could see the condition of the ties just as well as if I was walking along. Of course, I could not see right down under the engine, but I could see ahead, and see how the track was being repaired, and how it was being got in line.

**Cross-examination:**

"I could not tell the particular place where the rail broke. I do not know the condition of the ties under the particular place where the rail broke. I could only tell from the condition of the ties thrown out. They had repaired right over where the cars jumped the track. I do not know where the rail was broken, but where the cars jumped the track. They had repaired the ties from the rails where the wheels of the cars got off the irons and on to the cross-ties. I could not tell where the cars got off the track. Every tie apparently had been ground up and thrown out. It seems to me that all the ties, commencing where they began to be broken up by the wheels of the cars, had been thrown out, but I could not say positively. Under the circumstances, I could not observe so closely as to be able to say. It seemed to me as if all the ties had been removed. I could not tell about what was the number. The whole mass was piled up, and I could not tell whether they had ever been in there or not. I do not know the condition of the broken rail, or the condition of the ties underneath the broken rail. I could not say whether the ties under it were removed or not."

**Redirect examination:**

"I do not know where that particular rail broke, nor where the particular broken rail was, but where the track had been repaired up all along the line. I was coming north. Of course, I could see where they had commenced repairing the track and where it ended. I could not see where the new rail had commenced. As I came on, the ties at the north end right opposite that place were in about the same condition. In fact, the north section they were about all the same condition. You could not say just how they were, because the top of the ties seemed to be sound when not more than an inch below. They were simply dry on top, but underneath were rotten, and by just passing over it with your finger you could see whether they were sound or not; but you could get down—I have very often done that—to pick the spikes out. I could not tell whether these ties right opposite the place where they had been repairing on the north end were decayed or not. The ones taken out were all rotten. They would not have left them in while rotten. They were nothing but dust. They extended up to where I could see the new rails commenced. The ties they had taken out were rotten. They

were all broken into dust. I could not tell you they had been ties. They extended the whole length, from the beginning to the end. They had been thrown backwards and forwards, and you could not tell just where they came from. That was their general appearance,—general condition. To all appearance, in passing right over them, they appeared to be sound, but only about an inch and half before you would find that the ties were decayed. The top of the ties where the sun had come out and dried it after the rains would leave a crust on top, but underneath that the ties,—there was nothing underneath them; all of the rest of the tie appeared to be rotten. Those extending along the sides—extending from the new rail—were all rotten."

A second bill of exceptions shows that some time during the examination of the said George A. Lambeth he was asked by plaintiff's counsel the following question:

"About the time and before this wreck occurred I will ask you with reference to the condition of the rails that you say had been in use so long, as to whether there was any other breaking of rails, whether that was common or uncommon, and what your orders were with respect to running over the road, if you had any?"

The defendant objected to this question, assigning as a reason that it was not competent to prove other accidents and notice with reference to the breaking of other rails at different times and places; but the objection was overruled, and the witness permitted to answer, and did answer, as follows:

"A. I had such instructions,—got them at every trip. At terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. Q. Was that common? The Court: Did that include this kilo? A. Yes, sir."

This ruling of the court was duly excepted to, and is the substance of the first assignment of error in this case. Considering that the railway company by its plea tendered an issue as to the condition and inspection of its roadbed, and that evidence was offered in relation thereto by both plaintiff and defendant unobjected to, we are inclined to the opinion that the ruling of the court admitting this particular question propounded to witness Lambeth, and the answer thereto, was correct; but, whether correct or not, we are satisfied that, in the mass of evidence offered on both sides on the condition of the railway company's roadbed, the admission of the answer to the question propounded to Lambeth did not prejudice the railway company to any appreciable extent.

The only other assignment of error in the case is as follows:

"(2) The court erred in submitting this cause to the jury, and erred in refusing to give defendant's special charge wherein it asked the court to instruct for defendant, for the reason that under plaintiff's allegations the negligence of defendant in having rotten ties in its track was the basis of

## Central Ohio R. Co. v. Mahoney

plaintiff's claim, and for the reason that the testimony wholly failed to establish this allegation or to show that plaintiff was entitled to recover a verdict herein, as shown by defendant's last bill of exceptions."

Counsel contends that the court erred in submitting this case to the jury, because no explanation or avoidance of the recital and release pleaded in the railway company's first amended original answer was proven by the plaintiff, counsel contending that the plaintiff had relieved the defendant of the necessity of any proof of this instrument by admitting that he had signed the same in the replication filed to the first amended original answer. The record does not show that the defendant offered said release in evidence, and no reference appears to have been made to it during the trial either in the evidence offered or in the charge of the court, nor in the motion for a new trial, nor in the special instructions asked for by the defendant. Not having been offered in evidence by the defendant, nor in any wise called to the attention of the court and jury on the trial, we are of opinion that no error can be predicated upon the failure of the court to make it the basis of a special instruction to find a verdict for the defendant. While not offered in connection with the release, there was undisputed evidence showing that at the date of the release Wilder was in no condition of mind and body to make a valid contract.

We have herein recited enough of the evidence adduced on the trial to show that the negligence vel non of the railway company in maintaining its track was properly submitted to the jury.

The judgment of the circuit court is affirmed.

CENTRAL OHIO R. Co. *et al.* v. MAHONEY.

(*Circuit Court of Appeals, Sixth Circuit, April 8, 1902.*)

[114 Fed. Rep. 732.]

## Removal of Causes—Removal to Federal Court—Joint Defendants.

Under Rev. St. Ohio, § 3305, declaring that, notwithstanding an Ohio corporation leases its railroad, it shall remain liable as if it operated the road, and "both the lessor and lessee shall be jointly liable" to any person for negligence, and "may be jointly sued" in the state courts, an action by a citizen of the state, brought in the state courts, for a joint tort, against the lessor of a railroad, a state corporation, and the receivers of the lessee, citizens of another state, was improperly removed to the federal court on the petition of the receivers, alleging that the other defendant "had no interest or liability jointly with the receivers"; plaintiff's petition not presenting a separable, but a joint, controversy, though at the time of filing the petition for removal the lessor had not been served with the summons, the sheriff's return showing that it had not been found.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action brought in a state court of Ohio by



Mahoney, the defendant in error, against the above-named plaintiffs in error, to recover damages for a personal injury sustained by him from the negligence of the above-named receivers while they were operating the railroad of the Central Ohio Railroad Company under an appointment made by the circuit court of the United States for the Southern district of Ohio, in a case therein pending, in which the Mercantile Trust Company of New York was complainant, and the Baltimore & Ohio Railroad Company was defendant; the last-named company having theretofore been in possession of the railroad under a lease from the Central Ohio Railroad Company. The petition alleged the joint liability of the Central Ohio Railroad Company and the receivers, and prayed a joint judgment against them upon the ground that a statute of the state imposed a joint liability upon the lessor and the lessee for damages arising from the negligence of the lessee in operating the railroad. Section 3305 of the Revised Statutes of Ohio provides that, when one railroad company leases its road to another, "the company to whom any railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability." Process was duly served upon the receivers, but the sheriff returned that the Central Ohio Railroad Company was not found. At this stage of the case the receivers removed the case into the circuit court of the United States upon their petition setting forth that they were citizens of Maryland, and that the plaintiff was a citizen of Ohio, and further that "the defendant the Central Ohio Railroad Company had no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company." The plaintiff moved to remand upon the ground that the circuit court of the United States had not acquired jurisdiction. This motion was overruled, and thereupon the Central Ohio Railroad Company appeared and filed a demurrer to the petition. The receivers also demurred. Both demurrers were overruled. The defendants severally answered,—the receivers as well as the Central Ohio Railroad Company,—averring, among other things, that the receivers were not operating the railroad under the lease at the time of the plaintiff's injury. The issues being formed, the case was brought to trial, and resulted in a verdict and judgment for the plaintiff, and the case was brought here on writ of error.

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J. H. Collins, for plaintiffs in error.

Emmett Tompkins and Thomas Steele, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the proceedings in the case as above, delivered the opinion of the court.

When this case was reached for hearing at a former term, the question of jurisdiction was brought to the attention of the court, and a grave doubt was expressed whether the case was properly removed from the state court; but the case was permitted to be argued on the merits, and subsequently the following question was certified to the supreme court of the United States:

"Is a suit removable from a state court to a United States court upon the petition of the receivers alone, when the action is against receivers appointed by a United States court, and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort?"

The question has been answered in the negative, and that answer practically determines the course which we should take. For the statute upon which the action is founded, in creating the liability, declares that it shall be joint, and that the lessor and lessee may be jointly sued; and the plaintiff, in his petition, pursues the defendants upon their alleged joint liability.

Only one further question requires consideration. It appears from the preceding statement of the proceedings in the case that there had been a return by the sheriff that the Central Ohio Railroad Company was not found at the time when the petition for removal was filed. But this did not discharge that defendant from the case. The plaintiff might still take steps for bringing the railroad company in, by taking out an alias summons. Moreover, the receivers did not pray for the removal upon the ground that the suit had become one against them alone, but claimed the right to remove upon the ground that the other defendant had "no interest or liability jointly with the said receivers." The Central Ohio Railroad Company appeared in the court below after the removal, and defended the suit upon the footing that it had been removed as a joint action, and a joint judgment was rendered against the railroad company and the receivers. We are therefore of the opinion that the circumstance that there had been a return of non est inventus as to the railroad company when the petition for removal was filed was unimportant. As the case made by the plaintiff's petition did not present a separable controversy, it could not be removed by the receivers alone. We cannot for the present purpose consider the question of the validity of the defense made by the railroad company, since the right to remove is determined by

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the case made by the plaintiff's petition. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511.

The judgment must be reversed, and the cause remanded, with a direction to remand it to the state court from which it was removed. The plaintiffs in error (the receivers, who wrongfully removed the case from the state court) will pay the costs of the court below and of this court.

COCHRAN v. MISSOURI, K. &amp; T. RY. CO.

*(Court of Appeals at Kansas City, Mo., May 5, 1902.)*

[68 S. W. Rep. 367.]

**Action to Recover Value of Old Right of Way—Construction of Deed—Intention of Parties—Boundary Line.**

The owner of an 80-acre tract of land, through which an abandoned railroad grade ran, conveyed "all that part of the" 80 acres "lying" north of the railway survey, \* \* \* containing 70 acres of land, more or less" to one party, and "all that part \* \* \* that lies south of the right of way of the \* \* \* railroad, containing 8 acres, more or less," to another. The evidence was conflicting as to what the expression "railway survey," in this connection, meant: *held*, that in an action by the original owner of the 80 acres to recover the value of the old right of way taken by a new corporation, where his interest in the strip was made an issue, the meaning, as intended, was properly submitted to the jury, notwithstanding the fact that, when land is bounded by a street or stream, the boundary line is presumed to be the center thereof.

**Same—Damages—Elements of Value.**

In an action to recover the value of a strip of land taken by a railroad for right of way, an instruction that, in determining its value, the jury should take into consideration the character of the land, its condition and quality, and the uses to which it might be put, was proper.

**Same—Same—Same—Cost of Old Roadbed.**

In an action to recover the value of a strip of land taken by a railroad for right of way, the supposed value or cost of constructing an old roadbed by a trespassing corporation, to which the defendant was successor, was not a proper element of damages, as plaintiff, by electing to sue one claiming under the original corporation for the value of the land, waives his right to recover for the improvements which the original corporation put thereon.

Appeal from circuit court, Vernon county; H. C. Timmonds, Judge.

Action by J. R. Cochran against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition.

Geo. P. B. Jackson, for appellant.

Scott & Bowker, for respondent.

ELLISON, J. This action is to recover the value of a strip of land 50 feet wide, running across (near the south end of) an 80-acre tract. Plaintiff recovered judgment in the trial court. It appears that plaintiff was the owner of the 80 acres of land, and in possession thereof; that in 1888 a railway corporation known as the Kansas City, Rich Hill & Eldorado

Railway Company began the construction of a railway, and, for that purpose, agreed to pay plaintiff for a right of way 100 feet wide, through that and other land, \$250,—one-half cash, and one-half in six months. That company failed to make the payment, and did not take up the deed, which plaintiff had had prepared for delivery. Notwithstanding this, that company went upon the land, against plaintiff's objection, and made cuts and fills for a roadbed. That company afterwards failed, and abandoned the land, without having built the road. Plaintiff retook possession of the strip, fenced it in, and used it for pasture down to 1898, when another corporation, known as the Kansas City, Rich Hill & Southern Railway Company, against plaintiff's objection, entered on the strip, tore down his fences, and constructed a railroad thereon. This road was afterwards purchased by defendant, which now operates a railway thereon. The right of way went through the 80 acres near the south end. The greater part (about 70 acres) of the land was north of the right of way. Plaintiff sold that part to Sallie M. Medlin "lying north of the railway survey to the Kansas City, Rich Hill & Eldorado Railroad, containing 70 acres, more or less." Plaintiff also sold to T. J. Pearce 8 acres on the south, describing it as follows: "All that part of the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of Sec. 29, T. 36, R. 29, that lies south of the right of way of the K. C., Rich Hill and Eldorado R. R., containing 8 acres, more or less."

It is contended by defendant that plaintiff has shown no interest in the subject-matter of this action, since, according to defendant's view, he conveyed the strip by his deed to Sallie M. Medlin. When land is bounded by a street or non-navigable stream or lake, the boundary line is presumed to be the center of the street or stream or lake. But if the description discloses an intention not to convey to the center, that intention will control. *Mott v. Mott*, 68 N. Y. 246; *Insurance Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361; *Kirkpatrick v. Ice Co.*, 45 Mo. App. 335; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428. And if the description, as written, construing it most strongly against the grantor, leaves the intent in doubt, the court may properly leave the fact to be ascertained by a jury. The description in controversy is "all that part of the" 80 acres "lying north of the railway survey, \* \* \* containing 70 acres of land, more or less." Each party introduced evidence of surveyors and civil engineers to show what the expression "railway survey," in this connection, meant. These witnesses, in a general way, stated the view favorable to the party calling them. The court submitted the meaning as intended by the parties to the jury. It seems to us that such action by the court was as much as defendant could ask for. The most that defendant could reasonably claim, in the situation of the case at this point, was that the intent was uncertain. Ordinarily it is presumed that one would have no private use or need for a highway after

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parting with the land on either side. It would be of no value to him, and therefore will be presumed to have been deeded to the abutting purchasers. On the other hand, in this case the two deeds above referred to contain that which tends to show that the railroad right of way was not intended by plaintiff to be parted with; for the Medlin deed is limited to 70 acres, more or less, and the Pearce deed is limited to 8 acres, more or less, thus disclosing that the whole 80 was not intended to be conveyed. But more than this, the strip in controversy had not been acquired by the railroad company as a right of way. There was no easement upon it. It had not assumed such condition as to be of no interest to a private owner, as is the case with streets and highways.

The court gave an instruction to the jury which directed the allowance of a reasonable value, and that, in determining the value, they should take into consideration the character of the land, its condition and quality, and the uses to which it might be put. This was a proper instruction. *Webster v. Railway Co.*, 116 Mo. 114, 22 S. W. 474; *Bridge Co. v. Ring*, 58 Mo. 191; *Railway Co. v. Heiger*, 139 Mo. 315, 40 S. W. 947. But the jury, in arriving at the value, evidently allowed the grading—the construction of the roadbed—by the original trespassing company to be considered as adding to the value of the land. Plaintiff defends this by the statement that the work thus done on his land against his warning and against his consent became his, and that, when defendant came to appropriate the land, it took such added value from him. Plaintiff illustrates his position by the statement that if a trespasser digs a well on his land, and afterwards a railway company condemns the land, he is entitled to the value of the land, enhanced, it may be, by the well. We may grant this, but it does not meet the facts in this case. The defendant here is the successor in claim to the land from the one who constructed the roadbed. If a trespasser builds a house on my land over my protest, it becomes mine. But if I elect, within the period of limitation, to sue him, or those claiming under him, for the value of the land thus appropriated, I cannot have the house included in that value, for I have validated his act, and he should have the title.

Under the theory that plaintiff was entitled to the value of the roadbed, plaintiff asked judgment for \$1,500; and witnesses estimated the value by going into calculations of the value of the roadbed, and of the cost, by cubic yards, of excavations and fills. The court, however, instructed the jury that plaintiff was not entitled "to recover anything on account of the supposed value or cost of constructing the cuts and fills." The jury nevertheless allowed plaintiff \$137. That sum was \$100 (or more) than the value of the land without the roadbed, as fixed by the evidence. Plaintiff should therefore remit \$100, and, if he does so within 15 days, we will affirm the judgment; otherwise it will be reversed, and the cause remanded. All concur.

CHOCTAW & M. R. CO. *v.* SULLIVAN.*(Supreme Court of Arkansas, March 15, 1902.)*

[68 S. W. Rep. 495.]

**Railroads—Material Men's Liens\*—Contract—Law Applicable.**

One furnishing materials entering into the construction of a railroad under a contract with a railroad contractor executed prior to the passage of Act March 31, 1899, giving a lien on a railroad to any one furnishing any materials in its construction, acquires no lien against the road, but the contract is governed by the law in force at the time of its execution.

Appeal from circuit court, Sebastian county, Greenwood district; Styles T. Rowe, Judge.

Action by W. A. Sullivan against the Choctaw & Memphis Railroad Company to enforce a lien for materials used in the construction of defendant's railroad. From a judgment for plaintiff, defendant appeals. Reversed.

On the 8th day of November, 1899, the appellee, W. A. Sullivan, filed in the Sebastian circuit court, Greenwood district, his complaint against Graham & Miller and the Choctaw & Memphis Railroad Company in words and figures as follows:

"The plaintiff, W. A. Sullivan, states that L. G. Graham and J. T. Miller are tie and timber contractors doing business in the state of Arkansas under the firm name and style of Graham & Miller. That the Choctaw and Memphis Railroad Company is a corporation organized under the laws of the state of Arkansas, and owns and operates a line of road running from Howe, Indian Territory, to Little Rock, Ark. That the said Graham & Miller on the — day of —, 1899, then and there being under contract to furnish railroad and switch ties for the construction of said line of railroad, employed by oral contract the said plaintiff, W. A. Sullivan, to furnish and deliver the said Graham & Miller for the construction of said railroad, subject to inspection, first-class railroad ties at the agreed price 22 and 23 cents per tie, and the cull ties at the agreed price of 6 cents per tie, and switch ties at so much as the same should be reasonably worth, ranging in price at from \$22.50 to \$25 per set. That under said contract plaintiff delivered to the defendant:

32,240 first-class ties at 22 cents per tie.....	\$7,092 80
4,847 first-class ties at 23 cents each.....	1,114 81
1,104 cull ties at 6 cents each.....	66 24
5 sets switch ties at \$22.50 per set.....	112 50
3 sets switch ties at \$25.00 per set.....	75 00
2 sets switch ties at \$24.00 per set.....	48 00

Making in all the sum of..... \$8,509 35

"(2) That thereafter the plaintiff was employed by the defendants Graham & Miller as subcontractor by oral con-

\*See note, 12 Am. & Eng. R. Cas., N. S., 863; 6 Rap. & Mack's Dig., 277 et seq.

tract to furnish and deliver to the said Graham & Miller railroad ties for the construction of aforesaid railroad, under the following agreement, to wit: The plaintiff was to purchase timber and to employ men to make the said ties from the timber so purchased by him, and was to employ teams and use his own teams, and deliver said ties upon the right of way of the said railroad, and was to receive for said ties the sum actually paid by him for the purchase of said timber, the making of said ties, the cost of hauling and delivering the same, including the sums paid to teams hired by him, and the amount reasonably earned by his own team at the same price per tie paid to other teams, and one cent per tie additional thereto as plaintiff's profit thereon; and plaintiff avers that under said contract that he caused to be made, furnished, and delivered to said defendants for the building of the said railroad 118,171 ties, and the cost of buying said timber, making said ties, and delivering the same upon the right of way of said railway company, to be used in building said railroad, including a reasonable compensation to the plaintiff for the use of his team, as aforesaid, amounted to twenty-two cents per tie, which, with one cent per tie, allowed by agreement of plaintiff as his profit thereon, amounted in all to the sum of \$27,179.33.

"(3) That the defendants Graham & Miller have paid to the plaintiff, W. A. Sullivan, on account of the foregoing materials furnished and delivered by the said W. A. Sullivan to said Graham & Miller for the building of the said railroad, the total amount of \$8,000, which amount is subject to deductions as follows, to wit:

To tools returned.....	\$47 90
Unloading hay.....	2 00
Overcharging on order.....	6 00
Orders given by C. S. Sullivan.....	35 00
Freight on tents.....	6 95
Two tents furnished James Elliott's men.....	26 00
Hauling freight two days.....	66 00
Feed bill, Graham's horse at Magazine.....	16 00

"(4) That the said ties and other material hereinbefore specified in the complaint as having been by the plaintiff furnished for the defendants Graham & Miller were used and entered into the construction of the Choctaw and Memphis Railroad, hereinbefore specified; and the plaintiff, W. A. Sullivan, by force of the statute in such cases made and provided, is entitled to and has a lien upon the roadbed and superstructure, the rolling stock, and franchise of the Choctaw and Memphis Railroad Company, hereinbefore specified as extending from Howe, I. T., to Little Rock, Ark. Therefore the plaintiff, W. A. Sullivan, prays judgment against L. G. Graham and J. T. Miller, partners as aforesaid under the name and style of Graham & Miller, in the sum of \$1,837.56, and that the same by the judgment of this court be adjudged and declared to be a lien upon the roadbed, superstructure,

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rolling stock, and franchise of the Choctaw and Memphis Railroad Company, as hereinbefore specified and stated, and for all other and proper relief your petitioner will ever pray," etc.

The appellee, W. A. Sullivan, being a nonresident of the state of Arkansas, filed his bond for costs on the 17th day of January, 1900. At the January term, 1900, of the Sebastian circuit court, the defendants Graham & Miller filed their answer. At the same term the Choctaw & Memphis Railroad Company also filed its answer. At the January term, 1900, Graham & Miller not appearing, judgment was rendered against them in the sum of \$1,181, and the cause continued as to the Choctaw & Memphis Railroad Company. At the July term, 1900, of said court, the Choctaw & Memphis Railroad Company was, on motion, by the court permitted to withdraw its answer theretofore filed. To this complaint the railroad company filed a demurrer because it alleged the complaint did not state facts sufficient to entitle the plaintiff to a lien on the road of the defendant. The answer was overruled, and the defendant saved exceptions, and makes this ruling of the court a ground in his motion for a new trial. The railroad company then answered, and upon a trial judgment went against it. The company filed a motion for a new trial, which was overruled, and thereupon it excepted and appealed to this court.

At the trial the court refused the following instructions, which the defendant asked: "(1) The court instructs the jury that under the pleadings and evidence in this case your verdict will be for the defendant. (2) The court instructs the jury that if they find from the evidence that the plaintiff, W. A. Sullivan, was merely employed by Graham & Miller to superintend the getting out of the ties for them, for which he was to receive a compensation of one cent for each tie, then he was not a subcontractor, and is not entitled to a lien upon defendant's railroad, and your verdict will be for the defendant,"—to which the defendant saved its exceptions. And upon its own motion the court gave to the jury the following instructions, to which the defendant excepted:

"(1) Gentlemen, the court will read to you an act of the legislature of 1899, at page 145: 'That section 6251 of Sandels & Hill's Digest be amended so as to read as follows: Every mechanic, contractor, subcontractor, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor, or cause to be done or performed any work or labor upon, or furnish any materials, machinery, fixtures, or other things toward the building, construction, or equipment of any railroad, or to facilitating the operation of any railroad, whether completed or not, and every person who performs work of any kind in the construction or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof, and every person who



furnishes any board, provisions or supplies for any employees, or teams of any railroad employed in the construction or repair thereof with the consent or authority of the person authorized to make such construction or repair; and every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law, and every person who performs any valuable services, manual or professional for any railroad by or from which such railroad receives a benefit shall have a lien on said railroad for said labor, materials, machinery, fixtures, board, provisions, supplies, loss, damages and services upon the roadbed, building, equipments, income, franchise, right of way, and all other appurtenances of said railroad superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, and beneficiaries under trusts or owners.'

"(2) Of course, gentlemen, the burden is on the plaintiff in this case to prove that he has a lien on the railroad of the defendant.

"(3) If you believe from the evidence that Sullivan was a subcontractor under Graham & Miller to furnish ties for the construction of the Choctaw & Memphis Railroad, and he furnished \$1,181 worth of ties, for which he has not been paid, and said ties were used in the construction of said railroad with the consent or authority of the person authorized to make such construction, then the court tells you that the plaintiff is entitled to a lien on said railroad, and your verdict should be for the plaintiff."

The defendant separately objected to each paragraph of the above charge. The jury thereupon retired, and after deliberation returned the following verdict: "We, the jury, find for plaintiff a lien on the Choctaw & Memphis Railroad for \$1,181." On the same day the defendant filed its motion for a new trial in words and figures as follows: "Comes the defendant Choctaw & Memphis Railroad Company, and moves the court to set aside the verdict rendered against it therein, and grant it a new trial, upon the following grounds, to wit: "(1) The verdict is contrary to law. (2) The verdict is contrary to the evidence. (3) The verdict is contrary to both the law and evidence. (4) The court erred in refusing to grant defendant's motion for a change of venue. (5) The court erred in examining the panel of the jury as to their bias or prejudice against the defendant, in passing upon defendant's motion for a change of venue, and because there is no law authorizing such examination. (6) The court erred in overruling defendant's challenge to the panel of the jury, because the jury had been prejudiced against it by the examination of the court and counsel for plaintiff in their examination on defendant's motion for a change of venue. (7) The court erred in permitting plaintiff, W. A. Sullivan, to testify as to specific amounts of ties furnished, and times and places

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when and where furnished, after the court had refused to require plaintiff to make his complaint more specific in such particulars."

J. W. McLowd and E. B. Pierce, for appellant.  
W. A. Sullivan, pro se.

HUGHES, J. (after stating the facts). The evidence in this case shows that on the 29th of November, 1898, the Choctaw & Memphis Railroad Company made a contract with the Choctaw Construction Company for the construction of its road from Little Rock, Ark., to the Indian Territory line; that on the 12th of December, 1898, the Choctaw Construction Company entered into a contract with Graham & Miller to furnish all the ties necessary to be used in the work; that a short time afterwards, to wit, on the 1st day of January, 1899, or about that time, the appellee claims to have entered into a contract with Graham & Miller to furnish them ties to be used in the construction of said road, and about that time commenced to deliver to them ties under this alleged contract. It is under this contract made with Graham & Miller about the 1st of January, 1899, that appellee claims the right to have a lien declared upon the railroad for the value of the ties furnished to Graham & Miller. Now, the contract the appellee made with Graham & Miller, under which he delivered them ties for the value of which he claims a lien upon the road of the appellants, was made prior to the passage of the act of March 31, 1899, about three months. When this contract was made the appellee did not have and could not claim any lien for the value of the ties furnished by him to Graham & Miller. There was no privity of contract between him and the railroad company. The act of March 31, 1899, has no application to this case. The contract was made under a different law, and in reference to it, and must be governed by that law. The appellee claims as a subcontractor under the above act of 1899, which was not passed until after his contract was made, by virtue of which he claims his right to a lien. The rights of the parties to the contract must be determined by the law in force at the time the contract was made. That this is well settled there are numerous authorities, among which we cite: *Donahy v. Clapp*, 12 Cush. 440 (in which Chief Justice Shaw delivered the opinion); *Parker v. Railroad Co.*, 115 Mass. 580; *O'Neil v. Anderson* (Minn.) 4 N. W. 47; *Hall v. Banks* (Wis.), 48 N. W. 386. It follows, therefore, that appellee had no right to a lien under the act of March 31, 1899, passed after the contract by virtue of which he claims a lien was made. The demurrer to the complaint should have been sustained.

The judgment is reversed, and the cause is dismissed.

WESTINGHOUSE ELECTRIC MFG. CO. *v.* CITIZENS' ST. RY.  
Co. *et al.*

(*Court of Appeals of Kentucky, May 27, 1902.*)

[68 S. W. Rep. 463.]

**Property Added to Street Covered by Prior Mortgage on Road.\***

Property added to the plant of a street railroad company, and which becomes an essential and integral part of its road, passes under a mortgage previously executed and recorded, conveying its entire road, constructed and to be constructed, though the property thus added was furnished under a contract stipulating that the title was to remain in the seller until payment made.

Appeal from circuit court, McCracken county.

"Not to be officially reported."

Action by the Westinghouse Electric Manufacturing Company against the Citizens' Street Railway Company and others to recover machinery, consolidated with an action by Guardner, Leech, and Palmer to enforce a mortgage lien. Judgment enforcing lien and dismissing action of the Westinghouse Electric Manufacturing Company, and that company appeals. Affirmed.

Campbell & Campbell, for appellant.

Bloomfield & Crice and Greer & Reed, for appellees.

BURNAM, J. All of the stock of the Citizens' Street Railway Company of Paducah was owned by R. Roland. On the 24th of June, 1892, he notified the Westinghouse Electrical Company of Pittsburg, Pa., that he wanted to electrify his road, and requested information from them as to the cost and probable time it would require to make the change. In response to this communication they sent E. W. T. Gray, one of their salesmen, to Paducah, to confer with Roland as to the change. Upon his arrival in Paducah, at Roland's request he made an estimate for him of the probable cost of the proposed change in the railroad, which he said would not exceed \$15,000. Roland at the time told Gray that he did not have the money to make the change, but that he expected the necessary funds would be furnished by Messrs. Leech, Palmer, and Guardner; and at Roland's request he went with him to see these parties, and made to them the same estimate as to the probable cost of the change. In this estimate the Westinghouse Company were to supply the electrical appliances needed in the transfer, which were to cost \$4,500. No agreement, however, was arrived at on this trip, but Gray left with the understanding with Roland that, if he succeeded in making arrangements for the \$15,000, he would accept his proposition for the electrical appliances. On July 7th thereafter Roland telegraphed Gray that everything was all right, and that he had accepted his proposition; and on the 12th of July

\*See notes, 17 Am. & Eng. R. Cas., N. S., 560; 15 Am. & Eng. R. Cas., N. S., 294; 12 Am. & Eng. R. Cas., N. S., 870.

Roland forwarded to the appellant company at Pittsburg the contract which he had made with Gray, signed by him as president of the railway company, and notified it that he would want the goods not later than the 20th of August. This contract contained the following provision: "The title and ownership of the property called for and furnished under the terms of this contract shall remain in the company until the full and final payment therefor shall have been made by the purchaser according to the terms agreed upon, and until notes, if any, shall have matured and been settled in full. In case of default in any of the payments above provided, the company may possess itself of the above-mentioned property wherever found, and shall not be liable in any action of law on the part of said purchaser for such reclamation of its property, nor for the repayment of any money or moneys which may have been paid by said purchaser in part payment for said installation and equipment." The contract provided that \$1,500 was to be paid in cash, \$1,500 in 30 days, and the balance in 60 days. This contract was approved by the vice president of appellant's company on the 18th of July, 1898, at Pittsburg, Pa., and the apparatus called for in the contract duly furnished thereunder. The first and second installments of the purchase price were paid. This litigation is over the third installment of \$1,500. On July 15, 1892, Guardner, Leech, and Palmer loaned to the Citizens' Street Railway Company \$15,000, which was to be used in paying the expense of electrifying the road. They took the notes of the company therefor, due one year after date, and simultaneously with the making of the loan Roland executed a mortgage on all property of the railway company, which included the electrical machinery contracted for with the Westinghouse Company. This mortgage was, by mistake, signed by Roland individually. Subsequently, on the 1st day of October, 1892, after all the machinery had arrived, a second mortgage was drawn up, exactly like the first, which was signed by Roland as president of the railway company. In consideration of the money advanced by Guardner, Palmer, and Leech, in addition to the mortgage, Roland gave to each of them one-twelfth of the capital stock of the new corporation; and it was further agreed that they were all to become officers of the new company. It turned out that the cost of electrifying the railroad exceeded the estimate of \$15,000 made by Gray, and the railway company had no money with which to pay the last installment due appellant for the appliances furnished by them. Subsequently appellant agreed to accept in satisfaction of its claim four notes signed by the railway company, indorsed by each of the stockholders individually, the amount of these notes being in proportion to the holdings of each stockholder; the notes of Palmer, Leech, and Guardner being for \$125 each, and the one indorsed by Roland for \$1,125. The three smaller notes were paid at maturity, but the one

indorsed by Roland was not paid. The railway company were unable to meet the mortgage debts due to Guardner, Leech, and Palmer, which matured on the 15th of July, 1893. On the 16th of March, 1894, they brought suit to enforce their mortgage lien; and on the 24th day of March thereafter appellant brought its action against the railway company and the other appellees seeking to recover the machinery furnished by them under the terms of their contract. These actions were consolidated, and transferred to equity, and upon final submission it was adjudged that the mortgage lien of Palmer, Leech, and Guardner was superior to the claim of the Westinghouse Company, and a decree entered for the sale of the road. It only brought a sum sufficient to pay the mortgage debt, and to reverse that judgment this appeal is prosecuted.

Roland testifies that he never informed either Guardner, Leech, or Palmer of the stipulation in the contract that the appellant company was to retain the title to the appliances furnished by them until they were paid for. And Guardner testifies that he never knew or heard of this provision of the contract until several years after its execution; that he had had no active connection with the railway company until after the time of its completion. And both Roland and Guardner testify that Gray was notified that a mortgage was to be executed on the corpus of the road to secure the money advanced by appellees. Gray denies this, however. But the fact still remains that the mortgage, which specifically embraced the appliances to be furnished by appellant, was on record in the proper office for some six weeks before it actually arrived, whilst the contract relied on by appellant was not recorded at all. Section 496 of the Kentucky Statutes provides that: "No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deeds shall be acknowledged and proven according to law and lodged for record." And this court has uniformly held that a pocket mortgage is inferior to the lien acquired by mortgagees who have given credit on the faith of the property without notice of such liens. This question has been very fully considered in *Wicks v. McConnel* (Ky.) 43 S. W. 205, where all the previous cases are cited and discussed. In that case the court said: "While we desire to adhere strictly to the decision and reasoning of the court in the *Baldwin Case*, we are not inclined to push the doctrine further than we are required by the language of that opinion in support of secret liens as against creditors whose debts were created, or may reasonably be supposed to have been created, upon the faith of the property being, so far as they could by any possibility discover, unincumbered. If this be not the construction, then the language of the statute 'or against creditors' is entirely nugatory." And the last clause of that opinion is in these words: "On

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the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected as against the secret lien in the rights which they secure by their diligence." The mortgage in this case shows conclusively that the appellees relied upon the identical property sought to be recovered by appellant when they advanced their money. When appellant accepted the notes indorsed by the respective stockholders of the company, it waived any rights which it may have had under its contract of sale. See *Gaines v. Casey*, 10 Bush, 92; *Ducker v. Gray*, 3 J. J. Marsh. 163. Besides, the law is well settled that property added to the plant of a street railroad, and which becomes an essential and integral part of its road, passes under a mortgage previously executed and recorded covering its entire property and road constructed and to be constructed, although furnished under a contract by which the title was to remain in the seller until payment made. See *Porter v. Steel Co.*, 122 U. S. 283, 7 Sup. Ct. 1206, 30 L. Ed. 1210, and *Phoenix Iron Works Co. v. New York Security & Trust Co.*, 28 C. C. A. 76, 83 Fed. 759. We therefore conclude that there was no error in adjudging appellees a prior lien on the machinery furnished by appellant under its contract.

Judgment affirmed.

LOUISVILLE & N. R. Co. v. SIMPSON.

(*Court of Appeals of Kentucky, Oct. 15, 1901.*)

[64 S. W. Rep. 733.]

**Injury to Passenger—Collision\*—Evidence—Outcries of Passengers.**

The fact that outcries were made by passengers other than plaintiff in the collision in which plaintiff was injured was not admissible in evidence, but, as there was no objection to the admission of the evidence, there can be no reversal on that account.

**Same—Personal Examination of Plaintiff.**

Where plaintiff testified that by reason of an injury to her hand she could not close the hand by voluntary exercise of its muscles, it was an abuse of discretion not to compel her to submit to an examination of the hand by physicians introduced by defendant as witnesses, who testified that they could tell by such an examination whether the hand was stiffened as claimed, and whether such condition would probably be permanent.

**Same—Recklessness—Exemplary Damages.**

Where the evidence presented a case of such negligence that the jury might be warranted in finding that it evinced a reckless disregard of human life, it was proper to give an instruction authorizing exemplary damages.

Appeal from circuit court, Nelson county.

"To be officially reported."

Action by Susan B. Simpson against the Louisville & Nash-

\*As to the liability of carriers for injuries to passengers by collisions, see notes to *Chicago, etc., R. Co. v. Durand*, post.

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ville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

John S. Kelley, for appellant.

Geo. S. & Jno. A. Fulton, for appellee.

O'REAR, J. Appellee was a passenger on the Bardstown Accommodation (a passenger train operated by appellant on its Springfield branch) on December 23, 1899. This train was due to leave Louisville at 4:10 o'clock p. m., but on this occasion left at 4:16. Within three minutes after it passed South Louisville, freight train No. 13 (a "double header," with 49 cars, 35 of which were loaded) pulled out onto the track, following the passenger; and, it is claimed, in about 11 minutes after the passenger passed it started in the same direction, being something over two hours later than its schedule time. The evening was cloudy, and a mist of rain was falling. The passenger was due to stop at 8 or 10 flag stations, and one regular stop before it would leave the track upon which the freight was following it. The freight had no stops to make, and took up and continued a speed averaging about 30 miles an hour, and at times numbering as high probably as 35. The passenger was heavily loaded with holiday travelers, and made about all the stops shown in the time card. The freight ran into it at Gapin, the Knob station, about 16 miles south of Louisville. The rear car of the passenger, in which was appellee and a large number of others, was partially wrecked, and appellee claims she was injured in that collision. In her suit for damages she was adjudged to recover on the jury's verdict \$3,000.

Two matters of evidence are presented by appellant as constituting errors by the trial court. One was that it was shown by several of the witnesses that a Mrs. Carrothers, who was sitting by appellee at the time of the accident, was killed in this collision; and the manner of her finding by the wreckers, and their efforts in rescuing her body, and the manner of its being fastened in the debris of the wreck, all were shown in this trial. However, the record shows that all of this evidence was, "by consent of the parties," withdrawn from the jury, and they admonished by the trial court not to consider it. It was also shown by some of the witnesses that outcries and screams were made by passengers in this coach when the collision occurred, and that in the darkness great confusion reigned. None of this was objected to by appellant, so far as the record shows. The outcries and exclamations by others than appellee were not relevant matters to go to the jury, but we cannot reverse for errors not excepted to at the time.

Another matter of evidence was that on the trial appellee claimed that in the collision her hand was injured, and she was permanently crippled; that because of the injury she could not close two or more of the fingers of that hand by

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voluntary exercise of its muscles. No other permanent injury was claimed, nor was the injury to that member apparent to an ocular inspection. Appellee on the trial showed the hand to the jury, demonstrating she claimed how far she could close the fingers by the use of their muscles. She declared that the leaders and joints of the fingers were stiff and enlarged. One of her witnesses (her physician) testified that he could not tell by an examination of the hand whether it was permanently injured or not; that he would have to rely upon the statement of the patient. Appellee submitted her hand to his examination while he was testifying. Appellant introduced two physicians as witnesses, who testified that they could tell by an examination of the hand, without reference to what the patient said, whether it was stiffened as claimed, and whether such condition would probably be permanent. Thereupon appellant asked each of the witnesses to then and there examine appellee's hand, and state to the jury whether the fingers were stiffened as claimed, and whether such injury was permanent. Appellee declined to permit the witnesses to examine her hand, and the court overruled appellant's motion to compel her to do so. The right to demand such a personal examination of the injured member of one suing for permanent personal injuries was first before this court and decided in *Electric Line Co. v. Allen*, 44 S. W. 89. We then held that the weight of authority was to the effect that "such physical examination may be demanded in cases where discovery of the truth will more likely result with than without the examination, and the end of justice be thereby better subserved." The rules of practice governing such examinations were also declared in that case, providing, among other things, that the ordering of such an examination was within the sound discretion of the trial judge, but such discretion was reviewable on appeal. In this case the injury sued for was not apparent. Whether it existed in fact was disputed. To permit the plaintiff to testify that the member was injured and that the injury was permanent, and to deny other competent witnesses, who are especially skilled in treating such injuries, an opportunity to examine the hand, and to demonstrate, if they could, that it was not in fact injured at all, was an abuse of discretion, which, it was said in the *Belt Line Co. v. Allen* Case, was lodged with the trial judge. And for that error the judgment must be reversed. As the case is returned to the circuit court, it may not become necessary to pass upon whether the verdict was excessive, as that question may not occur after another trial. We are of opinion that this case is one authorizing the submission of the question to the jury whether exemplary damages should be awarded. For it presents a case of such negligence that the jury might be warranted in finding that it evinced a reckless disregard of human life aboard the passenger train by the trainmen in charge of the freight.

The case is remanded for proceedings not inconsistent herewith.



CITIZENS' RY. CO. *v.* CRAIG.

(*Court of Civil Appeals of Texas, May 28, 1902.*)

[69 S. W. Rep. 239.]

**Street Railway Companies—Duty to Passengers.\***

It is the duty of a street railway company to exercise the highest degree of care in operating its cars to prevent injury to passengers, and failure of its servants in that respect is its negligence.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Miss Hortense Craig against the Citizens' Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark & Bolinger, for appellant.

L. W. Campbell and Felix D. Robertson, for appellee.

FISHER, C. J. This is an action by the appellee against the street railway company for damages arising from personal injuries alleged to have resulted through the negligence of one of the motormen operating one of the cars on defendant's line, in permitting the same to come in collision with the car upon which the plaintiff was riding, thereby violently and with great force throwing her against the floor, by reason of which she sustained injuries. The facts, briefly stated, are as follows: The appellee was a passenger on one of appellant's street cars, the same being crowded; and, there being no vacant seats, she was standing up, holding onto the back of one of the seats, when, without warning, another street car on appellant's road collided with and ran into the car upon which the plaintiff was riding, with such force as to throw her to the floor of the car, whereby she received a terrible knock on the head, and severe flesh bruises about the hips and limbs, and by reason of which, also, her back was injured, she was not able to walk without a limp for about two weeks, and suffered with continual pains in her head for at least two months after the accident, and, as a result, had some trouble with her right ear, which has continued up to the time of trial, with some defect of hearing. There followed the accident a difficulty in swallowing, with soreness in the throat, and her eyes have troubled her since then. And further on, upon the subject of her injuries, she testifies: "My eyes have been weak and have troubled me since then. My side was swollen some, but no permanent injury has resulted to my side. I received more than one injury in the accident. The most serious injury I received was to my head. The most suffering was the continual pain in my head. I suffered from a soreness and buzzing in my ear. It was sore and painful, and from the time of the accident I have noticed a defect in my hearing."

\*As to the liability of carriers for injuries to passengers by collisions, see notes to Chicago, etc., R. Co. *v.* Durand, post.

There was some ulceration on the inside of my ear, and some discharge therefrom. There was soreness in the throat, and great difficulty in swallowing. I have been troubled with my eyes since the accident, making me nervous, and my eyes are weaker. I was extremely nervous and more listless right after the accident, having little energy or strength for exertion of any kind. There seemed to be some soreness in the back of my neck, which lasted about two weeks. My back was considerably injured and made weaker from the fall. My hip was bruised to an extent that I could not walk for some time without limping,—for about ten days. My side was similarly affected to my hip. My lower limbs were bruised and contused. The flesh was very black and blue, and it was about two weeks before it resumed its normal color. I suffered a great deal, both mentally and physically. The most painful effect to the body passed away in two weeks' time. My back is still weak, and I cannot walk without a limp in my limb. There is a slight limp, but it is not noticeable to other people. The pain in my head continued for two months, and it still troubles me at times, aching dreadfully. There is still some difficulty in my throat,—some difficulty in swallowing. My ear is still sore, and my hearing is decidedly impaired. The defect in my eyes still troubles me, and makes me nervous. I have most positively not recovered from my injuries. I was confined to my bed at least four days. I was confined to my room at least two weeks. I did incur some expenses for medical treatment. The exact amount I do not know yet, as the bills have not all been rendered." It appears that the accident occurred on the 16th of February, 1901, and the date of trial (the time when the plaintiff was testifying) was at the December term of the court, in 1901. The physician who attended the plaintiff after the accident testified as follows: "I found she was bruised on one shoulder and one hip. I also found she had difficulty in talking. She had difficulty in swallowing. She attempted to swallow something while I was there, and had quite a difficulty in swallowing it. She complained of a great deal of headache, a difficulty in swallowing, and also a difficulty in the use of her arm and hand. I tested the pressure of her hand, and it was not as strong as it ought to be. She said the back of her head was hurting at the time. I had her to swallow some water, and pressed her tongue down, and saw that there was some paralysis of the muscles of deglutition, and, instead of having that action which they should have to carry the food down, they would throw back the bulk of it. I had her to swallow some water and other things, to see whether the action was normal, and I came to the conclusion that there was partial paralysis of the throat. I did not see any bruises, that I recall, on the head. The bruises on her shoulder and head did not seem to be very extensive. I mean very deep. They were blue, but not a contusion of a very violent character. The bruises and

injuries that I found could very easily have resulted from a collision between two street cars, where the plaintiff was thrown backwards, striking her head on the floor or the door of the car. A man may be struck on the head without fracturing the skull, yet it may injure the base of the skull and cause some injuries, or a person may jump off of a place and fall on his feet violently, and fracture the base of the skull, and cause all of the symptoms without causing external violence. If constant headaches had set up after this injury, which had lasted up even to the present time, in my opinion this could have been the result of a collision. Her eyes, her hearing, and her throat could have been affected from that kind of a collision. The reason is that our senses of sight, hearing and taste (that is, the nerves of these organs) pass down through the base of the brain, and injury to this region would, as a consequence, injure all of these parts. Any violent jar to the head, or any portion of it, might affect these various organs of sense. It might be temporary, or it might produce a hemorrhage and cause complete destruction. If the injury in this case had been temporary, it would have passed off in a few days. If it continued more than two or three weeks, I would expect something permanent. From the examination I made of the young lady, I think the injury is permanent. If it passes off, it will be a long time. I also tried her hearing with my watch, and found that she could not hear with one ear as well as she could with the other."

The facts found in the record justified the conclusion that the motorman on the rear car was guilty of negligence in permitting his car to come into collision with the car upon which the plaintiff was riding, and as a result she sustained the injuries above stated.

The appellant's second assignment of error complains that the verdict and judgment for \$600 in favor of the plaintiff are excessive. We have not stated all the facts, but we have stated sufficient to show that there is evidence to support the verdict in the amount found by the jury.

The court instructed the jury as follows: "And it was the duty of the defendant to have exercised the highest degree of care in the operation of its cars to prevent injury to its passengers thereon, including the plaintiff; and the failure by its servants operating said cars to exercise such care would be negligence upon the part of the defendant." Appellant's first assignment of error complains of this charge as imposing upon the defendant a higher degree of care than the law requires. This question was gone over and considered by this court in the case of *Railway Co. v. George* (Tex. Civ. App.) 60 S. W. 313, where a charge was approved which substantially required the railway company to use the highest degree of care in the operation of its cars, so as to prevent injury to its passengers.

We find no error in the record, and the judgment is affirmed. Affirmed.

CHICAGO, R. I. & P. RY. CO. *v.* DURAND *et al.**(Supreme Court of Kansas, July 5, 1902.)*

[69 Pac. Rep. 356.]

**Injury to Hack Passenger—Collision at Crossing between Hack and Train\*—Parties.**

A driver of a hack carrying passengers, who negligently drives in front of an approaching train of cars at a street crossing, may be joined in an action against the railway company for negligently running into his hack to the injury of one of his passengers.

**Same—Same—Evidence—Failure to Signal at Another Crossing.**

In an action against a railway company for negligently running its train on a traveler at a city street crossing without giving any signal of the train's approach, it is error to admit evidence of a like failure of the train to signal its approach to another street crossing in the city. *Railroad Co. v. Hague*, 38 Pac. 257, 54 Kan. 284, 45 Am. St. Rep. 278, overruled.

**Same—Same—Failure to Operate Gates.**

In an action against a railway company for negligently running one of its trains on a traveler at a city street crossing, where the company was in the habit of operating gates across the street at certain hours of the day, but not at the time of the accident, it is error to refer to the jury the question whether the single isolated circumstances of failure to operate the gates at that time was negligence in the company.

(Syllabus by the Court.)

In banc. Error from superior court, Sedgwick county; D. M. Dale, Judge.

Action by C. G. Durand and others against the Chicago, Rock Island & Peoria Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

M. A. Low, W. F. Evans, and Stanley, Vermilion & Evans, for plaintiff in error.

Houston & Brooks, for defendants in error.

DOSTER, C. J. This was an action for bodily injuries negligently inflicted upon plaintiff at a railroad and street crossing in the city of Wichita. There was a circus entertainment in the outskirts of the city. Albert Wilson was a hack driver carrying people to and from the city and circus grounds. The plaintiff and others were passengers in his conveyance. He negligently drove in front of a train as it was running over the crossing near the depot. The train approached the crossing without warning signals, and ran over it at a dangerously rapid speed, and struck the conveyance in which plaintiff was riding. These were the allegations of the petition, made against the railway company and Wilson jointly. The defendants defended separately. A verdict and judgment were rendered against them together, from which the company on its part has prosecuted error.

The counsel for the railway company intended to file a demurrer to the petition for misjoinder of causes of action, but inadvertently filed an answer. The making of this mis-

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\*See notes at end of case.

take was satisfactorily shown to the court, and leave asked to withdraw the answer and file a demurrer. The leave to do so was refused. This refusal constitutes the first claim of error. It will not be necessary to consider, in its ordinary aspect, the question of the court's abuse of discretion in refusing to allow the one pleading to be withdrawn and the other to be substituted. The court did not abuse its discretion if the demurrer, when filed, could not have been sustained; and that such could not have been done as reasonably clear. The objection is that the petition charges a separate independent tort on the part of both defendants,—Wilson for negligently driving the plaintiff into danger, the railway company for negligently running over him. It is true that the drivers of public conveyances, whether railway coaches or common vehicles, are individually responsible for the safety of their passengers; but so likewise are the drivers of other conveyances responsible to the former's passengers at points of collision or common danger. At such points there is a common and mutual duty of diligence and caution, because there, to the knowledge of each, a dangerous juxtaposition of their respective vehicles is liable to occur. In the case of a railroad and highway crossing there is a common point of danger against which there is a mutual and concurrent obligation to guard. That common point is the one of contact between the train and the vehicle. It is as though the injured person stood at that point, and the two rushed upon him with mutual design to crush him between them. From one he might escape, but not from the two together, seeking to compass his injury by the impact of their opposing forces. The rule of joint liability in such cases is stated in 3 Thomp. Negl. § 2781, with citations to many supporting decisions. The case of *City of Kansas v. File*, 60 Kan. 157, 55 Pac. 877, applies the same general principle to a somewhat different state of facts. That the carrier of the passenger may be under a greater obligation of prudence and caution than the driver of the train or other vehicle does not change the rule of joint liability. The carrier may be required to use extraordinary care; the other only ordinary care. That, however, does not excuse the latter from using such measure of caution as the law imposes on him. It is no answer to him to say that, while he failed to observe the minor degree of prudence required of him, the other party failed to observe the greater degree required of him. The question of joint liability in such cases cannot be affected by the comparative culpability of the offenders. If the neglect of one to exercise the extraordinary degree of diligence required of him conjoins with the neglect of another to use the lesser degree of diligence required of him, to the injury of a third person, such injury is none the less the single result of the two negligent acts or omissions of duty. It is well settled that the law will not undertake to apportion consequences between two or more persons jointly

guilty of wrongful conduct towards another, though their contributions to the injury were in unequal degrees, or from different motives, and it must be that the same rule applies where the injury was wrought by the neglect of differing degrees of responsibility.

There is no statute or ordinance of the city of Wichita requiring trains to give warning signals of their approach to street crossings. It was, of course, a disputed question whether the trainmen gave any signals of their approach to the crossing of the street at which the accident occurred. About two-fifths of a mile before reaching that crossing there is another street, likewise running at a right angle with the track. Witnesses were allowed to testify that the employees operating the train in question failed to give any warning of their approach to that crossing. The admission of this character of evidence is defensible on the authority of the majority opinion in *Railroad Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278, although in that case the two crossings were about a mile apart, and were in the country, where there is a statutory duty to give signals of approach to highway crossings. We think, however, the rule is the same in both kinds of cases. In one, as in the other, the evidence is offered for the purpose of laying a foundation from which to argue that, inasmuch as the railway company was negligent at one crossing, it was, therefore, negligent at the other one. It cannot be any the more admissible to prove the violation of a statutory duty at one place, or under one set of circumstances, in order to deduce the conclusion of a violation of the same kind of duty at another place, or under another set of circumstances, than it is to prove the violation of a merely moral duty at one place, or under one set of circumstances, in order to deduce the conclusion of its violation elsewhere, or under other circumstances. We are constrained to think that the majority holding in the case of *Hague* was wrong. Although supported by the decision of another state, it seems to us to be violative of a fundamental rule of evidence. "Ordinarily, when a party is sued for damages flowing from negligence imputed to him, it is irrelevant, for reasons already given, to prove against him other disconnected, though similar, negligent acts. Thus, in an action against a bailee for the loss of property intrusted to him, evidence of independent acts of negligence not connected with the loss is inadmissible. So, where the question, in a suit against a railway company, is whether a driver was negligent on a particular occasion, it is irrelevant to prove that he had been negligent on other occasions." 1 Whart. Ev. § 40. Analogous to this rule is the more familiar one which prohibits the proof against defendants in criminal trials of different and disconnected offenses, though of the same particular class. Both these instances are applications of the general rule of inadmissibility of collateral incidents and circumstances to con-

vict the party on trial, unless they, with the main incident, form connected parts of a common and designed system. *Id.* § 29. Now, two failures of a locomotive engineer to sound crossing signals, though quite closely connected in point of distance and time, do not evidence a systematic inattention to duty; nor do we think, as counsel do, that the inference of systematic neglect is aided by the fact that the engineer was slightly behind time, and was running through the city at more than usual speed, there being no evidence that such circumstances were conducive to the neglect of the duty in question.

There is no statute of the state or ordinance of the city requiring the maintenance of gates at street crossings. The court, however, gave to the jury the following instruction: "It is for you to determine, from all the circumstances surrounding the case, whether it was necessary for the defendant railway company, in the exercise of ordinary care by the company, to keep and maintain and operate gates after six o'clock in the evening on said railroad crossing. And if you so find,—that the exercise of ordinary care by the company required such maintenance and operation,—then it becomes the duty of the railway company to use reasonable care and foresight to avoid leaving said gates in such position, or managing them in such manner, as to needlessly mislead a traveler on the highway to his injury, and without his fault, into attempting to cross said railway track at a time when there was danger from approaching trains; that is, the company should do as a person of ordinary care and prudence would do under like circumstances." This instruction was erroneous, because it singled out a particular circumstance, not directly connected with the operation of the train, but collateral to its operation, and gave it to the jury as a fact upon which they might predicate a conclusion of wrong. There is much dispute as to the soundness of instructions of the character of the one above quoted. The court was not without abundant precedent for giving it. 2 Wood, Ry. Law, pp. 1313, 1314; 2 Thomp. Negl. § 1537. The better opinion, as it seems to us, is that the court should not submit isolated facts, apart from the main act of negligence, to wit, the careless operation of the train, as sufficient to justify a verdict. The point to the instruction in question is that under it the railway company was made liable for failure to shut down its gates, though it moved its train never so cautiously. In *Grippen v. Railroad Co.*, 40 N. Y. 34, the trial court said to the jury: "I leave it to you to say, under all the circumstances, whether a flagman at this station, as a measure of proper caution, was or was not required of defendant." This instruction was held to be erroneous, and the ruling then made has been followed in many subsequent cases in the courts of New York. The argument in one of these cases—*McGrath v. Railway Co.*, 63 N. Y. 522—appears to us so strong and con-

vincing that we quote much of it. Said the court: "Where there has been a collision at a railroad crossing with a traveler upon the highway, and the railroad company is sued for negligence in causing the collision, its negligence is made out generally by proving all the circumstances surrounding the transaction, and submitting them, with proper instructions, to the jury. It may be proved that the collision took place in the nighttime, in a rainstorm; that the train was running fast or slow, with or without headlights; that it was backing or going forward; that it was running in a city in a crowded thoroughfare, or in the country; that there were many or few tracks; that there were obstructions making it impossible to see the train before the crossing was reached. These circumstances are proved, not to impose upon the railroad company any duty which the law does not impose, or any duty to do any acts collateral to the running and management of its trains in a lawful manner upon its road, but as bearing upon the question of the manner in which it has run and managed its train. A different degree of care may be required in running trains in the dark and in the daylight, in city and country, when there are obstructions and no obstructions near crossings. It would be error for a judge to charge a jury that it is the duty of a railroad company to remove obstructions near its road obstructing the observation of travelers at a crossing, and yet it would not be error to receive proof of the presence of such obstructions. For the same reason it would be error for a judge to instruct a jury that it is the duty of a railroad company to keep a flagman at a crossing, or to submit to the jury the question whether it ought to have kept a flagman there; and yet it would not be error to receive evidence of the absence of a flagman. There are many cases where trains can be run with greater speed, without negligence, if a flagman is kept at crossings, or other appropriate measures taken to warn travelers of the approach of trains. And, in the absence of flagmen, railroad companies may, in the exercise of proper care, be required to run their trains slower, or to take other precautions to protect travelers; the question in all cases being, not whether it was their duty to do any of the collateral things to warn travelers, but whether, under all the circumstances of the case, it run and managed its train with requisite care and prudence. To illustrate more fully the clear distinction which I claim to exist as to the use that may be made of such evidence: In a given case the evidence of the absence of a flagman is received, and the judge charges the jury that if they find that it was the duty of the defendant, under the circumstances, to keep a flagman at the crossing, the omission of that duty is negligence which may make the defendant liable. Under such a charge that duty is made the central and controlling fact, and, if the jury should find that the defendant had run its train with the greatest care in other respects, and that it was guilty of no other negligence, and yet should



Chicago, etc., Ry. Co. v. Durand

find that it had omitted that duty, they could find a verdict against the defendant. Under the laws which make the duty of railroad companies to put up signboards, and ring the bell and blow the whistle at railroad crossings, an omission of that duty, if the jury found that it contributed in any way to the accident, would make the defendant liable, no matter how careful it may have been in running and managing the train, and in all other respects. Such effect is given to that omission of duty because the law imposes the duty and enacts the consequence for its omission. Under such a charge as I have supposed, the jury is put in the place of the legislature, and its decision as to the duty has the force of statute law; and hence such a charge has properly been condemned by the courts of this state. In another case the evidence is received, and the jury is charged that the defendant owed no duty to any one to keep a flagman at the crossing, but that its sole duty to travelers upon the highway was to run and manage its trains with proper care, so as not to injure them in the exercise of their lawful rights; and that upon the question whether such care was exercised they must consider all the circumstances existing at the time and place of the accident, and among them the fact of the absence of a flagman at the crossing. In such a case a proper use is made of the evidence, and the charge is liable to no just criticism. If the jury find such care was exercised, they will find for the defendant, whether there was a flagman at the crossing or not." The same holding has been made by other courts. *Heddles v. Railway Co.*, 74 Wis. 239, 42 N. W. 237; *Winchell v. Abbot*, 77 Wis. 371, 46 N. W. 665; *Railroad Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Railroad Co. v. Luebeck*, 157 Ill. 595, 41 N. E. 897; *Lesan v. Railroad Co.*, 77 Me. 85; *Railroad Co. v. Neubeur*, 62 Md. 391. To hold, as some courts have done, that the nonuse of the accustomed gates at street crossings is a notice of safety to approaching travelers, and tantamount to an invitation to cross, impinges very closely upon, if not in reality abrogates, the rule which requires persons about to cross railway tracks to look and listen, and in some instances to stop in order to better do so. The doctrine that the single circumstance of leaving gates open may be accepted by the jury as sufficient evidence of negligence in the company is of a piece with that which acquits the traveler of negligence if he sees the gates open. They are both wrong. Of course, evidence in proof of the negligent omission to maintain gates at a street crossing is admissible, and in *Railway Co. v. Richardson*, 25 Kan. 391, it was held that such omission, although not specially alleged in the petition, was nevertheless included in the general charge of negligent operation of the train, and might be proved as one of the circumstances constituting the *res gestæ*. The implications from the language of the opinion in that case harmonize with the ruling we make in this one.

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Many other claims of error are made. None of them impress us as substantial enough to constitute of themselves grounds for reversal, if, indeed, they be even technically correct. However, in one instance a witness was allowed to give his opinion as to the speed at which the train approached the crossing, without showing a sufficiently close observation of it, or thought at the time concerning it.

The judgment of the court below is reversed, and a new trial ordered. All the justices concurring.

## NOTES.

### LIABILITY OF CARRIERS FOR INJURIES TO PASSENGERS BY COLLISIONS.

- I. In General.
- II. Collisions between Trains or Cars Operated on the Same Track.
- III. Collisions of Trains with Cattle and Other Obstructions.
- IV. Collisions of Street Cars with Road Vehicles.
- V. Collisions with Structures Alongside the Track.
- VI. Collisions with Cars on Parallel, or Side, Tracks.
- VII. Collisions between Vehicles of Different Carriers.
  - A. In General.
  - B. Collisions between Trains of Intersecting Railroads.
  - C. Collisions between Street Cars and Trains or Cars of Intersecting Railroad, or Street Railway, Companies.

#### I. IN GENERAL.

In the management of the carrier's vehicle, care must be exercised to avoid injury to passengers in consequence of collisions with other vehicles or with obstructions of any kind; if, by negligence in this respect, a passenger, who is himself in the exercise of due care, sustains injury, the carrier is liable. And the carrier cannot escape liability for negligence which contributes to an accident of this kind by reason of the fact that the negligence of the other party to the collision contributed to the accident (*Kellow v. Central, etc., R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; *Eaton v. Boston, etc., R. Co.*, 11 Allen [Mass.] 500, 87 Am. Dec. 730; *Olsen v. Citizens' R. Co.*, 152 Mo. 426, 54 S. W. 470; *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307; *Barrett v. Third Avenue R. Co.*, 45 N. Y. 628, affirming 8 Abb. Pr., N. S., 205, 1 Sweeney [N. Y.] 568; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Sears v. Seattle, etc., R. Co.*, 6 Wash. 227, 33 Pac. 1081; *Hencke v. Milwaukee, etc., R. Co.*, 69 Wis. 401, 34 N. W. 243), or even by reason of the fact that the other party was more culpable than the carrier. *Union, etc., R. Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896, 28 Am. & Eng. R. Cas. 193, affirming 19 Ill. App. 145; *Chicago, etc., R. Co. v. Ransom*, 56 Kan. 559, 44 Pac. 6, 3 Am. & Eng. R. Cas., N. S., 259. Where there is negligence on the part of the driver of a street car in attempting to cross a railroad track in front of an approaching train, the street railway company cannot escape liability on the ground that the negligence of the railroad contributed to the accident. *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468. Thus where the driver of a street car attempted to cross a railroad track in front of an approaching train, and an accident happened which would not have taken place but for such negligence, the fact that the negligence of the railroad company in lowering the gates contributed to the happening of the accident could not. it has been held, absolve the street railway from liability. *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468. In an action against the pro-

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prietor of a stage coach to recover damages sustained by plaintiff, while a passenger, in consequence of a collision with another coach, it was held that, although the accident might have been caused immediately by the negligence of the driver of the other coach, defendant was nevertheless liable if his driver did not use all the means which a skilful and prudent driver could and would have used to prevent the injury done. *Peck v. Neil*, 3 McLean (U. S.) 22, Fed. Cas. No. 10,892.

## II. COLLISIONS BETWEEN TRAINS OR CARS OPERATED ON THE SAME TRACK.

When more than one train or car is operated upon the same track, the carrier must exercise care to make proper provision for their operation without danger of interference; when necessary for the safety of passengers, the carrier must adopt and conform to proper rules and regulations, some system of signals or other means of giving information as to the movement of the trains or cars, and take every precaution which will be suggested by an observance of the high degree of care which the law exacts. *Union, etc., Traction Co. v. Shacklet*, 119 Ill. 232, 10 N. E. 896, 28 Am. & Eng. R. Cas. 193, affirming 19 Ill. App. 145. A railroad company which undertakes to regulate the running of its trains by telegraph is bound to have a proper and fit telegraph line for the purpose, with a reasonable number of telegraph stations and operators properly to conduct and control the movements of trains. *Grand Trunk R. of Canada v. Walker*, 154 U. S. 635, 14 Sup. Ct. 1189, 25 L. Ed. 977. Plaintiff was injured in a collision between two of defendant's electric cars, going in opposite directions on a single track. By the time schedule in force when the accident occurred, the car which collided with the one in which plaintiff was riding, should have turned off on a branch track two minutes before plaintiff's car was due at the junction of the two tracks, but there was no provision made by signal, flag, register or otherwise to inform those in charge of plaintiff's car, when the junction was reached, whether the other car had in fact passed that point. It was held that this was sufficient to establish the fact of defendant's negligence. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241. In an action to recover damages for the death of plaintiff's intestate it appeared that the accident happened as follows: The train upon which decedent was a passenger, by mistake of the engineer, moved out of the station at B., leaving the conductor behind and failing to take a sleeper which should have been attached to the train. The engineer's error was due to the fact that he mistook the night watchman's signal, directing him to move his train out of the way of an incoming train, for a signal by the conductor, notifying him to leave the station. The conductor and watchman were supplied with the same uniforms, the same kind of lanterns for signaling purposes, and the signal made by the watchman for the train to move out of the way was made in the same way that the conductor would have signaled for the train to proceed on its way to the next station. The engineer did not discover his mistake until he reached E., a station five or six miles from B., and at which there was no night operator. Upon discovering his mistake at E., the engineer, after waiting about one or two minutes, started to back his train to B. There was no light on the rear coach, and he was backing at the rate of fifteen or twenty miles an hour. When the train had gone back about two and one-half miles, it collided with an extra freight, which had been ordered to move out in the rear of the passenger train, and plaintiff's intestate received injuries from the effects of which he subsequently died. It was held that all these acts and omissions were properly considered by the jury on determining the question of defendant's negligence, and a judgment for plaintiff was affirmed. *Kansas City, etc., R. Co. v. Sanders*, 98 Ala. 293, 13 So. 57, 58 Am. & Eng. R. Cas. 140.

Care must be exercised that the track at a station is clear at the time when an incoming train is due. Thus, a railroad company has been held liable to a passenger for injuries received in a collision which was

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caused by the negligence of the foreman of a switch engine in failing to notify his engineer that an extra train would arrive at a certain time. *Eddy v. Letcher*, 6 C. C. A. 276, 57 Fed. 115. Where a car in which there are passengers, and which is left standing on the main track near a station, is run into by another train, which is known to be approaching, in consequence of a failure to flag the train, or the recklessness of the servants in charge thereof in continuing the speed of the train until they see the danger, the railroad company is chargeable with gross negligence. *Louisville, etc., R. Co. v. Long*, 94 Ky. 410, 22 S. W. 747.

Railroad trains and street cars should be run a safe distance apart. In an action to recover for injuries received in an accident caused by a freight train running into the rear end of a passenger train in which plaintiff was riding, the facts were as follows: The two trains had left the same station from four to eleven minutes apart; the passenger train consisted of engine, baggage car, and three coaches, and, heavily loaded, had a schedule of 23 miles an hour, and was to stop at nine stations. The freight train was a double header that made no stops, and ran at least 25 or 30 miles an hour, carrying 49 cars. The freight train instead of keeping 10 minutes behind the passenger train was run at a speed which caused it to overtake and collide with the passenger train. It was held that the facts presented a clear case of gross negligence. *Louisville, etc., Ry. Co. v. Richmond* (Ky. 1902), 67 S. W. 25. While a freight train was ascending a steep grade, on a curved track, a number of cars, including the caboose in which plaintiff and others were seated, became detached and, running backwards, came in collision with the engine of a train which was following eight minutes behind. In affirming a judgment for plaintiff it was said that it could not be said, as a matter of law, upon the facts found, that the company was exercising due care in running trains up a steep grade, on a curved track, where one train could not be seen from the other, without a greater interval between them. *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869. When a street car, on which plaintiff was a passenger, came to a stop, plaintiff, who was standing on the rear platform, leaning his back against the dasher, was struck in the back by the pole of another car, which was following rapidly, and injured, a judgment for plaintiff was affirmed. *Thirteenth, etc., R. Co. v. Boudrou*, 92 Pa. St. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Rep. 707. In an action to recover for injuries sustained in consequence of a collision between two of defendant's street cars, plaintiff's evidence tended to show that he had reached the car, which had stopped for him at a crossing, and was endeavoring to enter it by a single low step, in the rear and center of the car, between the rails; that while he was on the step and in the act of opening the door, which opened with difficulty, he heard the noise of another car approaching, which was unexpectedly brought into collision with the one he was entering, and he was thereby struck, knocked down, and severely hurt. Defendant's evidence also tended to show that the forward car had stopped and was waiting for plaintiff, and that he had passed to the rear thereof and stood between the rails, where he was seen by the driver of the rear car before the accident. The collision occurred in the evening, and during a storm, but the streets were sufficiently lighted, so that plaintiff and the car which he was about to board could be seen by the driver of the other car. It was held that a motion to dismiss the action was properly denied. *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, 18 N. W. 827.

When, by the running of other trains on the same track, it is hazardous to run a train several hours out of time, it is negligence to do so. *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239. And it may be negligence to run a train behind time, without notifying a train which is following of the fact. *Alabama, etc., R. Co. v. Beardsley* (Miss. 1901), 30 So. 660.

When a train or car meets with an accident which causes delay, and there is danger of another train or car coming in collision, steps should be taken to flag the approaching train or car, to remove the passengers to a place of safety, or to do whatever may be demanded by the sit-

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nation. A train, upon which plaintiff was a passenger, was delayed by the failure of the air-brakes to work. It was overtaken by a construction train of defendant, which was known to those in charge of the passenger train to be but a few minutes behind. A collision occurred, and plaintiff was injured. It was held that the question of defendant's negligence in failing to exercise due care in flagging the approaching train was properly submitted to the jury. *Louisville, etc., R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378. The train, upon which plaintiff's husband was a passenger, became stalled in snow, and could proceed no further. Thereupon a brakeman was sent back for aid. This brakeman, meeting an engine with a snow-plow attached, communicated the fact that the train was stalled, and undertook to inform the conductor and the engineer where the stalled train was located. He got on the engine, which proceeded toward the train, and, without stopping, ran into the rear end of the caboose attached to the stalled train, and injured deceased so that he died a short time thereafter. It was snowing at the time the accident took place, and the wind was blowing so as to render it difficult, if not impossible, for those on the engine behind the snow-plow to see the stalled train, towards which they were approaching, when the engine was in motion. There was no flagman placed on the track behind the stalled train to give warning to the approaching engine and snow-plow, nor was there any bell rung or whistle sounded on the stalled train. The brakeman who went back for the snow-plow said that he placed three torpedoes on the track behind the stalled train, but the evidence showed that these were entirely inadequate to give warning to the approaching engine, and were probably swept off by the snow-plow and not exploded, or, if exploded, the wind and drifting snow prevented those on the engine behind the snow-plow from hearing the explosion. It was held that, upon the evidence, the question of defendant's negligence was for the jury. *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 30 N. W. 282. Where a train was stopped to avoid running into a wagon, which obstructed the track and could not be removed, and a flagman was sent back to stop another train which was almost due, but the passengers were not removed from the cars, it was held that whether the failure to notify the passengers to leave the cars amounted to negligence, was a question for the jury. *Eaton v. Boston, etc., R. Co.*, 11 Allen (Mass.) 500, 87 Am. Dec. 730. As the freight train, upon which plaintiff was a passenger, reached the top of a hill, several cars, including the caboose in which the conductor, two brakeman, and plaintiff, who was asleep, were riding, became detached, ran backward, and came to rest at the bottom of the grade, some two miles from the place where the train parted. Without awaking plaintiff, one of the brakemen went back about a quarter of a mile to flag another freight train, which was known to be in the rear, and which would approach on a long down grade. It appeared that this rear freight train had met with a like accident at the top of the hill, and the forward part of the train, composed of some 16 or 18 cars, had but one brakeman on it, so that the train was not under the control of the engineer. It was held that there could be no doubt that the evidence tended to show negligence on the part of the trainmen. "They knew there was a freight train just behind them; that it would reach them on a long down grade; that the freight trains were liable to, and frequently did, break in two, and then not be under the complete control of the engineer; and that there was frost on the rails. The evidence tends to show that the rear train could have been heard for two miles, and there was ample time to have given a danger signal further from the standing caboose. Under the circumstance, to flag the train at a distance of only a quarter of a mile from the caboose, and without warning to the boy, who knew nothing of what was going on, furnishes evidence of even gross negligence." *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409. For a somewhat similar case, see *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608. In an action to recover for injuries received in a rear-end collision between two of defendant's electric cars,

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caused by the trolley of the first car, upon which plaintiff was a passenger, coming off the wire, there was evidence to show the following facts: At the place of the accident, the tracks of the railroad ran through woods, on a down grade, with frequent curves. The curve just before the place of the accident was of such a kind that the motorman of the second car could see only about 150 feet ahead. A light rain had fallen, and the tracks were very slippery, so that the brakes would not hold well. The second car left two minutes after the first. All this was known to the conductor of the first car, and yet, when the trolley came off, instead of letting his car go by its own momentum down the grade, he signalled to stop it, and when it stopped, after going some distance, instead of giving warning to the other car which was approaching from behind, he proceeded to get on the top of the car to adjust the trolley; and the collision occurred. It was held that there was evidence to warrant a finding of negligence on the part of the conductor. *Blanchette v. Holyoke, etc., R. Co.*, 175 Mass. 51, 55 N. E. 481.

A collision of the several parts of a train which has broken apart may be predicated upon the want of proper inspection, the absence of the trainmen from their posts, and stopping an engine which is following the train in close proximity to one of the sections. *Delaware, etc., R. Co. v. Ashley*, 14 C. C. A. 368, 67 Fed. 209.

In an action in which it appeared that the collision of a street car with another car ahead of it, was caused by the fracture of the brake-chain, so that the driver could not control the car, although he made every effort to do so, it was held that no negligence on the part of the driver was shown, notwithstanding that he may have used more force in applying the brake than was absolutely necessary, and that he did not shout to those in charge of the car ahead, it not being shown that shouting would have been of service in preventing the accident. *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721, reversing 14 N. Y. Supp. 172.

In an action to recover for injuries received in a rear-end collision between two elevated trains during a severe snow-storm, it was contended that defendant was negligent in continuing to run the cars, and the question was left to the jury. The facts were these: The storm had apparently abated. The trains of the defendant were crowded with passengers seeking passage to the lower part of the city. It was the duty of the defendant, under its charter, to operate its trains, if practicable, for the convenience of the public. No accidents had, so far as appeared, occurred on that day prior to the accident in question, and the road had continued its efforts to move its trains. Up to about the time of the accident the street-surface roads, although they naturally would be more likely to be impeded by the snow than the elevated roads, had continued their traffic. The forecasts of the weather were favorable. It was held that the evidence did not justify the submission to the jury of the question as to whether defendant was chargeable with negligence in not having wholly suspended the operation of its trains. *Connelly v. Manhattan R. Co.*, 142 N. Y. 377, 37 N. E. 462, reversing 68 Hun (N. Y.) 456, 23 N. Y. Supp. 88.

### III. COLLISIONS OF TRAINS WITH CATTLE AND OTHER OBSTRUCTIONS.

The care demanded of railroad companies in the management of their trains requires that they should maintain proper lookouts, moderate the speed of trains at especially dangerous points, and take every reasonable precaution to prevent injury to passengers in consequence of collisions with cattle and other obstructions on the track. *St. Louis, etc., R. Co. v. Stewart* (Ark. 1901), 61 S. W. 169, 20 Am. & Eng. R. Cas., N. S., 571; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Brown v. New York, etc., R. Co.*, 34 N. Y. 404; *Mexican, etc., R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; *Trinity Valley R. Co. v. Stewart* (Tex. Civ. App. 1901), 62 S. W.

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1085. See also, *Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500. When a train comes to a curve in the road and it is impossible for the engineer to see both sides of the track, it may be negligence for the fireman to omit keeping a lookout on his side of the cab. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597. Where the engineer of defendant's train, upon which plaintiff was a passenger, ran the train in broad daylight at the rate of ten or fifteen miles an hour against obstructions, lying directly across the track, and visible to him at a distance of more than a quarter of a mile, his excuse for the act being that, although he saw the obstructions in season to stop, he thought he could knock them out of the way, it was held that defendant was guilty of negligence. *Willis v. Long Island R. Co.*, 34 N. Y. 670, affirming 32 Barb. (N. Y.) 398.

## IV. COLLISIONS OF STREET CARS WITH ROAD VEHICLES.

The driver of a street car, whether operated by horses or machinery, should be vigilant in observing his track, and prompt in the exercise of every reasonable precaution to guard against accident, and if negligence in this respect results in collision with other vehicles and injury to passengers the carrier will be liable. It has been held that where the testimony, in an action to recover damages for injuries sustained by plaintiff while a passenger upon a street car, showed that the car was being driven with unusual speed, and was suddenly struck by the pole or shaft of a truck which penetrated through the front panel of the car with sufficient force to throw plaintiff from her seat and inflict serious bodily injuries, enough was proved to raise a question for the jury to render improper the granting of a judgment of nonsuit. *Hill v. Ninth Avenue R. Co.*, 109 N. Y. 239, 16 N. E. 61, 34 Am. & Eng. R. Cas. 522.

The due performance of the duty to exercise a high degree of care for the safety of passengers in the management of the carrier's vehicle, does not permit of the person in charge of a street car taking it for granted that a vehicle on the track ahead will turn out in time to allow the car to pass; at least in the absence of some indication on the part of the driver of the vehicle of an intention to turn out, it is the duty of the person in charge of the car to bring it under control so that it can be stopped in time to avoid a collision in case the vehicle does not turn off the track. *Sweeney v. Kansas City, etc., R. Co.* (Mo. 1899), 51 S. W. 682. Thus, where a wagon on the track ahead of an electric street car was seen by the motorman at a distance of at least four hundred feet, but he made no attempt to stop the car, although the driver of the wagon neither looked back, nor paid any attention to the ringing of the bell on the car, nor increased his rate of speed, nor attempted to leave the track until the car was so close that a collision could not be avoided by putting on the brakes or reversing the motion of the wheels of the car, it was held that there was negligence on the part of the motorman. *Sears v. Seattle, etc., R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081. Certainly where the track ahead of a moving street car is obstructed by a vehicle which has broken down on or near the track, the person in charge of the car has no right to assume that the track will be cleared in time to allow the car to pass. Plaintiff was injured in a collision of the cable car, upon which he was a passenger, with a coal wagon which had broken down on or near the track. The testimony of several witnesses tended to show that the gripman could have seen the broken-down wagon on the track, or its close proximity thereto, from 50 to 120 feet; that the train was running at full speed, and that no effort was made to stop, until about the time of the collision. The driver of the wagon, who was supported by another witness, testified that he ran fifty or sixty feet along the track to warn the gripman, who paid no attention to the warning. The gripman, however denied that he either saw or heard the witness when he was trying to attract his attention. The track was at the time what a witness called a "clean wet track." The evidence, as is usual in such circumstances, was conflicting with respect to the distance in which the train could have been stopped under

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the then existing conditions; some saying within 40 feet, others in not less than 75 to 100 feet. There was evidence tending to show that at the time of the accident the gripman was not looking down the track in front of the cars, but was talking to a passenger, and looking in a different direction. It was held that there was ample evidence to justify a finding of negligence on the part of defendant. *Sweeney v. Kansas City, etc., R. Co.* (Mo. 1899), 51 S. W. 682.

But a street car company is not liable for injuries received by a passenger in a collision which is caused by a vehicle suddenly and unexpectedly turning upon the track so close to a car that the servants in charge thereof, though exerting every effort, cannot prevent the accident. *Cleveland, etc., R. Co. v. Osborn* (Ohio 1902), 63 N. E. 604. Where, however, the driver of a dummy engine observed a balky team ahead and near the track, instead of stopping the car until the horses and wagon could be moved to a safe distance, attempted to pass at full speed, it was held that the question of his negligence was properly submitted to the jury. *Cook v. Clay Street, etc., R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175. In an action by plaintiff to recover for injuries received in a collision of the cable car in which he was a passenger with an ice wagon, although the testimony was conflicting, there was evidence to show the following facts. The car was going up a grade at a speed of about eight miles an hour. An ice wagon was coming in the opposite direction at a speed, according to some testimony, of about five miles an hour, but according to other testimony at a much greater speed. About twenty feet from the car the horses drawing the ice wagon, being frightened by an object at the side of the street, swerved upon the track, but did not slow up. The driver released the cable and applied the brake, which stopped the car within six feet. It was held that it was not error to refuse to direct a verdict for defendant. *Mt. Adams, etc., R. Co. v. Lowery*, 43 U. S. App. 408, 20 C. C. A. 596, 74 Fed. 463. The fact that the driver of a buggy knows that a car is behind him and coming in the same direction does not, as a matter of law, relieve the operator of the car of the duty to sound the gong. *West Chicago, etc., R. Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

A street railway company must exercise care in running its cars across a street not to come in collision with vehicles which may be travelling along the intersecting street (*Heucke v. Milwaukee, etc., R. Co.*, 69 Wis. 401, 34 N. W. 243), and it has no superior right to cross first, which it can set up as a defense to an action by a passenger for negligence in this respect. *O'Neill v. Dry-Dock, etc., R. Co.*, 129 N. Y. 125, 29 N. E. 84, 52 Am. & Eng. R. Cas. 573, 26 Am. St. Rep. 512, affirming 59 N. Y. Super. Ct. 123, 15 N. Y. Supp. 84. In an action to recover for injuries received by plaintiff in consequence of the collision of defendant's street car, in which she was a passenger, with a hook and ladder wagon, there was evidence to show the following facts: As the street car was approaching a cross-street, the wagon was rapidly coming toward the street car track on the cross-street. The evidence for plaintiff was that the gong on the wagon was being constantly sounded, and tended to show that it could be heard several blocks. There was also much evidence that the people in the street and on the sidewalks screamed at the motorman, and made gestures and signs to stop, whereas defendant's evidence tended to prove that the gong was not sounded, and the people did not halloo to the motorman. He did not stop, and when he saw the wagon approaching he undertook to avoid a collision by running his car at full speed across the intersection of the streets ahead of the approaching wagon, but the two vehicles collided and plaintiff was injured. A judgment for plaintiff was affirmed. *Olsen v. Citizens' R. Co.*, 152 Mo. 426, 54 S. W. 470. But where a street car, in making a sharp turn, and while the driver was stopping for passengers, was run into by a herdic coming in the opposite direction and down the street into which the car was turning, it was held that no negligence on the part of the street railway company was shown. *Hamilton v. West-End, etc., R. Co.*, 163 Mass. 199, 39 N. E. 1010.

Plaintiff got upon the side or foot-board of an open street car at about



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the middle of the car while the car was moving slowly. Before he could enter the car, and about six or eight feet from where he got on, he was struck by the hub of the hind wheel of a truck in the street. There was no evidence that the driver or the conductor of the car saw the truck or perceived the danger, and it did not even appear that the conductor was in a position to see the truck. The probabilities were that plaintiff, when he got on the car, was nearer, and had a better opportunity to see, the truck than the conductor. On the ground that plaintiff's injuries resulted either from an accident or his own negligence, a judgment for plaintiff was reversed. *Moylan v. Second Avenue R. Co.*, 128 N. Y. 583, 27 N. E. 977, reversing 59 Hun (N. Y.) 619, 13 N. Y. Supp. 494.

Plaintiff was a passenger upon one of defendant's street cars, which was proceeding on its way along one of defendant's two tracks. Coming in the opposite direction, and using the rails of the other track, was a wagon heavily loaded with lumber. When this wagon was abreast of the car, its driver suddenly turned off the track, and in doing so the ends of the lumber, which projected from the after-part of the wagon, were jerked or thrust, by the sudden movement of turning, through one of the car windows, striking the plaintiff a blow in the back. The driver, happening to look at his mirror, saw the wagon in the act of turning, and, fearing some injury from the load, at once set the brake and stopped the car. It was held that a nonsuit should have been granted. *Alexander v. Rochester, etc., R. Co.*, 128 N. Y. 13, 27 N. E. 950, 48 Am. & Eng. R. Cas. 46, reversing 59 Hun (N. Y.) 616, 12 N. Y. Supp. 685.

#### V. COLLISIONS WITH STRUCTURES ALONGSIDE THE TRACK.

In approaching an obstacle in the street, of which the person in charge of a street car has knowledge, and which is so close to the track that it may graze or come in such close proximity to the car as to be dangerous to passengers thereon, care must be exercised in the management of the car to avoid exposing the passengers to the danger. *Seymour v. Citizens' R. Co.*, 114 Mo. 266, 21 S. W. 739, 58 Am. & Eng. R. Cas. 395. See also, section III, B, 2, b, of note to *Whipple v. Michigan, etc., R. Co.*, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774. In an action to recover for injuries received by plaintiff, while a passenger on defendant's street car, in consequence of the contact of plaintiff's hand, which was partly outside the open car window, with upright planks placed by the city near the track in constructing a sewer across the street and under the track, it was held that the question of defendant's negligence in the management of the car when approaching the obstruction was for the jury. *Dahlberg v. Minneapolis, etc., R. Co.*, 32 Minn. 404, 21 N. W. 545, 18 Am. & Eng. R. Cas. 202, 50 Am. Rep. 585. Where a street car approached a point where the wall of a building was being torn down, a person in the middle of the street called to the motorman to stop, but he paid no attention to the warning, and, when the car came alongside a pile of bricks near the track, the wall fell, forcing some of the bricks into the car, whereby plaintiff was injured. It was held that the facts would justify a finding of negligence on the part of defendant. *Buehler v. Union Traction Co.* (Pa. 1901), 49 Atl. 788, 1 R. R. R. 92, 24 Am. & Eng. R. Cas., N. S., 92.

#### VI. COLLISIONS WITH CARS ON PARALLEL, OR SIDE, TRACKS.

A railroad company has been held liable to a passenger who was injured by being struck by a timber projecting from a negligently loaded freight train which was passing on a parallel track. *Curtis v. Central R. Co.*, 6 McLean (U. S.) 401, Fed. Cas. No. 3,501. Plaintiff was injured, while riding on the foot-board of an open street car which was so crowded with passengers that he was unable to obtain a seat. The car was passing along a switch or side track, provided for the pur-

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pose of enabling cars going in opposite directions to pass. It was run so close to the intersection of the side track with the main track that a closed car, passing along the main track, ran so near the open one upon which plaintiff was riding that he was squeezed against one of the posts which supported the roof of the open car and was injured. It was held that defendant was chargeable with gross negligence. *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pa. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754. In delivering the opinion of the court Simpson, C., said: "It must be held that when a street-railway company undertake to carry large numbers of people, vastly in excess of the seating capacity of their cars, and permit passengers to ride on the platforms and foot-boards, without objection, and collect fare from them, and stop their cars when in such a crowded condition that no seats are attainable, and permit persons to get upon them to be carried from place to place, and when the cars are in such a crowded condition, with passengers riding on the foot-boards, place them so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence."

## VII. COLLISIONS BETWEEN VEHICLES OF DIFFERENT CARRIERS.

### A. In General.

Railroad and street railway companies whose trains or cars run upon intersecting roads must exercise due care to guard against collisions at the crossings. And each carrier owes this duty, not only to its own passengers, but also to the passengers of the intersecting road. But the liability of the respective carriers to their own passengers and to those of the intersecting line are governed by different rules. As to its own passengers, each carrier owes the exercise of the high degree of care generally imposed upon passenger carrier, but as to the passengers of the other carrier, each carrier owes the exercise of only ordinary care. *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531; *Loudoun v. Eighth Avenue R. Co.*, 162 N. Y. 380, 56 N. E. 988, reversing 16 N. Y. App. Div. 152, 44 N. Y. Supp. 742; *Schneider v. Second Avenue R. Co.*, 133 N. Y. 583, 30 N. E. 752, modifying 15 N. Y. Supp. 557, 59 N. Y. Super. Ct. 536; *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72; *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. See also, *Central, etc., R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309. But see *Kansas City, etc., R. Co. v. Stoner*, 4 U. S. App. 109, 49 Fed. 209; *New York, etc., R. Co. v. Cooper*, 85 Va. 939, 9 S. E. 321, 37 Am. & Eng. R. Cas. 33. Since, therefore, the liability of a railroad or street railway company to the passengers of an intersecting line who are injured in consequence of a collision, is not governed by the law of passenger carrier, this discussion will be confined to the duties and liabilities of the carrier to its own passengers.

### B. Collisions between Trains of Intersecting Railroads.

As a general rule, in approaching the track of an intersecting railroad, a proper lookout should be kept, and the train should be under proper control, so that, if need arises, it can be promptly stopped. *Kansas City, etc., R. Co. v. Stoner*, 4 U. S. App. 109, 2 C. C. A. 437, 51 Fed. 649, 52 Am. & Eng. R. Cas. 462.

As aids in securing the exercise of proper care by trainmen, railroad companies frequently place, at proper points, stopping posts upon their roads, and adopt rules requiring all trains to be stopped at the posts before proceeding. It is the duty of the trainmen to conform to the rule, and a failure to do so may amount to negligence. See *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495. Where a train was not halted at the stop post, but at a point some three hundred and fifty to four hundred feet from the crossing, where, owing to trees and other obstructions, it was difficult, if not impossible, to see any distance along the track of the intersecting

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railroad, and then proceeded at so great a rate of speed that, when it was found that the crossing was occupied, the train could not be stopped in time to avoid a collision, it was held that a finding of negligence was justified. *Kansas City, etc., R. Co. v. Stoner*, 4 U. S. App. 109, 2 C. C. A. 437, 51 Fed. 649, 52 Am. & Eng. R. Cas. 462.

In some of the United States, it has been provided by statute that trains shall come to a stop at crossings. For example, see Ind. Rev. Stat. 1881, sec. 2172. It has been held that, when there is a statute to this effect, it is gross negligence to stop a train seven hundred feet from a crossing, and then start on to cross the intersecting track without again stopping. *Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480. In a case in which the evidence tended to show that the speed of a train when approaching a crossing was from thirty to forty miles the hour, and that the train was not brought to a full stop near the crossing, as required by statute, nor its speed even slackened, so that it could not be stopped after the train on the intersecting line came in view in time to avoid a collision, it was held that the jury was authorized to find defendant guilty of wanton negligence. *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495.

The duty of a railroad company to its passengers is not fully discharged merely by bringing a train to a stop at the proper distance from a crossing, and doing whatever may be necessary to entitle the train to precedence of a train on the intersecting road. The object of stopping is to enable the engineer to take observation of the track he is about to cross, as to whether there are any trains thereon with which there is danger of collision, and to have his train under proper control if there is danger of collision. And he must be vigilant in taking advantage of the opportunities for observation, and the safe management of his train, which are thus afforded him. Although his train may be entitled to cross ahead of a train on the intersecting track, he is not always warranted in assuming that the right will be respected. Although a train is entitled to the right of way, and the proper signal has been given to indicate the intention of going ahead, it may be negligence for engineer to assume that a train on the intersecting track, which he sees approaching the crossing, will come to a stop, and to go ahead without waiting to see that it actually does come to a stop. *Chicago, etc., R. Co. v. Ransom*, 56 Kan. 559, 44 Pac. 7, 3 Am. & Eng. R. Cas., N. S., 259. In a recent case, it was said: "While the train which reaches its stopping-board first has the right of way, and, in the absence of anything indicating the contrary, the engineer would have a right to act on the presumption that a train on the other track, which has not yet reached its stopping-board, would stop at the proper place, and concede the right of way, yet he would have no right to proceed, and attempt to make the crossing, so as to endanger his train, if he saw that his right of way was being disregarded by those in charge of the approaching train. If he saw that it had passed its stopping-board without stopping, or that it was approaching it at such a rate of speed as to indicate that it would not or could not stop, and hence that there would be danger of collision in case he proceeded, he would not be justified in doing so, if he could stop his train before reaching the crossing." *Pratt v. Chicago, etc., R. Co.*, 38 Minn. 455, 38 N. W. 356.

It may be negligence on the part of a railroad company to stop a train, for the more convenient handling of baggage, or taking on and setting down passengers, with some of the cars standing on a crossing, and to keep it standing there while the transfer of baggage, etc., is being made, without making provisions against the dangers to which the position of the train exposes the passengers. *Kellow v. Central, etc., R. Co.*, 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, 29 S. W. 1013.

#### C. Collisions between Street Cars and Trains or Cars of Intersecting Railroad, or Street Railway, Companies.

A street car, when approaching the track of an intersecting railroad or street railway, should be kept under control, and, before attempting

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to cross over, every reasonable precaution should be exercised to ascertain whether it is safe to do so. *West Chicago, etc., R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, affirming 47 Ill. App. 610. Where the driver of a street car, on which plaintiff was a passenger, approached and ran his car across an intersecting street railway track at a speed of about six miles an hour, colliding with a car of the intersecting company, which could have been seen at a distance of seventy-five feet from the crossing when the car on which plaintiff was riding was sixty-five feet therefrom, a judgment for plaintiff was affirmed. *Schneider v. Second Avenue R. Co.*, 133 N. Y. 583, 30 N. E. 752, modifying 15 N. Y. Supp. 556, 59 N. Y. Super. Ct. 536. While an electric street car was standing at a railroad crossing, the gates of which had been lowered, while a train was passing, an inspector was engaged in examining the controller, which had been reported to be out of order. Suddenly, and without any apparent reason, and without any cause which the defendant company seemed to be able to explain, the power or the electrical current suddenly came on, and there was a flash of light, and the car gave a plunge or bound forward, breaking off the end of the safety gate, and coming in contact with the rear car upon the railroad train. Plaintiff, a passenger, was injured in attempting to escape from the car. In sustaining a judgment for plaintiff, it was said that there was no doubt as to the negligence of defendant company. *Willis v. Second Avenue Traction Co.*, 189 Pa. St. 430, 42 Atl. 1.

It is undoubtedly negligence for a street car driver to attempt to cross a track when the least interruption or delay in crossing will probably lead to an accident. Thus where a driver of a street car attempted to cross a track in front of an approaching train, but was prevented from doing so by the gates being negligently lowered so as to come down between the car and the horses, it was held that the jury were justified in finding that he was chargeable with negligence, even though the street car would have been able to cross the track safely but for the lowering of the gates. The court said: "Upon the evidence, the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam-car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates, and the consequent obstruction to his passage across the steam-car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligence to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain; and such fact would support a finding of negligence in attempting to cross before the steam-car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz. the lowering of the gates, was not anticipated. The important fact was that there existed a possibility of delay, and therefore of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes. The horses might stumble. The harness might give way. The car might jump the track. A hundred things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of; and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates." *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468.

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If the driver of a street car sees danger of collision in time to avoid it, it is his duty to do so without running any risk. A driver of a street car who, in approaching an intersecting railroad track, takes no pains to inform himself of the approach of a train, and who, when he discovers that a train is approaching, attempts to cross in front of it, when, by the exercise of slightest care, he may avoid all danger, is guilty of negligence. *Central, etc., R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309. In an action to recover for injuries received by plaintiff, while a passenger in defendant's street car, in consequence of the car colliding at a crossing with a car of the intersecting road, it was shown that the night was dark and foggy, and it was not easy to discern objects in the distance, and the evidence of at least one of the plaintiff's witnesses was, that the defendant's car, before reaching the point of intersection of the two roads, was proceeding on a down grade at an unusual speed; that just before the point of intersection was reached the speed was greatly increased, and that at the time of collision the horses were on a full run; that the car approaching on the other road was seen by a person standing by the side of the driver when one hundred and fifty to two hundred feet distant, and that the defendant's car could have been broken up and stopped while passing over less than thirty feet. In sustaining a judgment for plaintiff, the court said: "This evidence, unexplained and uncontradicted, with the other circumstances in the case, raised a fair question to be submitted to the jury upon the alleged careless and reckless management of the defendant's car by the persons in charge, and whether the collision was attributable in whole or in part to those acts, and whether by a proper performance of their duty the collision might not have been avoided." *Barrett v. Third Avenue R. Co.*, 45 N. Y. 628, affirming 8 Abb. Pr., N. S., 205, 1 Sweeney (N. Y.) 568. In the jurisdiction where it is held that it is negligence, as a matter of law, for any person, although bound to exercise only ordinary care, to fail to stop, look and listen, before entering upon a railroad track, the higher degree of care which the law imposes upon a carrier for the safety of passengers, undoubtedly makes it the duty of the driver of a street car to stop, look and listen before crossing an intersecting railroad track, and charges the carrier with negligence, as a matter of law, if he fails to do so. *Downey v. Philadelphia, etc., R. Co.*, 161 Pa. St. 588, 29 Atl. 126, 58 Am. & Eng. R. Cas. 594. But it is extremely doubtful whether this rule will ever be generally adopted; in the jurisdiction where the "stop, look and listen rule" has been rejected it is probably not the law that it is negligence, per se, and in every case, to fail to stop, look and listen. But, of course, if the circumstances are such that a due regard for the safety of passengers demands that these precautions be taken, it should be done. Indeed, it may be necessary to do more. It may, under some circumstances, as where the view of the railroad is obstructed, be the duty of the driver of a street car, when about to cross a railroad track, to stop his car and go ahead on foot to the crossing to see if a train is approaching. *Central, etc., R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309. A street car approached to within a few feet of a train which was standing on a crossing, and stopped. The train was opened, and the street car moved forward until it came to another track of the railway, when it was struck by a passing engine. It did not appear that the conductor, in going ahead of the car to look for trains, went farther than across the track which had been vacated by the train. It was held that the question of the conductor's negligence in not going farther was properly submitted to the jury. *Douglas v. Sioux City, etc., R. Co.*, 91 Iowa 94, 58 N. W. 1070.

The management of street cars at railroad crossings has, in some of the United States, been regulated by statutes and municipal ordinances, some of which merely require street cars to be stopped at crossings, while others also require some employee of the carrier to go ahead of the car to ascertain whether it is safe to cross. In one case it seems to have been held that the violation, by the driver of a street car, of a city ordinance

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which required him to bring his car to a "complete stop before going on to or passing over" a railroad crossing, amounted to negligence. *Selma, etc., R. Co. v. Owen* (Ala. 1901), 31 So. 598. No doubt the violation of an ordinance of this kind is competent evidence of negligence, and even, in some jurisdictions, prima facie evidence of negligence. But as to whether the violation of an ordinance constitutes negligence per se, or as a matter of law, or is conclusive evidence of negligence, there is considerable conflict of opinion. See 21 Am. & Eng. Enc. Law (2d Ed.), 478 et seq. In one of the states in which the violation of a statute or ordinance is not regarded as negligence per se, it seems to have been held that the mere fact that a street car was not stopped at a crossing, as required by an ordinance, was not alone sufficient to establish the carrier's negligence. *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. Elsewhere, however, it has been held that, when it is provided by statute that, before a street car shall cross a railroad track, the car shall be stopped within a prescribed distance of the track, and some employee of the street railway company shall go ahead of the car and see if the way is clear and free from danger (Act of May 4, 1891, 88 Ohio Laws 582), it is negligence, at least in the absence of extraordinary circumstances, to cause a car to cross a railroad track without stopping the car and going ahead as required by the statute. *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72. And it was doubted whether a violation of the statute can be justified or excused by any circumstances whatever. *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72. It was further held that the facts that a crossing is provided with gates and a watchman is stationed thereat, are not alone sufficient to justify or excuse a failure to discharge the statutory duties. *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72. Nor is the failure to discharge the duties excused by the fact that there is only one person in charge of the car. *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72.

In crossing a railroad track the driver of a street car, who is not informed that there is danger in going ahead, and has no opportunity to see for himself what the situation may be, ordinarily has the right to act upon the directions of the railroad company's watchman, who is stationed at the crossing to direct the movement of vehicles. *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531, 14 L. R. A. 613. But in a case in which it appeared that the driver of defendant's street car, though beckoned by the flagman of the railroad company "to come on," yet at the same time was expressly warned of the danger by a passerby, but, in spite of this warning and of an unobstructed view of the railroad track, which he might have had, ventured to cross, it was held that he was guilty of gross negligence. *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. And where a statute requires that, before a street car shall cross over a railroad track, the car shall be stopped within a prescribed distance of the track, and some employee of street railway company shall go ahead of the car, and ascertain if the way is clear and free from danger, the fact that the watchman stationed at a crossing, which is provided with gates, does not let down the gates, or invites those who are in charge of the car to go ahead, does not excuse them from discharging the statutory duties, and if a failure to discharge those duties proximately results in injury to a passenger, the carrier is liable. *Cincinnati, etc., R. Co. v. Murray*, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 Ohio Cir. Ct. 291, 3 Ohio Dec. 72.

As between two carriers whose tracks cross, each has the right to presume that the other will comply with the law in approaching the crossing. But the high degree of care which the law exacts of passenger carriers does not permit of this presumption being indulged in at the risk of injury to passengers. *Clark v. Chicago, etc., R. Co.*, 127 Mo.

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197, 29 S. W. 1013. Thus the negligent conduct of a steam railway in crossing a street railway upon a public highway without sounding the whistle at a specified distance from the crossing and continuously ringing the bell from that point to the crossing, as required by statute, could not, it has been held, excuse the negligence of the street railway in running its car in the way of the approaching engine. *Hammond, etc., R. Co. v. Spyzehalaki*, 17 Ind. App. 7, 46 N. E. 47.

THEODOR MEGAARDEN.

MISSOURI, K. & T. RY. CO. OF TEXAS v. CARTER *et al.**(Supreme Court of Texas, May 12, 1902.)*

[68 S. W. Rep. 159.]

**Contract to Maintain Side Track for Convenience of Sawmill Owner—Consideration—Release from Damages for Injuries.**

The T. & S. R. Co. contracted to build and maintain a side track and switch for the mere convenience of a sawmill owner, in consideration of the latter releasing the company from all damages arising from the injury to or killing of stock belonging to him or his contractors or employees by the locomotives and cars on the side track and switch, and from all damages resulting from the injury or destruction of his and his contractors' and employees' property by fire from any locomotive of the company at or about the side track and switch: *held*, that since the contract, on its face, showed a sufficient consideration to render it valid, the court could not, on ex parte affidavits of one of the parties averring that it was not founded on any consideration, declare it void; the other party having the right to the submission of the question of a consideration to a jury.

**Same—Same—Same—Validity.**

The contract is not rendered invalid by Rev. St. art. 320, providing that railroad companies and other common carriers of goods, etc., for hire, shall not limit their liability as it exists at common law by any general or special notice, or in any manner whatever; the agreement not embracing property for the injury or destruction of which the company was liable as a common carrier.

**Same—Same—Same—Public Policy.**

The contract is not void as against public policy, the agreement establishing a side track and switch where none existed, and where none was required by the public, merely for the promotion of the private interests of the mill owner, and without relieving the company from its duty in the equipment and management of its trains.

**Same—Same—Assignment.**

The contract was assignable by the railroad company under Rev. St. art. 308, providing that the obligee of any written instrument not negotiable by the law merchant may transfer his interest by assignment.

**Same—Same—Liability of Consolidated Company.**

Subsequent to the execution of the contract the statutes authorized the consolidation of certain roads (the T. & S. R. Co. being one of them), and provided that the new corporation which should be created should have the power to purchase, maintain, and operate the lines of the roads to be consolidated, subject "to all legal incumbrances \* \* \* and the discharge of all and singular the obligations \* \* \* of every sort" against the roads consolidating: *held*, that the new corporation was bound by the contract of the T. & S. Co. to maintain and operate the side track and switch, and hence also entitled to the exemption of liability therein contained.

**Fires Set by Locomotives—Spark Arresters—Degree of Care.**

In an action against a railroad company for damages by fire set by sparks from its locomotive, plaintiff's evidence tended to show that the spark-arresting device on the engine setting the fire was not the

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best; there being a later and better device in general use. Defendant's evidence tended to show that the device used was among the most efficient in use; that it was equally as good as, or better than, the later device; and that it was so generally regarded among skilled railroad men: *held*, that defendant was merely required to exercise ordinary care in selecting and using the better of the two devices, and therefore an instruction that it was the company's duty to equip its engines with the best approved spark-arresting devices in use was erroneous.

**Same—Same—Same—Instruction.**

In an action against a railroad company for damages by fire set by sparks from its locomotive, instructions to the effect that a railroad company was not bound to adopt any particular kind of spark arresters, nor required to adopt every new invention, even though it had the highest scientific approval, but must use such appliances as are in general use among reasonably prudent railway men, and so, though the jury might believe that another device was more perfect, yet, if they found that the device used was an approved appliance in general use, then defendant would not be liable,—railroad companies having the right to run their trains and use fire in their furnaces, etc.,—were properly refused, as being argumentative in form.

**Same—Same—Same—Same.**

The instructions were properly refused for ignoring the requirement of ordinary care in selecting the machinery, in keeping it in good condition, and in operating the engine.

**Same—Same—Evidence of Condition of Other Engines.**

In an action against a railroad company for damages by fire set by sparks from its locomotive, evidence showing that locomotives operated by the company, other than the one claimed to have set the fire, were in bad condition, is admissible, as tending to show a want of ordinary care in having reasonably safe equipments.

Certified questions from court of civil appeals of First supreme judicial district.

Action by W. T. Carter and others against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiffs, and defendant appealed to the court of civil appeals, which certifies questions of law to the supreme court.

T. S. Miller, Brown, Lane & Garwood, Jas. Hagerman, and J. M. Bryson, for appellant.

Feagin & Carter, J. Holhausen, and Finley, Etheridge & Knight, for appellees.

BROWN, J. The court of civil appeals for the First supreme judicial district has certified to this court the following statement and questions:

"We respectfully propound for your decision the questions hereinafter set out, which have arisen in this cause, now pending before this court on appeal:

"The partnership of W. T. Carter & Bro., composed of W. T. Carter, E. A. Carter, and Jack Thomas, owned and operated a sawmill and planing plant, together with the land, houses, stores, machinery, and other property appurtenant thereto, and owned the real estate on which it was situated. The property was situated in Polk county, Texas, near and adjoining the right of way of the Trinity & Sabine Railroad. At the time of the establishment of the sawmill, etc., at that point, the railroad was owned and operated by the Trinity &



Sabine Railroad Company, a Texas corporation. The road was about 67 miles in length, and extended from the town of Trinity, Texas, through Polk county, to Colmesneil, in Tyler county, Texas. The Trinity & Sabine Railroad Company continued to own and operate its road until the 30th day of January, 1892, when the Missouri, Kansas & Texas Railway Company of Texas, also a Texas corporation, purchased all the properties of the Trinity & Sabine Company, and took a deed therefor. This purchase was made under the authority and powers conferred by the special act of the legislature April 30, 1891, and the general act of March 28, 1891. The appellant from the date of the purchase owned and operated the Trinity & Sabine Railroad as a part of its system. On the 9th day of August, 1897, W. T. Carter & Bro. owned and were still operating the mill and properties before mentioned, and had accumulated a large quantity of lumber, a part of which was stacked on the right of way of the railroad company at the point on the road where the mill was situated. The partnership had also built on the right of way a shed 300 feet long and 40 feet wide, in which was stacked and stored on the last named date a large quantity of kiln-dried lumber. On August 9, 1897, fire was discovered on or in the shed, near the east end thereof, at a point 60 or 65 feet from a side track on which one of appellant's engines had been used for switching about 30 minutes before the discovery of the fire. As a result of this fire, the entire mill plant, lumber, and other property was consumed, with the exception of a small amount of salvage. The lumber and sheds were on the right of way with the assent and acquiescence of appellant. At the time of its destruction, appellees Carter & Bro. were carrying fire insurance to the amount of \$22,000; the risk being distributed among the several insurance companies, parties to this suit. The insurance companies paid the amounts for which they were liable under their several policies, and, having, by assignment or by subrogation clauses in the policies, themselves acquired an interest in the claim of Carter & Bro. against any person or concern responsible for the fire and its consequences, joined Carter & Bro. in this suit to hold the appellant company liable therefor on the ground that the fire was negligently set by sparks from one of appellant's engines. Appellant answered by general demurrer, general denial, and special pleas whereby it set up in defense: (1) That appellees, in stacking their lumber on and near the right of way, assumed the risk of fires due to negligence of appellant in equipping and operating its engines; (2) that appellees were guilty of negligence in placing combustible material so near the track, and in failing to provide adequate protection against fire; and (3) that Carter & Bro. had, in consideration of the building of the switch near the mill for their convenience in shipping lumber therefrom, executed a written contract with the Trinity & Sabine Railroad Company in 1883 whereby they

agreed to release the railroad company from all responsibility for fires caused by the operation of their engines at and near that point, and that this contract, by its terms and nature, passed to the appellant company, by reason of its purchase of the properties of the Trinity & Sabine Railroad Company, and was an effectual bar to appellees' demands.

"On the trial before the court and jury, evidence was adduced by plaintiff showing that engine No. 35 of appellant, which had never belonged to the Trinity & Sabine Railroad Company, was switching on the side track, within 65 feet of the point of origin of the fire, about 30 or 40 minutes before the fire was discovered. They adduced testimony to the effect that the engine in question was of an old and discarded pattern, as to the spark-arresting device, and adduced circumstantial evidence tending to show that the spark-arresting device was not in good condition, and that the engine, while switching at the point in question, was negligently handled. They also adduced circumstantial evidence tending to show that the fire could not probably have originated from any other known source than defendant's engine. Appellant's evidence tended to show other causes as the probable source of the fire; that the course of the wind was from the fire toward the engine; that the smoke from the engine actually blew away from, instead of toward, the fire; and that its spark arrester was an approved device, in good condition. The contract of release from responsibility was shown to have been lost, and while some testimony was offered in an effort to show that it contained a clause of release, as alleged, the evidence was not sufficient to present the issue as against the appellees' plea of non est factum. The cause was submitted to the jury, and resulted in a verdict and judgment in favor of appellees for \$150,000 and interest.

"The contract of release from liability was discovered by appellant after verdict, and was appended to its motion for new trial, and made one of the grounds on which a new trial was sought. It was the original actually executed by W. T. Carter. Its date was 3d of May, 1883. The other party thereto was the Trinity & Sabine Railroad Company. The contract is as follows: 'Whereas, W. T. Carter, of the county of Polk, state of Texas, owns a steam sawmill and fixtures, which is located in the county of Polk, state of Texas, on a tract of land described as follows, to wit: Ira Conway league, in said Polk county, being about (70) seventy feet from the main track of the Trinity & Sabine Railway Company; and whereas, the said W. T. Carter, for his convenience in shipping lumber and other freight, has petitioned the said Trinity & Sabine Railway Company to construct a side track and switch at a point between stations 2600 and 2609, east from Trinity station, and about twenty miles east from Groveton station; and whereas, in consideration of the stipulations hereinafter contained, the said Trinity & Sabine Rail-

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way Company has agreed, and by these presents does agree, to construct the said side track and switch at said point, which switch shall be known and called "Barnum": Now, therefore, in consideration of the premises, and of the construction of the said side track and switch by the said railroad company, I, the owner of said mill, hereby release the said Trinity & Sabine Railway Company from any and all damages and claims arising from the injuring or killing of any stock or cattle belonging to me or my contractors or employees that may be injured or killed by the locomotives, trains, or cars of the said railroad company on the line of said road or any of its tracks, and from all damages resulting from the injury or destruction of any property whatever that may be injured or destroyed by fire or sparks from any locomotive of said railroad company at or about said Barnum switch, belonging to me, my employees or contractors, in and about said mill; and in the event the said railroad company shall be made liable for any damage done by it to any cattle, stock, or property belonging to any of my contractors and employees as aforesaid, then I bind myself and assigns to reimburse said railroad company for any money they have to pay therefor, including all costs of court; and I hereby agree that the claim against us for such money so paid by said railroad company shall be a lien on said mill and its fixtures, as also on the premises on which the same is located. It is understood that the stipulation herein contained shall be a covenant running with the said land and mill, and in the event I shall assign, transfer, or lease said premises, then the stipulation herein contained shall be binding on my assign or lessee. The said railroad company reserves the right to take up said track and switch whenever they may deem it proper, upon giving — days notice to the occupant of said mill. May 3rd, 1883. [Signed] W. T. Carter.' Though the contract was executed by W. T. Carter alone, no question is made but that it was equally binding upon his copartners. Appellees contested the motion for new trial, and, in so far as it was sought upon this ground, urged that, as the release was made between Carter and the Trinity & Sabine Railroad Company, appellant was a stranger thereto, and that it was not assignable without the consent of Carter & Bro., and no such assent was shown. Appellees also filed affidavits to the effect that the switch, the construction of which purported to be the consideration moving Carter to the execution of the release, had been actually constructed by the company, and was in use by Carter & Bro., two or three months prior to the date of the release, and the contract was therefore void for want of consideration. Appellant filed no controverting affidavits, but the proof adduced upon the trial of the cause showed that, whatever the nature of the agreement between Carter & Bro. and the Trinity & Sabine Railroad Company, it was in force at the date of purchase by appellant of the properties of the above-named road. It

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further appeared that appellees Carter & Bro. continued to use the switch from the date of appellant's purchase until the fire, and enjoyed the benefits of the construction and maintenance of the switch. There appeared to be no difference between the course of dealing between the Trinity & Sabine Company and Carter & Bro. and the appellant and Carter & Bro., in so far as the use of the switch was concerned, nor was anything ever said or done either by appellant's agents or Carter & Brother by which the agreement embodied in the lease was abrogated. Appellant continued to maintain the switch, and its use for the mutual benefit and convenience of the railroad and Carter & Brother continued unchanged until the fire occurred. The facts of the situation at that point were not such as to impose on the railway company the duty to construct or maintain the switch as a part of its obligation to the public. The affidavits showed that the release was not executed in pursuance of any previous verbal agreement. Appellant showed such diligence in its effort to discover the original of the release as would have entitled it to a new trial, should it be held that the release, if adduced upon the trial, would have operated as a bar to this action.

**"Questions Propounded.**

"(1) Was the contract of release void, either as against public policy or for want of consideration?

"(2) Was it assignable?

"(3) Could it, in any aspect of the case, be successfully invoked by appellant as a bar to plaintiff's actions?

"Appellant introduced evidence on the trial tending to show that the 'diamond stack,' nonextension spark-arresting device was among the most efficient in use for the purpose; that it was equally as good or better than the extension front straight stack device; that it was so generally regarded by practical railroad men skilled in such matters, and that, while the extension front straight stack was in more general use among railroads than the diamond stack, yet the more general adoption of the straight stack extension front was not due to the fact or the belief that it was a more efficient device for the prevention of escape of sparks of fire, but its adoption was due to other considerations; that the netting which really controlled the size of sparks emitted was of the same size mesh in each of the different devices named. Engine No. 35, which was the only engine shown to have been in proximity to the point where the fire originated, was shown to have been equipped with the nonextension diamond stack device. Appellees' evidence tended to show that the straight stack extension front was the later and better device in general use for the prevention of the escape of sparks and fire, and that the nonextension diamond stack went out of general use in Texas between the years 1880 and 1885. The court charged the jury to the effect that it was the duty of appellant to equip its engines with the best approved spark-arresting

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device in use, \* \* \* and that a failure to do so would render it liable for the consequences of the fire, if the fire was shown to be due to such failure on the part of appellant. On this phase of the case, appellant requested the three special charges hereinafter set out: 'No. 13. A railroad company is not bound to adopt any particular kind of appliances or machinery for the prevention of fires, nor is it required to adopt every new invention, even though it has the highest scientific approval, nor is it bound to at once discard its machinery and appliances, and adopt new and better ones which are coming into general use; but it is its duty to use such approved appliances as are in general use among reasonably skillful and prudent railway men. Hence you are instructed that, although you should believe that what is known as a 'straight stack extension front engine' is a more recent or a more perfect device for the arresting of sparks and preventing the setting out of fires than the diamond stack nonextension boiler, shown to have been in use upon defendant's engine at the time the fire is alleged to have been set out, yet if you should further find from the evidence that such diamond stack nonextension boiler is an approved appliance for the arresting of sparks in the operation of engines, and that such appliance is in general use among railroad men of reasonable care, prudence, and skill; that at the time of the alleged injury such engine was provided with such appliances, that they were in good repair; and that said engine was at the time of the fire operated in a reasonably careful and prudent manner by competent employees,—then, in that event, you will find for the defendant, even though you should believe that defendant's engine set out the fire.' 'No. 16. You are charged that railroads are authorized and permitted by law to run their trains upon their tracks, propelled by steam generated by fire, and they are authorized to use all reasonable means which will permit them to carry out the purposes for which they are created. They are permitted to use fire in their furnaces, and are not to be restricted in their operation or be made liable because sparks of fire may be emitted from their engines. They are required to keep their engines and appliances in good order, and handle them with reasonable care and skill, and to use and keep in good order such appliances as experienced and practical railroad men may determine are among the best to prevent the escape of sparks and fire. No. 17. Railroad companies are authorized and empowered by law to operate their trains, and in so doing to use fire and steam, but they are also required to use due and reasonable care to prevent injury to the property of others. Reasonable care does not require the adoption of every new invention or contrivance which science may or can suggest as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and

contrivances as are in practical use by well regulated railroad companies, and which have been proved by experience to be adapted to that purpose. Hence, in this case, although the jury may believe from the evidence that the straight stack extension front boiler is a later and a better device than the diamond stack nonextension boiler, or that a combination of the diamond stack extension boiler is a later and better device than the diamond stack nonextension boiler for the arresting of sparks and preventing the setting out of fires, yet, if they should believe that the diamond stack nonextension boiler is in practical use by well-regulated companies, and that it has been proved by experience to be adapted to that purpose, and that defendant's engine at the time of the injury being provided with such appliances, the same being in good order and repair, and that such engine and appliances were operated at said time with reasonable care and prudence by competent employees, then, in that event, they will find a verdict for the defendant, even though they might believe from a preponderance of the testimony that the fire was actually set out by the defendant's engine.'

"Questions.

"(4) Under the evidence as stated, did the trial court err in imposing on appellant the duty to equip its engine with the best approved appliances then in use for the prevention of escape of sparks and fire?

"(5) Did the court err in refusing to give either of the special charges above mentioned?

"(6) Are railway companies required, at their peril, to select and equip their engines with the best appliances in use and approved by railway companies, even though it should appear that persons equally skilled in such matters differ as to the relative merits of such devices?

"The trial court, over the objection of appellant, permitted the witness Clegg to testify in behalf of appellees as shown by the following bill of exceptions, which also shows the nature of the objection urged. The only engine which could possibly have set out the fire had then been identified as engine No. 35, and appellant had adduced no proof as to the condition of its other engines. No testimony was offered to show that engine 35 had ever thrown sparks or set out fires prior to the date of the fire in question. After the evidence was closed, appellant, by special charge, requested the court to exclude it on the ground that it was immaterial, and the court refused to do so. Only three engines were in use on that division of defendant's road at the time of the fire. The bill of exception is as follows: 'Be it remembered that, upon the trial of the above-numbered and entitled cause, the plaintiff offered to prove by the deposition of T. H. Clegg the following facts, to wit: "The defendant company usually kept in service on the Trinity & Sabine Division old engines. Apparently, some of them were in ordinary condition, and some of

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them were in bad condition. I know their condition from having seen them daily, and from having worked frequently on them." This testimony was objected to by the defendant upon the ground that it seeks to prove the condition of other engines at an indefinite time before and after the fire, giving the general custom as to the use of bad engines on a particular branch of defendant's road; and there are no allegations of that kind in the petition, charging the defendant with the general use of bad engines and locomotives on that branch of its road, and there was nothing to advise the defendant of this issue. The objection was overruled, and the testimony admitted by the court, to which ruling the defendant excepted,' etc.

"Questions.

"(7) Was the testimony admissible as against the objection urged as shown by the bill of exceptions?

"(8) Should the court have given the requested charge excluding it?

To the first question we answer: The contract is not void as being against public policy of the state, nor for want of a sufficient consideration.

Upon that portion of the question which submits the validity of the contract for want of consideration, we will state that our answer is limited to the contract itself, as we do not feel authorized to pass upon that question on the ex parte affidavits presented by the appellee on the motion for rehearing. The appellant had the right to submit the contract, and the issue of consideration arising upon it, to a jury for determination; and, if this court should undertake to decide the question in the present state of the record, we should be denying the appellant its constitutional right to have a verdict of the jury upon every material issue in the case, when properly presented. The fact that the contract was not in evidence on the trial cannot affect this question. Sufficient reason was shown why it was not produced at that time. The recitals in the contract show the consideration to be the establishment by the railroad company of a switch at the given point for the convenience of the appellee, and not to remove it, except upon reasonable notice given to the appellee of the intention to do so, and an implied and legal obligation to maintain the switch in good condition, and to furnish cars when demanded by appellee, as well as to receive and discharge freight at that point. These were valuable rights secured to the appellee by the contract, and constitute sufficient consideration to support it.

Counsel for appellee have discussed the question of the validity of the contract under the view that its terms constitute a limitation upon the common-law liability of the railroad company as a common carrier; therefore it is prohibited by article 320 of the Revised Statutes. If that contention can be sustained, the contract must be held to be invalid, at

least to the extent that it contravenes the provisions of that statute. The certificate does not, in terms, submit the question whether the contract is a limitation of the common-law liability of the railroad company as a common carrier; but we believe that it is proper, under the facts stated and the question submitted, to answer with reference to the statutory provision and the public policy of the state. In determining the meaning of the contract, we must construe the language which is claimed to constitute such limitation in connection with the body of the instrument, and in the light of the circumstances in which it was made. The appellee sought to have a switch put in upon the line of the appellant's railroad, so as to enable appellee to ship lumber from, and other things to, that point. The putting in of the switch would cause the building of the mill, which would bring together a number of persons as contractors and laborers, with live stock to be used in connection with the business, and cause the accumulation of lumber and combustible matter near the railroad track, all of which would increase the probability that the railroad company might incur liability for damages on account of the injury to or destruction of such property in the operation of its trains "at and about the switch." In order to induce the construction of the switch, in view of these facts, this provision was inserted in the contract: "Now, therefore, in consideration of the premises, and of the construction of said side track and switch by the said railroad company, I, the owner of the said mill, hereby release the said Trinity & Sabine Railway Co. from any and all damages and claims arising from the injury or the killing of any stock or cattle belonging to me or my contractors or employees that may be injured or killed by the locomotives, trains, or cars of the said railroad company on the line of the said road, or any of its tracks, and from all damages resulting from the injury or destruction of any property whatever that may be injured or destroyed by fire or sparks from any locomotive of said railroad company at or about said Barnum switch, belonging to me, my employees or contractors in and about the said mill." The language, taken in connection with the purposes of the contract and the surrounding circumstances, seems to refer to such property as the appellees and their contractors and employees might own and be using about and near to the switch, and is not apt, if it was intended, to include property in the possession and under the control of the railroad company as a common carrier. In order to bring the contract within the terms of the statutory prohibition, it must embrace property for which the railroad company would be liable as common carrier at the time of its destruction. The terms of the contract do not embrace property for which the railroad company could be held liable as common carrier. Therefore it is not within the statutory inhibition. It is a sound rule of construction that a contract should be so interpreted, if



fairly susceptible of it, as to make it legal and to accomplish the purpose of the parties; but the construction which counsel for appellee contend for would make the agreement illegal, and defeat the purposes for which it was made.

The most important question certified arises out of the proposition of appellees' counsel that the contract is contrary to the public policy of the state, and therefore void. In the case of *Registering Co. v. Sampson*, L. R. 19 Eq. 465, the court said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider: That you are not lightly to interfere with this freedom of contract." The power to make contracts is too valuable a right to be lightly swept away under the general declaration that such contracts are contrary to public policy, and we must come to some definite point-of understanding what the public policy offended against consists of. Under the facts in this case, we must ascertain the public policy of the state as to protection from fire by railroad companies from the decisions of the supreme court, there being no statute on the subject. In some instances, courts have spoken upon the subject of contracts against the negligence of the contracting parties as if there was a general rule of public policy which forbids persons to make contracts by which one would be exempted from, or indemnified against, the consequences of his own negligence, or that of his servants or agents; but we have not been able to find any sound authority for such a proposition. In fact, the body of judicial decisions establishes the contrary doctrine, for it is unquestionably true that in matters of life, accident, and fire insurance, the contract is made with a view of indemnifying the insured party against the results of his own negligence, as well as against the negligence of his servants. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 363, 53 L. Ed. 730. A railroad company, when not contracting in its character of common carrier has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of itself and servants. For example, in case of a failure to fence the right of way, when by contract released from damages on account of injury to or killing stock in consequence of such failure, the courts have held generally that such contracts are valid to the extent of the interest of the adjacent landowner. *Railroad Co. v. Waterson*, 4 Ohio St.

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434; *Railway Co. v. Smith*, 26 Ohio St. 124. Likewise a railroad company may contract with an express company for exemption from liability for injuries to its goods, or its agent in charge of them, although the injuries be caused by the negligence of its servants, because the contract of carriage is not that of a common carrier. *Railroad Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Express Co. Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. Such a corporation may likewise, by contract, secure immunity from liability for damages caused by the negligence of its servants in operating locomotives, whereby fire is set to property upon the right of way leased to persons for occupancy, and the conduct of private business thereon. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84, 16 Am. & Eng. R. Cas., N. S., 779; *Railroad Co. v. McClure* (N. D.) 81 N. W. 52, 47 L. R. A. 149; *Griswold v. Railroad Co.*, 57 N. W. 843, 24 L. R. A. 647; *Stephens v. Pacific Co.* (Cal.) 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *American Cent. Ins. Co. v. Chicago & A. Ry. Co.*, 74 Mo. App. 89. These cases certainly establish the proposition that there is no general public policy which forbids the making of a contract whereby one of the parties may secure exemption from the consequences of his own negligence or that of his servants, and they establish that, in the class of cases cited, it is legitimate to make such contracts. The only material difference between the cases last cited and this is that in those the railroad companies leased to other parties a portion of their right of way, authorizing such parties to conduct thereon a business which would supply freight for shipment upon the railroad from that point. This contract does not provide that the appellees may carry on business upon the right of way, but has in view the establishment of a convenience by which the appellees would be enabled to use their adjacent property to advantage, and also to enable them to ship lumber manufactured at that point over the said railroad to other points in the state. We can see no reason why the contract in this case should be forbidden that does not apply with equal force to the cases cited. There being no general rule of public policy which will condemn this contract, the inquiry then arises, is there in the state of Texas any such policy indicated, either by statutory provision, its constitution or judicial decisions, as would establish a right in the public inconsistent with the terms of this contract?

The decisions of this court establish that railroad companies must equip their locomotives with the best approved appliances for preventing the escape of fire. *Railway Co. v. Horne*, 69 Tex. 646, 9 S. W. 440. Indeed, our court has created an exception to the general rules of evidence, by which proof of the fact that fire from a locomotive set fire to adjacent property constitutes a prima facie case of negligence

on the part of the railroad company, and devolves upon it the burden to prove that its locomotive was equipped in the manner required by law, and carefully operated. The decisions are as potent to establish the policy of the state as if the same principles and requirements had been embodied in a statute, and it may be safely said that it is the public policy of this state that railroad companies, as a protection to property situated near their track, shall provide the best approved devices in use for the prevention of the escape of fire from their locomotives. If the contract certified contravenes that policy, then it must be held to be void. In order for the contract to violate the public policy of the state, the subject of it must be such as that policy applies to; for, if the relations of the parties be different, the same rules of law will not govern them. This public policy of the state relates to conditions which arise out of the construction and operation of a railroad, and out of the pursuits of business in its vicinity; but the parties in this case established by their contract a switch where none was required by the existing conditions of business, or for the public use, and it was established solely for the promotion of the private interests of the appellees, to develop at that place a business out of which would arise increased risks to the railroad company in the operation of its locomotives. By the terms of the contract, the exemption from liability is limited to such property as might belong to appellees, situated at and about the switch, for which the railroad company was not responsible as a common carrier. The contract does not provide that the railroad company may relax its diligence in the equipment of its locomotives, nor does it exempt the railroad company from liability for damages occasioned to the property of others at and about the switch; but the same diligence in equipping the locomotives, and the same care in operating them, was required, as to property of all other people, as would have been if the exemption had not existed. It is true that the appellees bound themselves to indemnify the railroad company against damages which might occur to property belonging to contractors and employees of the appellees, but the contract does not purport to exempt the railroad company from responsibility to the owners of such property. We conclude that the contract certified is not violative of the public policy of the state, but is a legitimate exercise of the liberty of contract, by which the appellees voluntarily, and for the purpose of securing the convenience of the railroad at that point, agreed to release the railroad company from liability for injury which might occur to their property by the negligence of the employees of the railroad, or by such unavoidable accident as is frequent by the escape of fire from the best equipped machinery. This conclusion is in harmony with the decisions of the supreme court of the United States and the current of judicial decisions of the several states. Especially is it sup-

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ported by that class of decisions which hold that railroad companies may by contract relieve themselves of liability for injuries occasioned to the property of express companies or to their messengers when carried upon passenger trains, although such injury may arise through the negligence of the railroad employees. *Express Co. Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. The agent of an express company, while riding upon the same train with passengers, and liable to the same dangers, occupies a different relation to the railroad company, when, by the terms of the contract, the railroad company is released from liability to such agent or servant of the express company. The *Express Co. Cases*, before cited, are thoroughly analogous in principle to this case, and establish clearly the distinction which exists between contracts limiting the liability of railroads as common carriers, and contracts by which they are permitted, in the matter of carrying the property and messengers of the express company, to contract for exemption; and out of this difference different duties arise, and different responsibilities rest upon the carrier. If a railroad company may by contract change its liability as to a special class of property or persons, then by a greater reason, they would be authorized to make such contracts as in this case, which apply to a given locality and particular circumstances.

The second and third questions read as follows:

"(2) Was it assignable?

"(3) Could it, in any aspect of the case, be successfully invoked by appellant as a bar to plaintiff's action?"

To both of the questions we answer that the Missouri, Kansas & Texas Railway Company of Texas, after the consolidation, had all of the rights under the contract that the Trinity & Sabine Railway Company would have had under like conditions.

The appellees urge that the contract certified to us is personal in its nature, involving a personal trust and confidence in the Trinity & Sabine Railway Company, and therefore not assignable, and that it did not pass to the appellant by the act of the legislature. There is nothing in the subject of the contract indicating that one railroad company could not fulfill its obligations as well as another, and there does not appear, from the terms of the contract, to have been any relation of trust or confidence between the appellees and that particular railroad company. The contract contains no language indicating an intention of the parties that it should not be transferred to another. Article 308, Rev. St., is in this language: "The obligee or assignee of any written instrument not negotiable by the law merchant may transfer to another by assignment all the interest he may have in the same." This statute is expressed in terms broad enough to embrace the present contract. In the case of *Lakeview Land Co. v. San Antonio Traction Co.*, 66 S. W. 766, 4 Tex. Ct.

Rep. 180, this court had under consideration a contract very similar to the one submitted in this case; and we held that such a contract was assignable by the parties thereto. By the same rule, the contract in this case, under our statute, would be assignable by the railroad company in case of the sale of its property to another corporation; and, being so assignable, the legislature might, by the terms of consolidation, impose its obligations upon the new corporation, and give to the latter the benefits of its provisions. We deem it unnecessary to enter into an extensive discussion of this question, but we refer to the case last cited and the authorities cited in support of our conclusion that the contract under examination is such as might be assigned under our statutes.

Counsel for appellees insist with much earnestness and ability that under the general and special acts of the legislature by authority of which the consolidation was made, the Missouri, Kansas & Texas Railway Company of Texas acquired only the physical properties of the Trinity & Sabine Railway Company. It is unnecessary for us to follow the able counsel on both sides in their discussion of the effect of consolidation where there is no statutory provision specifying the rights and obligations of the new company, because the general and special laws under which this consolidation was effected plainly limit and prescribe the rights and duties of the new corporation, which reduces the question to a construction of the language of those statutes. In order to understand the terms of the statutes, it is necessary to briefly state the circumstances under which the laws were passed. The Missouri, Kansas & Texas Railway Company, a foreign corporation organized under the laws of the state of Kansas, had been permitted by an act of the legislature to carry on its business in Texas, being by the said act granted certain rights, powers, and privileges, in pursuance of which that company had constructed some railroads in this state in its own name, and had acquired, by purchase and otherwise, control over, and ownership of, a number of railroads operating under charters and under other names; and the said foreign corporation was engaged in operating the several railroads which are mentioned in the special act hereafter referred to. The state of Texas claimed that the purchase, ownership, and control of the other railroads were in violation of the constitution and laws of the state of Texas, and that no such power had, by this state, been granted to the said foreign corporation. Upon these grounds the state instituted a suit to forfeit the rights of the Missouri, Kansas & Texas Railway Company to carry on business in Texas, and to dissolve the combination existing between it and the other railroad companies. A compromise was effected between the state and the foreign corporation, whereby the corporation was required to convey all of its railroad properties in Texas, mentioned in the special law, to a corporation to be created under a general

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law of the state which was enacted at the same time; and a special act was passed by the legislature which in its preamble recites in full the facts which we have stated briefly, and in the body of the special act the terms upon which the new corporation, when organized, should receive the properties from the several railroad companies mentioned, are specified in full. As pertinent to the issue under discussion, we copy from the special act as follows:

"Section 1. That the Missouri, Kansas & Texas Railway Company be, and it is hereby authorized and empowered to transfer, sell and convey all and singular, the railway property, tracks, side-tracks, depots, right of way and all property and property rights within this state, acquired, controlled or held by it, or in its name, by purchase, construction or otherwise; and which sale and conveyance to be made under the power herein given, shall be to some railway corporation, company or association of persons, to be incorporated under the laws of this state for the purpose of acquiring, owning, maintaining and operating the railways so purchased as one property.

"Sec. 2. The sales to and purchase by the said Missouri, Kansas & Texas Railway Company of the several lines of railway within this state from the railway companies hereafter mentioned, and which lines have been heretofore operated by or as the property of the said Missouri, Kansas & Texas Railway Company, or as a part of the system of railroads within this state known as the Missouri, Kansas & Texas Railway, are hereby authorized, approved, ratified and confirmed, and the consent of the state is hereby given thereto.

"Sec. 3. The sale herein authorized to be made shall be subject to all just and legal incumbrances, suits or actions for damages or rights of way, liens, judgments and debts given, contracted or incurred by said Missouri, Kansas & Texas Railway Company and other companies herein mentioned, upon or against the said properties or any part thereof, as well as to the payment and discharge of all and singular the legal obligations and liabilities of every sort whatsoever against the Missouri, Kansas & Texas Railway Company and properties herein mentioned."

At the same session of the legislature, and within a few days of the time when the special act was passed, the legislature of Texas enacted a general law entitled:

"An act to provide for the incorporation of railway companies for the purpose of acquiring, owning, maintaining and operating any line or lines of railway within this state, authorized by law to be sold, and to empower such companies, when so organized, to purchase and extend.

"Section 1. Be it enacted by the legislature of Texas: That whenever any line or lines of railway or railway properties within this state are by special law authorized to be sold and conveyed, the persons contemplating or engaging for the pur-

chase thereof, may be formed into a corporation for the purpose of acquiring, owning, maintaining and operating such line or lines of railway, by complying, as far as is applicable with the requirements of chapter one (1) of title eighty-four (84) of the Revised Statutes of this state. \* \* \* And when such corporation has been formed, it shall have the power to purchase, acquire, own, maintain and operate such line or lines of railway and properties pertaining thereto, and all other rights, powers and privileges given by the laws of this state to railway companies, including the right to complete and extend such line or lines of railway and to construct branch lines thereto, and any proposed extension or branch lines may be provided for and included in the original article of incorporation, or the same may, by amendment thereto at any time thereafter, be projected and provided for by such company.

"Sec. 2. Every railroad company organized under the preceding section of this act shall take the property so purchased subject to all incumbrances, judgments, claims, suits, claims for damages and for right of way against the old company and subject to all debts and claims for damages accruing against any receiver, which may have been appointed for the old company, to the same extent that such property would have been liable in the hands of the railroad company from which it was purchased."

We have copied thus extensively from the two acts under which the consolidation was had because they show the purpose of the legislature to have been that all of the old corporations controlling the properties named should be merged into the new corporation to be formed, and that all of the property of the existing corporations should be vested in the new, and all of the liabilities, contracts, and obligations of the existing corporations should be assumed and discharged by the new. The following language contained in the special act as above quoted applies to the question under consideration: "The sale herein authorized to be made shall be subject to all just and legal incumbrances \* \* \* as well as to the payment and discharge of all and singular the legal obligations and liabilities of every sort whatsoever, against the Missouri, Kansas & Texas Railway Company and properties herein mentioned." The Trinity & Sabine Railway Company was one of the corporations mentioned in the special act as merged into the new company by the consolidation. What obligations did the contract between Carter & Bro. and the railroad company impose upon that company? The railroad company agreed to put in the switch at the place designated, and, having done that, not to remove it without reasonable notice to the appellee. The switch was put in for the purpose of enabling Carter & Bro. to ship lumber from that point, and to ship freight from other places to that point. Out of the terms of this contract there arose, by implication, an obligation on

the part of the railroad company to maintain that switch in reasonably good condition for use, and to furnish cars at that point for the shipment of freight, and to receive and ship freight from that point, and to likewise transport and deliver freight destined to the same place until the switch should be removed, after reasonable notice, in accordance with the terms of the contract. By the terms of the consolidation, as specified in the law quoted above, the appellant assumed those obligations, and was substituted for the Trinity & Sabine Railway Company. It was bound to perform all of the duties to the appellees that might have been demanded by them of the Trinity & Sabine Company. *Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*, 115; U. S. 594, 6 Sup. Ct. 194, 29 L. Ed. 499. The Missouri Pacific Railway Company made a contract with the Pullman Car Company by which the railroad company agreed to haul over its railroads the cars of the Pullman Company. Under a statute of the state of Missouri, the Missouri Pacific Company was consolidated with the Iron Mountain & Southern Railroad Company. The terms of the Missouri statute are very similar to those of our statute. The new corporation took the name of the Missouri Pacific Railway Company, and subsequently litigation arose between the Pullman Company and the railroad company, in which it was held by the supreme court of the United States that the new corporation was bound to carry out the contract to haul the cars over the road which the old Missouri Pacific Company owned at the time the contract was made. That case is well in point in the construction of the language of our statute, and supports our conclusion that, under the terms of the statute, the duty to maintain the switch and to receive freight and deliver it to appellees at that point was assumed by the appellant. After the formation of the new corporation, it continued the switch in existence as before, and recognized all the rights of appellees therein, by receiving and transporting lumber from that point, and delivering freight to them at the switch; and, at the time of the fire by which the property was destroyed, the appellant was engaged in the discharge of obligations which rested upon it by reason of the contract made between Carter & Bro. and the Trinity & Sabine Railway Company. The effect of substituting the appellant for the Trinity & Sabine Railway Company in the contract was to give the appellant the full benefit of that contract, as well as to charge it with the performance of its obligation, for it is a well-settled principle that the obligations of contracts must be mutually binding upon the parties. *Furnace Co. v. Magill*, 108 Ill. 656; *Lewis v. Insurance Co.*, 61 Mo. 534. If the Trinity & Sabine Railway Company had been operating the locomotive at the time the fire was set, then the terms of the contract would have exempted that company from liability; and the appellant, being bound only as the Trinity & Sabine Railway Company would have been, and being entitled to all



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the benefits that the former company would have had under the contract, is also, by its terms, acquitted of liability for the damages caused by the fire.

The fourth, fifth, and sixth questions submitted are as follows:

"(4) Under the evidence as stated, did the trial court err in imposing on appellant the duty to equip its engine with the best approved appliances then in use for the prevention of escape of sparks and fire?

"(5) Did the court err in refusing to give either of the special charges above mentioned?

"(6) Are railway companies required, at their peril, to select and equip their engines with the best appliances in use, and approved by railway companies, even though it should appear that persons equally skilled in such matters differ as to the relative merits of such devices?"

To all of these questions we answer that the trial court committed error in the charge given, under the facts of this case, in failing to instruct the jury that it was the duty of the railway company to use ordinary care to provide its engines with the best approved devices for preventing the escape of sparks and fire therefrom, and the court did not err in refusing the special charges which were asked. The charge of the court presents the law applicable to a case in which the question is the character of the spark arrester required by law, but, under the facts of this case, the charge given failed to submit an important issue,—the question of diligence in the selection of the apparatus. The testimony in this case tended to prove that each of two different kinds of spark arresters was used by railroad companies, and each was considered by experienced railroad men as better than the other, which produced a condition in which it was necessary for the railroad company to make a choice between the two. Under this state of facts, it was the duty of the railroad company to exercise ordinary care (that is, such care as a man of ordinary prudence would exercise under like circumstances) to select and use the better of the two; but, having used such care as the law requires, it cannot be held that a failure of judgment honestly exercised in an attempt to discharge the duty should render the company liable. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. 350, 93 Am. Dec. 708; *Jackson v. Railroad Co.*, 31 Iowa, 178, 7 Am. Rep. 120; *Hoye v. Railway Co.*, 46 Minn. 269, 48 N. W. 1117; *Railway Co. v. Corn*, 71 Ill. 496; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 463, 65 N. W. 176. In *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, cited above, the plaintiff asked the trial court to charge the jury as follows: "If the defendants neglected to supply the engine which is alleged to have fired plaintiffs' bridge with the best and most perfect form of spark catcher in use, for the purpose of guarding against the emission of sparks, and

if, in consequence of such neglect, sparks were emitted, which fired the plaintiffs' bridge, that, without some proof of concurring neglect on the part of plaintiffs in originating the fire, they are entitled to recover." The court refused the requested instruction, and gave to the jury the following charge: "The degree of care to be observed by the defendants is ordinary care, and the absence of this care, if it appear by sufficient proof, is evidence of negligence. I therefore say that if the defendants used ordinary care and skill in procuring good and safe spark arresters, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater care or skill in respect to the character of the spark arrester used by them." The supreme court of Pennsylvania approved the charge given. That case presents sharply the very question that we have before us,—the necessity of a charge upon the issue as to whether the railroad company exercised ordinary care in selecting its machinery, and, if it did, should it be held liable for a failure in that particular? The opinion of the supreme court of Pennsylvania sustains the charge given, by very cogent and convincing reasons, from which we copy as follows: "What is care in one case may be negligence in another, where the danger is greater, and more care is required. The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable such care must be required which it is shown is ordinarily sufficient, under similar circumstances, to avoid the danger and secure the safety needed. Ordinary care is therefore the only rule which can be stated by a court. But as the degree of care is measured in every case by its circumstances, that which is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and that which would be ordinary care in a case of ordinary danger would be less than ordinary care in a case of great danger. \* \* \* Care according to the circumstances being the rule, we must not overlook what the judge said upon the particular subject to which this care related. In his answer to the first point, he said, if the defendant used ordinary skill in procuring a good and safe spark catcher, such as are most in use in the country, and approved by experienced railroad operators and mechanics, they would not be required to use any other or greater skill or care in respect to the spark catcher used by them. Now, clearly, this was an application of the rule to the very case before the jury, and not to one of less danger, in which the care required would be less." The other cases cited sustain our conclusion as expressed in the answer to the question. In passing upon this question, courts have usually expressed the rule without the qualification, because the facts in the case did not demand it. The standard established is that the railroad company must select the best devices in use for the purpose of arresting sparks and prevent-

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ing the escape of fire from the locomotive, and it is said that a man of ordinary prudence will do so. *Jackson v. Railroad Co.*, 31 Iowa, 178, 7 Am. Rep. 120. But this does not prescribe the form of the charge to be given, which must conform to the facts of each case. The requisites of a charge by trial courts are prescribed by article 1317, Rev. St., which is as follows: "The charge shall be in writing and signed by the judge, and he shall read it to the jury in the precise words in which it is written; he shall not charge or comment on the weight of evidence; he shall so frame the charge as to distinctly separate the questions of law from the questions of fact; he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact solely to the decision of the jury." The requirement that the court "shall instruct the jury as to the law arising on the facts" means that it shall inform the jury as to what the law is upon the facts as proved by the testimony introduced by both parties. The facts upon which the plaintiff claims a right to recover, and those under which the defendant resist that claim, equally constitute the case upon which the court must submit the charge. *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801. The charges submitted by the appellant's counsel were properly refused, because they were argumentative in form, and ignored the requirement of ordinary care in selecting the machinery,—that it be in good condition at the time, and carefully operated. *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801.

The seventh and eighth questions are as follows:

"(7) Was the testimony admissible as against the objection urged as shown by the bill of exceptions?

"(8) Should the court have given the requested charge excluding it?"

It is insisted that, because the engine which set out the fire was identified as No. 35, the testimony of Clegg was not admissible. It must be borne in mind that when the plaintiff was developing the case the identity of the engine which set the fire had not been established, and that the plaintiff had the right to show that any locomotive which then belonged to the appellant was defective in the particulars to which Clegg's testimony was directed. This testimony was admissible upon the issue of ordinary care in the selection of its machinery. It would be permissible to show that all of the locomotives which were owned and operated by the railroad company were in bad condition, which would tend to prove that ordinary care had not been exercised, for it could not be expected that the exercise of ordinary care would fail in every instance to secure reasonably safe equipments.

LOGANSPORT RY. CO. *v.* CITY OF LOGANSPORT *et al.**(Circuit Court, D. Indiana, March 8, 1902.)*

[114 Fed. Rep. 688.]

**Equity Jurisdiction—Contract between Street Railroad Company and City.**

Before a street railroad company can complain, in a court of equity, of the violation by a city of its contract rights, it must show that it has a contract which is free from fraud and enforceable at law, and one which is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If it is unfair, unreasonable, or against good conscience, a court of equity is justified in refusing to enforce it, and in leaving the complainant to its remedy at law.

**Street Railroads—Authority to Use Streets\*—Law of Indiana.**

Under the law of Indiana, by which the fee of streets in cities is in the abutting lot owners, and exclusive authority, jurisdiction, and power over the streets of a city are vested by statute in the common council, such authority is held in trust for the benefit not alone of the city, but for that of all the people of the state, and extends only to the regulation of the use of streets for ordinary public purposes. The authority to lay tracks and operate a street railroad thereon can only be conferred by statute, in express words, or by language from which such power must be necessarily implied.

**Same—Powers of City Council.**

By Act Ind. Sept. 7, 1861 (2 Burns' Rev. St. 1894, § 5450 et seq.), authority was conferred to organize street railroad companies, and to construct and operate street railroads, but it is provided that "nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets \* \* \* within the corporate limits of such cities; and all street railroad companies \* \* \* shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the public streets of any city, before the construction of the same shall be commenced." By Act March 3, 1891 (2 Burns' Rev. St. 1894, § 5473) horse railroads were authorized to use electricity for motive power; but the same reservation as to the power of city councils was made, and it was provided that companies desiring to change to electricity should first obtain the consent of the common councils, which might give such consent "upon such terms and conditions as they may see fit to impose": *held*, that neither of such acts conferred on the common council of a city, either expressly or by necessary implication, the power to grant to a street railroad company either an exclusive or a perpetual use of its streets for railway purposes.

**Same—Ultra Vires Grant.**

The common council of a city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over the streets of the city, cannot alienate such power by a grant to a street railroad company in perpetuity of the right to build and operate railroads through such streets as it may from time to time elect to use and occupy.

**Same—Contract Created by Ordinance.**

Such a grant, even if authorized and valid, amounts merely to an offer, which creates no contract as to a particular street until accepted and acted upon; and until such time the offer may be withdrawn by a repealing ordinance.

**Same—Necessity of Consent of City Council to Use of Street—Indiana Statute.**

Under the statute of Indiana (2 Burns' Rev. St. 1894, § 5464) which

\*See generally, *State v. Barbetta*, 73 Ind. 185; *Varwig v. Cleveland, C., C. & St. L. R. Co.* (Ohio), 4 Am. & Eng. R. Cas., N. S., 265; 7 Rap. & Mack's Dig., 352 et seq.

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requires all street railroad companies to first obtain the consent of the common council "to the location, survey, and construction of any street railroad through or across the public streets of any city," an ordinance giving general consent to a company to occupy and use any or all of the streets of the city for railway purposes, at its election, does not obviate the necessity of a specific consent to the location, survey, and construction of a road upon any particular street selected; and the company acquires no vested right to the use of such street until such consent has been given.

**In Equity. On demurrer to bill.**

Winter & Winter, Nelson & Meyers, and Charles A. Dryer, for complainant.

John G. Williams, McConnell, Jenkins & Jenkins, and Frank M. Kistler, for defendants.

**BAKER, District Judge.** The question for decision is raised by a demurrer to the bill of complaint. The bill is brought by the Logansport Railway Company against the city of Logansport, and the mayor and members of its common council, to enjoin them from enforcing an ordinance adopted on October 30, 1901, on the ground that it is void because it impairs the contract rights of the complainant. The bill is in the nature of a bill for the specific enforcement of the complainant's contract rights against alleged infringement by the enforcement of the later ordinance. Before the complainant can, in a court of equity, complain of the violation by the city of its contract rights, it must show that it has a contract, and that such contract is free from fraud and enforceable at law, and one that is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If the contract is unfair, unreasonable, or against good conscience, a court of equity would be justified in refusing to enforce it, and would leave the party to its remedy at law. The court, too, must enforce the contract, if it enforces it at all, just as it is written; and it has no power, by changing or varying material terms, to make, in effect, a new contract for the parties.

By an act of the legislature of this state in force on September 7, 1861 (2 Burns' Rev. St. 1894, §§ 5450-5454, 5463, 5464), authority was conferred on any number of persons, not less than five, to incorporate as a street railway company in perpetuity; prescribing its powers, and providing generally for the construction of the street railway. By section 5464 it was enacted that:

"Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the pub-

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lic streets of any city, before the construction of the same shall be commenced."

By the first section of an ordinance adopted on December 6, 1882, the consent, permission, and authority of the city of Logansport were given, granted, and duly vested in the Logansport Railway Company, to lay and construct a single or double track for a street railway, with all necessary and convenient tracks, turn-outs, etc., in and along the course of the streets and bridges of the city of Logansport hereinafter mentioned, and the same to occupy, maintain, and use, and to operate thereon street railway cars, etc., in perpetuity, and in the manner and upon the conditions set forth in the ordinance. By the second section of the ordinance it was provided that said railway company, its successors and assigns, were exclusively authorized to construct, own, and keep, maintain and operate, street railways therein provided for, as follows: Commencing at the center of Fourth street, on the north line of Canal street, thence southerly through Fourth street to Market street, thence easterly through Market street to Second street, thence northerly through Second street to Broadway, thence easterly through Broadway to the easterly limits of the city; also through such other streets and over such bridges in said city as the said company, its successors and assigns, might from time to time elect to use and occupy: provided, that the common council reserves the right to ordain and direct said company to build and operate a line of railway through other streets, and if the company, its successors or assigns, fail or refuse to construct and operate such line on such streets within one year, then and in that event the common council may grant the privilege to any other company. The power to be employed in moving the cars was restricted to animal power. By an act of the legislature in force on March 3, 1891 (2 Burns' Rev. Stat. 1894, § 5473), it was enacted that:

"Any street or horse railroad heretofore or hereafter organized in this state may, with the consent of the common council of the city in which the railroad or any part thereof is located and operated, and with the consent of the board of commissioners of the county where such railroad or any part thereof is operated beyond the limits of such city, use electricity for motive power: provided, that nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities, and all such street railroad companies shall first obtain the consent of such common councils for the operation by electricity of their cars along, through or across the public streets or alleys of any city before the operation by electricity of their cars shall be commenced: provided, that in giving such consent such com-

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mon council or board of county commissioners may do so upon such terms and conditions as they may see fit to impose."

After the enactment of this statute, on July 3, 1891, the common council of the city of Logansport adopted an ordinance by the first section of which it was provided:

"That consent, permission and authority be and are hereby given, granted and hereby vested in said Logansport Railway Company, its successors and assigns, to operate by electricity its cars, carriages and vehicles of any kind and character along, through, on, over and across the streets, and alleys, bridges and highways in the said city of Logansport now existing or that may be hereafter established or constructed as it may from time to time elect, in perpetuity."

There was the same reservation to the city as is contained in the ordinance of 1882 in respect to the right to require the company to construct a railway and operate cars on other streets than those occupied by it.

The statute of this state confers exclusive authority, jurisdiction, and power over all streets, highways, alleys, and bridges within the corporate limits of cities in this state on the common council. In *Eichels v. Street Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561, it was held that the authority to lay the tracks and operate a railway on the streets of a city can only be conferred by statute in express words, or by language from which such power must be necessarily implied. Such a power, it was said, is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. Hence the sole power possessed by the city of Logansport to grant an exclusive and perpetual right to the complainant to occupy and use such streets of the city for street railway purposes as it might from time to time elect depends upon the acts of 1861 and 1891 above mentioned. We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the city of Logansport any such power? The fee of the streets in cities in this state resides in the abutting lot owners, and the city possesses only an easement of way in the streets. It does not hold title to the easement as a private property right, which it may alienate at pleasure, as it might alienate property belonging to the city by a title unimpressed with a trust. The city holds the easement in the streets in trust not simply for the city alone, but for the benefit and use of all the people of the state. In interpreting the statutes, the court ought never to lose sight of the fact that in dealing with the use of the streets the common council of a city is acting as a trustee for the benefit and advantage of the public.

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It is manifest from a reading of the above-mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the city of Logansport, the power to grant to a street railway company either an exclusive or a perpetual use of its streets for railway purposes. The act of 1861 simply provides that the street railway company shall first obtain the consent of such common council to the location, survey, and construction of it railroad, before the construction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens' St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, the question for decision was whether the legislature of Michigan had conferred power on the city of Detroit to grant to a street railway company the exclusive use of its streets. The statute provided that:

"All companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have exclusive right to use and operate any railways constructed, owned or held by them: provided that no company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

The court says:

"It is clear that the statute did not explicitly and directly confer the power of the municipality to grant an exclusive privilege to occupy its streets for railway purposes."

And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891 above mentioned does not explicitly and directly confer the power on the common council of the city of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes. The court further says:

"There were many reasons which urged to this; reasons which flow from the nature of the municipal trust,—even from the nature of the legislative trust,—and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise? That such powers must be given in lan-



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guage explicit and express, or necessarily to be implied from other powers, is now firmly established.

The power to grant the use of its streets in perpetuity not having been granted to the city of Logansport in explicit and express words, is it granted by a necessary implication? The supreme court, in the above-cited case, further says:

"Mr. Justice Jackson, in *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.* (C. C.) 33 Fed. 659, says \* \* \* 'that municipal corporations possess and can exercise only such powers as are granted in *express words* or those *necessarily or fairly implied, in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.*' The italics are his. This would make 'necessarily implied' mean inevitably implied. The court of appeals of the Sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it means less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough,—would have been natural under any constitution not prohibiting it,—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it."

But assuming that the power "to give consent upon such terms and conditions as the common council may see fit," found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity. The supreme court, further on, says:

"Easements in the public streets for a limited time are different, and have different consequences, from those given in perpetuity. Those reserved from monopoly are different, and have different consequences, from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Can it be successfully contended that the perpetual use of the streets of a city is indispensable to their use for railway purposes?

But there are other reasons why the bill cannot be main-

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tained. The ordinances of 1882 and 1891 grant the exclusive right to use in perpetuity certain streets, designated by name, and also the right to use and occupy such other streets and bridges in the city as the street railway company, its successors and assigns, may from time to time elect to use and occupy. The repealing ordinance expressly excepts from its operation all the streets and parts of streets occupied and in use by the complainant at the time of its adoption. Its effect is simply to repeal so much of the ordinance of 1882 as purported to grant to the complainant the right to use and occupy such other streets of the city as it might from time to time elect to use and occupy, and also to repeal so much of the ordinance of 1891 as purported to grant to the complainant the right to use and occupy, at its election, all the streets of the city then existing or thereafter to be established, in perpetuity. The right granted, except as to the designated streets, was a mere offer, which could only become a contractual obligation by the election of the complainant to use and occupy the streets for railway purposes. Such election must be made in good faith, and evidenced by some open and notorious act brought to the notice of the common council. Until the offer was accepted by such an election, it could be withdrawn.

But the grant is open to a more serious objection. It was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare is a power incapable of absolute alienation by the common council. By these ordinances the common council has undertaken to surrender this power, and to remit it to the uncontrolled election of the complainant. The only power reserved is the power, if the common council wishes the railway to be extended along a particular street, to notify the complainant of such desire; and, if it fails within one year to construct and operate its road on such street, then the use of such street may be granted to another railway company. But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all the streets of the city, however injurious it may be to the public convenience, safety, or welfare. The public convenience, safety, and welfare, in this regard, are surrendered to the complainant. By these ordinances, if valid, to the complainant's election is relegated the question whether or not a street can, with due regard to the comfort and safety of the people, be occupied by a single or a double track railway. Such a surrender of corporate power in perpetuity to a street

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railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and not for the private advantage and gain of railway or other corporations.

But if the granting ordinances are not invalid and unenforceable so far as the repealing ordinance affects them, still the bill cannot be maintained for another reason. It was ruled in the opinions of Judge Woods and myself, both concurring in this particular, in *Citizens' St. R. Co. v. City R. Co.* (C. C.) 64 Fed. 647, that, under ordinances similar to those granted to the complainant, the Citizens' Street Railroad Company acquired no vested right to commence the construction of a particular line of street railway on an unoccupied street without first obtaining the consent of the common council to "the location, survey, and construction" of such proposed line. No such consent is alleged to have been obtained before the complainant began to construct its railway on George street, High street, Erie avenue, and Seventeenth street. It is simply averred that the complainant gave notice of its intention to construct such street railway, and then, without asking or waiting for the consent of the common council, it began to tear up these streets and to lay down its tracks. By the ordinances of 1864 and 1865 the city of Indianapolis granted to the Citizens' Street Railroad Company the right to enter upon, use, and occupy for the term of 30 years all the streets of the city then existing and thereafter to be established, for street railway uses and purposes. Under this grant the company had constructed and had in operation about 40 miles of street railway. In 1889 the common council and board of aldermen of the city of Indianapolis adopted an ordinance prohibiting the railway company from entering upon or constructing its railway on any unoccupied street until it had first obtained the consent of the city street commissioner. In 1893 the city granted to the city Railway Company the right to enter upon and construct a street railway system on and along 29 specified routes, embracing a great proportion of the most important streets of the city, and including many of the streets on which the Citizens' Street Railroad Company had constructed its railroad, and had it in operation. It was claimed by the Citizens' Street Railroad Company that the two later ordinances infringed the contract rights secured to it by the earlier ordinances of 1864 and 1865. In discussing this question, Judge Woods said:

"I am of the opinion that the complainant is not entitled to equitable relief in respect to its alleged rights in the streets so designated for the use of the defendant. Prior to that designation the complainant had no lines upon those streets, except a fragment on Pennsylvania street, which had been practically, if not legally, abandoned. By its own charter, as I construe it,—indeed, according to the plain letter,—it had

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no right to commence construction on a particular line without first having obtained the consent of the common council to the 'location, survey, and construction' proposed. The necessity for this consent was not affected, as I think, by anything contained in the ordinance of January 18, 1864, or in the supplemental ordinance of September 18, 1865. Besides, the entry of the complainant upon those streets was in violation of the ordinances of 1889 and 1893; and, if rights were thereby acquired, the complainant, in view of all the circumstances, should rely upon the courts of law for their defense, rather than look to equity for their establishment. The question whether the last-named ordinances are valid or not need not be considered, because, by its own charter, the complainant had no right to enter upon a street without the consent of the city; and the city was free, with or without reason, to give or withhold its consent."

This was said by the learned judge notwithstanding the city of Indianapolis had given a general consent, permission, and authority to the Citizens' Street Railroad Company to enter upon, use, and occupy for railroad purposes, all of the streets of the city. In the same case Judge Baker said:

"Prior to the designation of the additional north and south streets for the use of the defendant, the complainant had no lines upon those streets, except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to the location, survey, and construction of such proposed line. Therefore the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company."

The consent conferred upon the Logansport Company by the ordinances of 1882 and 1891, so far as the ordinance of October 30, 1901, affects them, is not so clear and explicit in giving consent and granting authority to enter upon the streets of the city of Logansport as were the ordinances of 1864 and 1865 adopted by the common council of the city of Indianapolis. Judge Woods and Baker, in the above-cited case, held that the general consent conferred by the original ordinances to occupy and use all of the streets of the city for railway purposes did not satisfy the statute, nor take away from the common council the right, before the railway company should construct a street railway upon an unoccupied street, to require it to obtain the consent of the common council to its location, survey, and construction.

For these reasons I am of opinion that the demurrer to the bill should be sustained, and it is so ordered.

CITY OF WILLIAMSPORT, to Use of SICILIAN ASPHALT PAV. CO.  
OF NEW YORK, *v.* WILLIAMSPORT PASS. RY. CO.*(Supreme Court of Pennsylvania, May 19, 1902.)*

[52 Atl. Rep. 51.]

**Street Railways—Liability for Paving Street\*—Estoppel.**

A street railway company, which, under its charter, is not liable for any paving or repaving of streets, but only for repairing between its tracks, is not liable for paving, though, when informed that the city has made a contract for a company to pave the street, said company to look to the street railway company alone for the cost of the paving between the tracks, it in no way repudiates the contract.

**Same—Same—Contract—Ratification.**

One, by making a payment for work done under a contract, does not make or ratify any contract making it liable thereunder, it at the time being stated that this is not to be regarded as an admission of liability for anything more.

**Appeal from court of common pleas, Lycoming county.**

Action by the city of Williamsport, to the use of the Sicilian Asphalt Paving Company of New York, against the Williamsport Passenger Railway Company, for paving between defendant's tracks, done by the use plaintiff under a contract with the city which provided that the contractor should look to the railway company alone for the cost of the paving between its tracks. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below, per Mitchell, P. J., refusing a new trial, is as follows:

"This was an action brought to recover the cost of paving laid on a portion of West Third street, between and for eight inches on either side of the rails of the Williamsport Passenger Railway Company. The paving was a new paving, consisting of a hydraulic concrete cement base and a wearing surface of Trinidad sheet asphalt. The paving was laid under a contract entered into September 5, 1893, by the use plaintiff in the present case and the city of Williamsport, and this contract was made in pursuance of an ordinance of the city of Williamsport, which was approved August 5, 1893. The defendant was not party to the contract. On the trial of the case a judgment was found by the jury in favor of the defendant, under directions of the court. The sole reasons urged in support of the motion for a new trial are: (1) That the plaintiff is entitled to recover if the defendant had knowledge that plaintiff was proceeding to lay the pavement above specified at defendant's expense, and defendant did not in any way repudiate the implied contract; (2) if even unauthorized agents of the defendant agreed to the contract and matters inseparably connected therewith, and this agreement was adopted and acted on by the defendant, the liability of defend-

\*See note, 5 Am. & Eng. R. Cas., N. S., 663. See also, generally, 1 Am. & Eng. R. Cas., N. S., 68.

ant should have been submitted to the jury; (3) if even acts of unauthorized agents were not adopted formally by the defendant, yet if defendant ratified the contract by accepting the work done by plaintiff, and made payments on account of the contract, she is liable. It must be borne in mind that under the charter of the defendant it is not liable for paving or repaving streets occupied by its tracks, or any portion of them, but only for keeping the streets in repair, and that the work done by the defendant was a paving and not a repairing. The paving company had, therefore, no right to expect the defendant to pay it for any portion of the work it did under its contract with the city, and the city had no right to act as agent for the defendant. Turning, then, to the first reason urged in support of this motion, it seems impossible for any act done by the defendant to have injured the plaintiff, or caused it to assume any responsibility which it otherwise would not have assumed. The contract between the city and the paving company was an entire contract, entered into September 5, 1893. Under this contract the paving company became responsible for paving the entire portion of West Third street, including the portion for the paving of which it seeks to recover from the railway company in this action. The acts of the defendant or its agents which the plaintiff relies upon to estop the defendant from contesting its liability were all done subsequent to the making of this contract; in other words, subsequent to the time when the responsibilities of the plaintiff had been fixed, and when no act of the defendant could induce it to change its position. No difference what the Passenger Railway Company did, the city of Williamsport, under the contract, would have compelled the paving company to pave the portion of the street in dispute. In reference to the second reason urged in support of the motion, it should be remembered that under its charter the defendant is obliged to conform to all grades established by the city. The endeavor to so conform would seem to satisfactorily account for the meeting of Messrs. Emery and Lawshe, members of the executive committee of the railway company, with the highway committee of councils, and the change in the depth of excavation and height of rails made by the company in pursuance of the discussion at such meeting. Nor do the acts of the defendant appear to the court to have amounted, singly or together, to a ratification of the contract between the city and the paving company, or, rather, to an agreement that the defendant should be liable for its portion of the pavement as contended for by the plaintiff. The defendant did pay the plaintiff for paving between its tracks on another portion of West Third street, and for pavement which was laid under the same contract between the plaintiff and the city. At the time of making this payment, however, it took every precaution to advise the plaintiff that the payment must in no wise be regarded as an admission of liability

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for any other portion or any other paving done under the same contract. This warning applied to both payments made by the defendant, or, rather, to both installments of one payment which was made by it. By these payments the plaintiff was certainly not misled or deceived or induced to change its position. Whether they were made or not, the plaintiff would have been compelled to finish all the paving, as it subsequently did under its contract with the city. And the attitude of the defendant throughout, instead of being calculated to make the plaintiff believe that the defendant had ratified the contract with the city, or would be responsible for any portion of the paving laid under that contract, was of a character planned to warn the plaintiff that the defendant admitted no liability on its part, and would use every means it deemed reasonable to avoid payment. Now, the motion in arrest of judgment, and for a new trial, is overruled."

Reading & Allen and John K. Hays, for appellant.

Henry C. McCormick, C. La Rue Munson, Addison Candor, and Seth T. McCormick, for appellee.

PER CURIAM. This judgment is affirmed on the opinion of the court below refusing a new trial.

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LOUISVILLE & N. R. Co. v. WALTON.

(*Court of Appeals of Kentucky, April 24, 1902.*)

[67 S. W. Rep. 988.]

**Injury to Property from Operation of Coal Bins\*—Estoppel.**

The fact that the owner of adjoining property stood by and saw a railroad company expend large sums of money in erecting coal bins does not estop him from recovering damages for injury to his property from the manner of operating the bins.

**Same—Damages.**

The fact that the bins were necessary to the operation of the road does not preclude plaintiff from recovering damages for injury to his property from the operation of the bins.

**Same—Same.**

The court properly instructed the jury that there could be no recovery unless there was damage to plaintiff's property from the manner of operation of the bins, and that there could be no recovery for damage, if any, caused by trains passing on the track by plaintiff's house.

**Same—Excessive Verdict.**

In determining whether the verdict is excessive, the fact that the recovery is in full of all damage caused by the reasonable, ordinary, and prudent operation of the bins is to be considered.

Appeal from circuit court, Rockcastle county.

"Not to be officially reported."

Action by John H. Walton against the Louisville & Nash-

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\*See *Chicago Burlington and Quincy R. Co. v. O'Connor* (Neb.), 1 Am. & Eng. R. Cas., N. S., 51.

On condemnation of land for an elevator, see *Milwaukee & St. P. Ry. Co. v. Milwaukee*, 34 Wis. 271.

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ville Railroad Company to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Alcorn and Edward W. Hines, for appellant.  
W. G. Welch, for appellee.

WHITE, J. This action for damages was instituted by appellee to recover for injury to his house and lot in Livingstone, Ky., caused by the erection and maintenance of coal bins in front of appellee's lot, and for injury caused by the noise and cinders, soot, and smoke incident thereto. The appellant admits that the coal bins have been erected as alleged, but denies any damage to appellee's property. It denies liability for damage, even if there be in fact an actual injury to appellee's property. This denial of liability is on the ground that the coal bins are necessary for appellant to carry on its business. For a further defense it is pleaded that appellee is estopped from claiming damages because he saw the work of building the bins, and knew such was to be done, and the use to which it was to be put, without objection or effort to stop it. A demurrer was sustained to the answer presenting the last two questions, and a trial was had on the question of fact as to whether appellee had been damaged, which resulted in a verdict and judgment for \$1,250; and, after appellant's reasons and motions for new trial had been overruled, this appeal is prosecuted.

We are of opinion there was no error in sustaining the demurrer to that paragraph of the answer that attempts to plead an estoppel. If this was an action for injunction, a plea setting out that appellee was estopped by reason of his standing by and seeing large sums of money expended on the improvement, so that an injunction would cause more injury to appellant than the bins would to appellee, might be a good plea. But in the case at bar it is doubtful if appellee could have enjoined the erection of the coal bins, as, according to the answer of appellant, they were absolutely necessary in order to supply its engines with fuel.

We are also of opinion that there was no error in sustaining the demurrer to that paragraph pleading the necessity of the bins at that point. Necessity for the protection of the business interests and traffic of a railroad may operate to defeat an injunction, but necessity for a structure is not *damnum absque injuria*. *Railroad Co. v. Ingram* (Ky.) 30 S. W. 8; *Railroad Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 67; *Railroad Co. v. Esterle*, 13 Bush, 677; *Willis v. Bridge Co.* (Ky.) 46 S. W. 488. In the first three cases the rule requiring compensation to be made is applied to an abutting property owner, and in the latter case the rule is extended so as to cover injuries done to any property owner. The only question presented, therefore, is as to the damage to appellee's



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property, if in fact there is any. This question of fact was submitted to the jury, and their verdict was for appellee.

Complaint is made of the instructions given. Counsel insists that the proper measure of damage was not given. The court very clearly and plainly instructed the jury there could be no recovery unless there was damage to the property, caused by the manner of the operation of the coal bins; that there could be no recovery for damage, if any, caused by trains passing on the track by appellee's house; and then, at the expense of repetition, told the jury that, if there was damage to the property by reason of the operation of the railroad and also by the operation of the coal bins, the damage caused by the railroad must not be considered. In our opinion, there was no error in this measure of damage. The jury were not even permitted to assess damages by reason of the coal bins being there, but were confined to the injury caused by the manner of operation. This is correct in principle. The case is analogous to that of a railway in a street, where there is permission from the municipality. The right exists to so locate the railroad, but compensation must be made to the property owner for damage suffered by reason of the operation. In view of the rule as to this recovery being in full of all damage caused by the reasonable, ordinary, and prudent operation of the bins, we are of the opinion that the verdict is not excessive according to the proof. The decided weight of the testimony is that appellee's property was worth, before the coal bins were built, some \$2,000, and now not over \$400 or \$500; yet the jury awarded only \$1,250 as damages.

The verdict is fully sustained by the evidence, and, as no error appears, the judgment is affirmed.

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ALEXANDER v. LOUISVILLE & N. R. Co.

(Circuit Court, N. D. Georgia, February 19, 1902.)

[114 Fed. Rep. 774.]

**Reference—Findings of Fact.**

Where, by consent, the issues in an action at law are referred to an auditor, his findings of fact are entitled to the same weight as the verdict of a jury.

**Railroads—Injury to Person Near Track\*—Contributory Negligence.**

Evidence considered, and *held* to support a finding that plaintiff, who was caught between a railroad train and a station platform and injured, was guilty of contributory negligence in attempting to cross the track ahead of the train after he saw it approaching.

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\*Injuries to persons at railroad stations. See note to Railroad Co. v. Hyde, 41 C. C. A. 550.

Crossing in front of approaching train. See *Burnett v. Eastern & A. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 469, and note 471; *Southern Ry. Co. v. Blake*, 10 Am. & Eng. R. Cas., N. S., 472; *Chicago & W. I. R. Co. v. Ptacek*, 10 Am. & Eng. R. Cas., N. S., 481, and note, 484; *State v. Cumberland & P. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 511, and note, 518.

Alexander v. Louisville & N. R. Co

At Law. Action for personal injury. On exceptions to report of auditor.

Burton Smith, for plaintiff.

King & Spalding, for defendant.

NEWMAN, District Judge. This is a suit brought by the plaintiff against the defendant for the recovery of damages for injuries alleged to have been received by the plaintiff by being caught between a moving train belonging to defendant and the depot platform in the town of Gadsden, Ala., the plaintiff claiming that he was entirely free from fault, and that said injuries were received on account of the negligence of defendant's servants and employees. The case was referred to an auditor,—an unusual proceeding in actions *ex delicto*,—but the reference was by consent of counsel, with the usual leave of exception. The auditor having found in favor of the defendant on the questions involved, the case now comes before the court on the exceptions of the plaintiff to the auditor's finding. There were several grounds of negligence alleged, which were as follows: First, that while the plaintiff was crossing the defendant's tracks, going to the depot to purchase a ticket, and in a place where he had a right to be, without any warning or notice to him of any sort a train of the defendant came swiftly upon him, and ran him down, and caught him between the platform and the train; second, that the tracks of the defendant are so arranged that he could not see the train until it was nearly upon him, and too late for him to escape the danger; third, that the train was running at a high rate of speed, and gave no signal or warning; and, fourth, that the defendant was negligent in running its train across the street where the plaintiff was injured at the time when the passenger train which plaintiff expected to board was due.

The auditor found for the defendant because he thought the plaintiff was guilty of contributory negligence in the following way: He thought the plaintiff saw the train, and sought to cross in front of it as it was approaching, so as to mount the steps leading to the ticket office; and in so doing was caught and injured. The auditor believed that this constituted such contributory negligence on the part of the plaintiff as would prevent recovery. If this finding of the auditor has evidence to support it, the duty of the court here is plain. The evidence set out by the auditor and relied on by him is as follows:

Examination of the plaintiff:

"Q. Where were you just before you started to the depot?

A. I was standing just across the track from the platform.

Q. About how long was that before train time? A. I had been there, I suppose, about a minute, I don't think I had been there longer than a minute. The train was then due there. I cast my eye up at the hotel, and the train was stand-

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ing there. I made to cross to the steps down there in about 15 feet of me, and as I got up against the platform I seen the car coming. I didn't advance any further up toward the steps. I seen the distance was too great, and I just closed myself up against the platform. Had been to Gadsden twice before,—once by private conveyance, and once by the cars. Got my ticket there at that place. I got off there this time. Q. Were you standing or walking when you first saw the train? A. Standing, sir. My back was towards this freight train. Q. What was the first notice you had of it? A. It was in about 15 or 20 feet of me,—the car was,—when I first noticed it. Q. How did you happen to see it, or know it was coming? A. As I just stated, when I intended to go to those steps, when I got across to the side of the platform, I saw that the car was advancing, and that I couldn't make it any further. Q. You hadn't seen the car until then? A. No, sir. Q. Were you on the track or off of it when you first saw it? A. I was off of the track. Q. On the side towards the platform, or how, when you first saw the train? A. No, sir; I was crossing over to the platform. Q. Where were you when you first saw the train? A. I was against the platform when I first saw the train that hit me. I was crossing,—done across the track,—and was on the ground."

On page 20, cross-examination, Alexander says:

"Q. How were you standing, in relation to those steps,—how far from them were you? A. I was about 15 or 20 feet from them. Q. Was this track that you were hurt by between you and the steps or not? A. Yes, sir. \* \* \* Q. Then, after you came down there and stopped, as you described before, where was it you stopped,—down here the station? A. Well, I stopped in 15 or 20 feet of the steps, just across the track. Q. What did you do there when you stopped? A. Well, I was talking to a gentleman standing there. I don't think it was more than a minute, sir. I look up towards the hotel, and seen the train (the passenger train). Q. Then what did you do? A. I walked right across towards the steps to get my ticket. Q. Where were you, or what looking did you do? A. Well, sir, I taken a general glance as I generally do. I have always been accustomed to trains, more or less, ever since I was a boy. I used to be a butcher (on W. Pt. R. R.). Q. Well, after you had taken that glance, what did you do? A. I walked right across to the steps. Q. Did you see your train? How close to you was it when you first saw it? A. The train was in 15 or 20 feet of me—the car was—before I seen it. Q. What direction were you, as to the car that hit you, just when you saw it, and just before? A. I was sidewise to it, going across, and the car was coming up. Q. Were you on the track, or where were you, when you saw that train? A. I was near the track, just stepped off against the platform, when I seen the train. Q. Was there a good space between the platform and the track there for a man to

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walk? A. Yes, sir; there is 3 or 3½ feet; may be more; I couldn't say."

Examination of Newt Adams:

Describes walking leisurely down Second street. Was so familiar with the locality that he says it was an unusual time for that train to be there. Did not stop at shanty, slowed up a little. "There was some shade trees, and we made it as long as possible staying in the shade until the train come in." Walked in the triangle. Never saw any ticket sold at Printup House. Office he worked for near the ticket office in Printup House. If any engine or cars had gone along pipe works track could have seen them. Did not see any. Never crossed the cut-off track. Alexander got on it. Went on, did not stop. "When he turned to go across I was on Alexander's left. We didn't make more than a step,—hadn't more than got started back, and started across,—before we discovered this train on us. Q. How far had you gotten into that pipe works track when you saw it? A. When we first saw it, we were just about stepping over into it. I think Mr. Alexander saw it first. He just spoke to me, and says, 'Newt, we are gone,' and we both made a run to the platform. We were going along down here, 'near the frog,' when he was ringing the bell down there getting ready to come out [passenger train]."

W. B. Armstrong, conductor of train that hurt plaintiff, says they made two trips on the pipe works track. On the first trip he saw Alexander and Adams. They were hurt 12 or 15 feet from the steps.

Mrs. C. W. Parr says:

"The men were coming down the sidewalk on Second street.

They came on down to the crossing, and got on the track, and walked up the track. The men had the opportunity of seeing the train coming if they had looked back. Don't know whether the bell rung or not."

The auditor says:

"The preponderance of the testimony is that the locomotive bell was ringing as the train which caught the plaintiff was coming 'across Second street.' The plaintiff says he did not hear the bell ring. Adams does not say whether it was ringing or not, but does say he heard the bell on the passenger train. McMullen, the fireman, says he was ringing the bell. Poterfield, the fireman, says the fireman was ringing the bell. The witness Howe says he heard the bell ringing. Carroll, the engineer, says the bell was ringing. There is no positive testimony that the bell did not ring. Some of the witnesses did not hear or did not notice it, while some were not asked about it. No witness denies the switching of the train, and the testimony is convincing that two trips were made to the pipe works, and each time it was necessary for it to cross Second street, making a crossing of that street four times, even if it did not run up and down the house track. It would

## Denison &amp; P. S. Ry. Co. v. Foster

seem impossible to conclude that the plaintiff did not know of the presence of this train, and that it had crossed Second street, and was in towards the pipe works, at the time he and Adams were approaching the tracks across Second street."

There can be no question that this evidence abundantly supports the finding. If it was the verdict of a jury in favor of the defendant, and a motion for a new trial, on the ground that the verdict was not supported by the evidence, no court would hesitate to overrule the motion. The same rule should apply where, by consent of the parties, the case is referred to an auditor.

The exceptions will all be overruled on the ground that there is sufficient evidence to support the finding of the auditor that the plaintiff endeavored to cross in front of a moving train, and was injured thereby, and was guilty of such contributory negligence as to bar a recovery for the injuries received. The report of the auditor will be confirmed.

## DENISON &amp; P. S. RY. CO. v. FOSTER.

(*Court of Civil Appeals of Texas, March 15, 1902.*)

[68 S. W. Rep. 299.]

## Defect in Crossing—Duty to Keep Bridge in Repair.\*

In an action against a railway company for injuries sustained by a traveler on a public street, due to his horse stepping into a hole in a bridge over a culvert at the intersection of the street with the company's track, an instruction that, if the bridge "was an approach to and a necessary part of the crossing of defendant's road over the street," and "if defendant permitted the bridge to become and remain out of repair to such an extent that it was not reasonably safe for use to travel over," plaintiff was entitled to recover if his injuries were proximately caused by the bridge being out of repair, was proper; it requiring the jury to find that the bridge was a "necessary" part of the crossing, and imposing on defendant the duty of keeping it in reasonably safe repair, and not imposing on it the duty of keeping the "approaches" to the crossing in repair.

## Same—Same.

The instruction did not impose on defendant the duty of exercising a higher degree of care in keeping the bridge in repair than ordinary care.

\*Care to be used in erecting bridges. See *Brown v. Pine Creek Ry. Co. (Pa.)*, 8 Am. & Eng. R. Cas., N. S., 693, and note at end of case, collecting authorities.

As to effect of plaintiff's knowledge of defect in bridge, see *Evans v. Charleston & W. C. Ry. Co. (Ga.)*, 15 Am. & Eng. R. Cas., N. S., 200; *Gulf, C. & S. F. R. Co. v. Gascamp (Tex.)*, 34 Am. & Eng. R. Cas. 6, 7 Am. & Eng. Enc. Law (2d Ed.), 392 et seq.

On point that the company is not entitled to notice of defect in bridge caused by its own act, see *Louisville & N. R. Co. v. Pittman (Ky.)*, 23 Am. & Eng. R. Cas., N. S., 55.

Duty to provide safe bridges. See extensive note, 22 Am. & Eng. R. Cas., N. S., 335.

Duty to keep in good condition and repair. See 1 Rap. & Mack's Dig., 697 et seq.; 4 Am. & Eng. Enc. Law (2d Ed.), 936 et seq.; *Bush v. Delaware, L. & W. R. Co. (N. Y.)*, 21 Am. & Eng. R. Cas., N. S., 516.

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**Same—Same.**

The refusal to give an instruction that defendant was not liable if it used ordinary care to keep the bridge in a reasonably safe condition, notwithstanding that the bridge was out of repair, and plaintiff thereby injured, was not erroneous when the court charged the jury that, before they could find for plaintiff, they must find that the bridge was not reasonably safe; that, if a plank was removed by a stranger and this caused the accident, plaintiff could not recover; and that the statute requiring defendant to keep the crossing in repair did not make it an insurer, but imposed the duty of keeping it in reasonably safe repair.

**Same—Burden of Proof.**

Where plaintiff's evidence in an action against a railway company for injuries sustained while traveling on a public street, due to his horse stepping into a hole in a bridge over a culvert at a crossing, fairly made out a prima facie case, without showing that a stranger removed a plank from the bridge, defendant, in order to defeat the case, has the burden of proving that the defect in the bridge was due to a stranger removing a plank from it.

**Same—Evidence.**

In an action for injuries sustained by a traveler on a public street, due to his horse stepping into a hole in a bridge, the exclusion of evidence to the effect that the bridge appeared to be constructed of good material, and that the witnesses, when traveling over it, saw nothing which rendered it unsafe, was erroneous.

**Same—Same—Harmless Error.**

The exclusion of the evidence was harmless error where the witnesses testified to the material used in the bridge, and also as to its condition.

**Same—Same—Same.**

The exclusion of the evidence of these witnesses, if erroneous, was harmless, for the positive testimony of defendant's section foreman and section men was to the effect that the material of the bridge was sound, and that the bridge was in good condition.

**Same—Same—Hearsay Evidence.**

In an action for personal injuries by a traveler, due to his horse stepping into a hole in a bridge over a culvert at a railway crossing, evidence of the declarations of the trainmen on a train passing about 15 minutes after the accident that some one had put a timber on the track was not a part of the res gestæ, but mere hearsay.

Appeal from district court, Grayson county; Ries Maxey, Judge.

Action by J. H. Foster against the Denison & Pacific Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman and Head & Dillan, for appellant.

H. H. Cummins, W. J. Mathis, and Wolfe, Hare & Semple, for appellee.

**BOOKHOUT, J.** On January 14, 1901, appellee was driving along one of the public streets of the city of Denison, when his horse stepped in a hole in a bridge across a culvert at the intersection of said street with appellant's track, and threw him out of his buggy, and on January 22, 1901, he instituted suit to recover of appellant damages for the injuries alleged to have been thus caused. A trial before a jury on October 12, 1901, resulted in a verdict and judgment in favor of appellee for \$6,000, to reverse which this appeal is prose-

cuted; appellant having given notice of appeal, filed appeal bond, and assigned errors, in compliance with our statutes and rules of court.

1. Appellant complains of the following charge: "If you believe from the evidence that the bridge in question over the culvert on Day street, in the city of Denison, was an approach to and a necessary part of the crossing of defendant's road over said Day street; and if you further believe from the evidence that the defendant permitted said bridge to become and remain out of repair to such an extent that it was not reasonably safe for use by the public to travel over, \* \* \* and that plaintiff's injuries, if any he received, were proximately caused by said bridge being out of repair; and if you find from the evidence that the same was out of repair, and not in a reasonably safe condition for use by the public, \* \* \* then you will find for the plaintiff." It is contended that defendant was only required to keep in repair the crossing proper, and was not required to keep in repair the approaches to the crossing after they had once been put in proper condition. This contention is sound. It does not, however, arise under this assignment. The charge does not impose upon the defendant the duty of keeping the approaches to the crossing in repair. The charge requires the jury to find that the bridge over the culvert in Day street was an approach to and a necessary part of the crossing, and, if they so find, then they are told, in effect, that the duty devolved upon defendant to keep it in reasonably safe repair. The jury must, under this charge, before finding for plaintiff, believe that the bridge over the culvert was a necessary part of the crossing. Nor does the charge impose upon the defendant the duty of exercising a higher degree of care in keeping the bridge in repair than ordinary care. In this connection the defendant requested the following charge: "If you believe from the evidence that defendant used ordinary care and prudence to keep the bridge in a reasonably safe condition (and by this is meant such degree of care and prudence as a man of ordinary care would use under the same circumstances), and, notwithstanding the exercise of such care, said bridge was out of repair on the night of January 14th, and plaintiff thereby received his hurts, you will return a verdict for the defendant." We are of the opinion that there was no error in refusing this charge. The jury were instructed by the main charge, in effect, that before they could find for the plaintiff, they must find that the bridge was not reasonably safe for use by the public. They were further told that, if the plank was removed from the bridge by a stranger, and this caused the injuries to plaintiff, he could not recover. The defendant was required by statute to keep the crossing in repair. While this statute does not make the railroad an insurer in this respect, it was its duty to keep the

crossing in reasonably safe repair. As the main charge covered this phase of the case, the refusal of the requested charge is not reversible error.

2. Complaint is made of the following clause of the charge: "The burden of proof is on the defendant, however, to show that plaintiff was guilty of a lack of such care as an ordinarily prudent person would have exercised under the same or similar circumstances in the manner in which he approached and drove on said bridge, which caused or contributed to cause the injuries, if any were received, or to show by a preponderance of the evidence that a plank was removed from said bridge by some third person, which caused the injuries, if any, received by plaintiff." It is contended that the burden of proof was not on the defendant to show by a preponderance of the evidence that a plank was removed from the bridge by some third person, and that this caused the plaintiff's injuries, but was on the plaintiff to show by a preponderance of the evidence that his injuries were caused by the negligence of the defendant, and were not caused by any one else. The plaintiff introduced proof tending to show that the bridge was not in safe repair. The testimony for plaintiff fairly made out a prima facie case in his behalf, and did not show that a plank had been removed from the bridge by a third party. The court charged the jury, "If you further believe from the evidence that the defendant permitted said bridge to become and remain out of repair to such an extent that it was not reasonably safe for use by the public to travel over," etc., and that plaintiff's injuries were caused thereby, then they should find for plaintiff. The court, in the same connection, instructed the jury as follows: "Or if you believe from the evidence that a plank was removed from said bridge by a stranger, thereby making a hole in said bridge, and that such removal of said plank caused plaintiff's horse to fall, and thereby proximately caused the injuries, if any, received by plaintiff, you will find for the defendant." The defendant pleaded contributory negligence on the part of plaintiff, and also, in substance, that, if the bridge was out of repair, it was through no fault of defendant, but was the act of a stranger, done without its knowledge or consent, and but a short time before the accident. The plaintiff having introduced sufficient evidence to make out his case without showing that a plank had been removed from the bridge by a stranger, if the defendant wished to defeat the case so made by introducing evidence to show that the defect in the bridge was caused by a plank having been removed therefrom by a third person, not connected with the defendant, the burden of showing such fact was on the railroad, and the court did not err in so instructing the jury. *Odom v. Woodward*, 74 Tex. 41, 11 S. W. 925; *Patterson v. Railroad Co.* (Tex. Civ. App.) 40 S. W. 445; *Missouri Pac. Ry. Co. v. China Mfg. Co.*, 79 Tex. 26, 14



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S. W. 785; *Cantwell v. Railroad Co.* (Tenn. Sup.) 18 S. W. 271; *Ryan v. Railway Co.*, 65 Tex. 13, 57 Am. Rep. 589.

3. Complaint is made of the action of the court in excluding certain testimony of the witness Mrs. J. E. Nading. This witness, in answer to a certain interrogatory as to whether or not the bridge over the culvert was constructed of good material, answered, "It appeared to be constructed of good material." The objection made was that the answer did not state a fact, but merely the opinion and conclusion of the witness. Also her answer to the following interrogatory: "State whether or not, at the time you were last over the bridge, the culvert, bridge, or approach was in any way defective or out of repair, or dangerous for people or horses to travel over," to which she answered, "I saw nothing which would render the bridge unsafe, or cause any accident at all." This answer was objected to because it was an expression of opinion, and her testimony did not show that she was qualified to express an opinion. We are of the opinion that the answers of the witness to both interrogatories were competent evidence, and should have been admitted. The witness had testified that: "It (meaning the bridge) appeared to be constructed of good material," and "it was constructed of plank,—pine, I think it was. I was simply walking along, looking down, and don't know exactly why I noticed it. I think one end of the plank was loose. The nail seemed to be a little loose. With this exception, nothing was out of repair. There was no holes, or any broken plank." She further testified on cross-examination: "I don't remember having ever passed there and seen it out of repair. I saw nothing out of repair." We think the evidence excluded was fairly embraced in other testimony of the witness contained in the record, and hence the action of the court in sustaining the objection to the above interrogatories and excluding the answers was harmless.

Complaint is made of the exclusion by the court of the answer of defendant's witness Mrs. C. A. Pearson, that: "It (the bridge) looked safe to me. I could not see anything wrong with it. The material of which it was constructed was good." The objection to this testimony was that it was an opinion, and the witness had not qualified herself to give the answer. The answer was admissible, and the objection should have been overruled. The witness did testify, as shown by the record, that she had frequently passed over and noticed the crossing. She says: "I did not see any defects in the crossing or bridge before the accident." We think the action of the court in excluding the evidence, in view of this testimony, was harmless. There was positive evidence introduced by defendant, to wit, the testimony of its section foreman and section men, that the material of the bridge was sound, and the bridge in good condition. The plaintiff's evidence was to the effect that the material was old and rotten.

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and the bridge not in safe repair. Considering the negative character of the testimony excluded and its inherent weakness, we are of the opinion that the result must have been the same had this testimony been admitted. Its exclusion, therefore, if error, was harmless.

It is contended that the court erred in excluding the testimony of Ollie Pearson that she heard one of the trainmen say, "Bill, here is a piece of timber somebody has put on the track." She had previously testified that after the accident the train on defendant's road struck something and stopped, and several men got off the train, and one of them removed a piece of timber. It was then the statement was made. The objection was that the testimony was immaterial, hearsay, and irrelevant. Appellant contends that it was admissible as a part of the *res gestæ*. There was no error in excluding the testimony. It was not *res gestæ*. Plaintiff had been injured some 15 minutes before the train arrived and the exclamation was made. The statement did not result from the accident which caused plaintiff's injury. These remarks dispose of the tenth assignment adversely to appellant.

Charles Graham, a witness for the plaintiff, stated on his cross-examination that he had a suit against the defendant railway company on account of injuries received by him at the same time plaintiff was injured. He was asked if he did not allege in that suit that he had received certain injuries to his head, and answered he did not. Defendant then offered to read, from the witness' petition in his cause, the allegations that he was injured at the same time and place, and received injuries in his head. This evidence was objected to as irrelevant and immaterial, and not a declaration of the witness, nor a declaration made under his instructions, and is not signed by him. The objections were sustained, and the evidence excluded. The evidence does not show that the witness had knowledge of the allegations contained in his petition or that he authorized the same. It is not shown that he signed the petition. The statement of the witness which it was sought to impeach was drawn out on cross-examination, and was not material to any issue in the case on trial. The court did not err in excluding the evidence. *Insurance Co. v. Schwulst* (Tex. Civ. App.) 46 S. W. 89. It does not appear to have been material on any issue in the case.

Complaint is made of the exclusion of the evidence of John Rabun that "there was no drain box put in the culvert after this time (meaning the time the plaintiff was injured), and that there was none there." It is contended that the evidence was admissible to contradict plaintiff's witness Harold. The witness Harold stated on his cross-examination, in answer to a question by defendant's counsel, that he told the section foreman, Rabun, that the drain box was broken, and that Rabun told the witness "he would fix it as soon as he could get some drain boxes; that the drain boxes did not come for

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several days after Foster got hurt, and after they came,—several days after Foster got hurt,—why then it was fixed.” The evidence of Rabun, which was excluded, was offered to contradict the testimony of Harold. The evidence of Harold as to what was done in the way of repairing the culvert after the accident is not competent evidence to show the culvert was out of repair at the time of the injury. *Railway Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336. The contention of the plaintiff is that the bridge was out of repair, in that the plank or floor of the bridge was loose, insecure, and insufficiently fastened to the joists or sleepers, and that the joists or sleepers were old and decayed, and that there was a hole in the bridge. Whether or not a drain box was put in the culvert after the plaintiff was injured is not pertinent to any issue in this case. The testimony of Harold not being relevant to any issue made in the case, it was not error to exclude evidence contradicting the same. *Railway Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852.

Finding no reversible error in the record, the judgment is affirmed. Affirmed.

## FREEMAN v. METROPOLITAN ST. RY. CO.

(*Court of Appeals at Kansas City, Mo., June 9, 1902.*)

[68 S. W. Rep. 1060.]

## Passengers—Personal Injuries—Trial—Instructions.\*

Instructing that if the sudden stop of defendant's street car which injured plaintiff was caused by defendant's negligence or want of skill or diligence, and that if said accident could not have been prevented by the utmost skill and foresight, plaintiff was entitled to recover, was prejudicial error.

Appeal from circuit court, Jackson county; Wm. B. Teasdale, Judge.

Action by Mary Freeman against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur F. Smith, John H. Lucas, and Frank Hagerman, for appellant.

J. H. McVay, for respondent.

BROADDUS, J. The plaintiff here is the wife of J. H. Freeman, plaintiff in the case of *Freeman v. Railway Co.* (decided at this term) 68 S. W. 1057. The statement of the facts of that case will substantially answer as a statement in this, as she seeks to recover for the alleged injury, which is the same in both cases.

\*As to the degree of care exacted of passenger carriers, see note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

As to the liability of carriers for injuries to passengers occasioned by sudden stops, see notes to *Freeman v. Metropolitan, etc., R. Co.*, post.

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The first instruction given for the plaintiff was objected to for the same reasons that were urged against the fourth one in the husband's case. Although said instruction is not quite so objectionable as the former one, the same objection applies to both. Instruction number two, given at the instance of plaintiff, is as follows: "The court instructs the jury that if they believe from the evidence that on or about the 8th day of July, 1900, the defendant was engaged in the business of transporting passengers on its cars over and upon Twelfth street and Troost avenue of Kansas City, Mo., and that on said day plaintiff, Mrs. Mary Freeman, was received by it to be carried as a passenger on one of its said cars, and that while being so transported on said car she was injured by reason of said car coming to an abrupt and sudden stop in such a way that the plaintiff was thrown out of her seat and against some portion of said car and was injured, and that said sudden stop was caused by the negligent, careless, or unskillful management of said car by defendant's servants, or the negligent management of said car or the equipment or machinery of the same by which it was operated, or by reason of any negligence or lack of care, skill, or diligence on the part of the defendant's servants, agents, or employees operating the said car, and that the said accident could not have been prevented by the exercise of the utmost human skill, diligence, and foresight, and unless the jury so believe they will find for the plaintiff. By the utmost human skill, diligence, and foresight is meant that skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." The objection to this instruction is that, after the jury were told what degree of care was required of the defendant, they were further told that if said accident could not have been prevented by the exercise of the utmost human skill, diligence, and foresight, they would find for plaintiff. It is hard to conceive how an instruction could have been constructed better calculated to bewilder and confuse a jury. The law of negligence is very clearly stated in an instruction written by the court and given on behalf of the defendant, and the one under consideration must have escaped attention. Between the two the jury was left without a guide, unless it rejected the bad and was guided in its deliberation by the good one. The first, if it meant anything, meant that the jury were to find defendant guilty of negligence at all events, otherwise that defendant was an insurer of plaintiff's safety; but we cannot tell how the jury acted on the instruction. The same objection exists as to plaintiff's third instruction as applied to number three in the husband's case.

For the errors noted, the cause is reversed and remanded. All concur.

**FREEMAN v. METROPOLITAN ST. RY. CO.**

*(Court of Appeals at Kansas City, Mo., June 2, 1902.)*

[68 S. W. Rep. 1057.]

**Injury to Street Car Passenger—Sudden Stopping of Car\*—Degree of Care.†**

In an action against a street railway company for injury to a passenger due to the sudden stopping of the car, an instruction that if "the said accident could have been prevented by the exercise of the utmost human skill, diligence, and foresight on the part of defendant's employees," defendant was liable, was erroneous, because imposing too high a degree of care.

**Same—Damages—Instruction.**

In an action against a street railway company for damages claimed for injury to plaintiff's wife through defendant's negligence, an instruction "that the husband is entitled to the society, health, strength, and usefulness of the wife, unimpaired by injury as the result of the negligence of another," is erroneous, when the fact of injury is disputed, and the evidence on that point is conflicting.

**Same—Same—Same.**

In an action against a street railway company for damages claimed for injury to plaintiff's wife through defendant's negligence, an instruction that he could recover "for loss of his own time in nursing and care of the injured wife," without limiting such recovery to the reasonable value of his time as a nurse, was error.

Appeal from circuit court, Jackson county; Edward P. Gates, Judge.

Action by J. H. Freeman against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur F. Smith, John H. Lucas, and Frank Hagerman, for appellant.

J. H. McVay, for respondent.

**BROADDUS, J.** The plaintiff sues as the husband of Mary Freeman, who is alleged to have been injured by the negligence of defendant while she was a passenger on one of its cable cars on the 18th day of July, 1900. The injury complained of occurred at the crossing of defendant's cable tracks at Twelfth street and Troost avenue, in Kansas City, Mo. It is claimed by plaintiff that his wife's injuries were occasioned by a sudden stop of the train upon which she was a passenger, which was caused by "the unskillful, careless, and negligent management of said car and its equipment by the defendant," and "by reason of the equipments of the track negligently and carelessly being allowed by said defendant to become and remain out of repair." A cable car, it is conceded,

\*As to the liability of carriers of passengers for injuries occasioned by sudden stops, see note at end of case.

†This case illustrates the tendency of the later cases to hold that it is erroneous to instruct juries that passenger carriers are bound to exercise the "utmost," the "highest," the "greatest possible," the "greatest human," care, etc. For an exhaustive review of these cases, see the note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

is propelled by a cable rope running in a conduit below the surface of the street. A grip shank fastened to the car runs along through a narrow slot extending under the ground, where it grasps the moving rope, and thus power is given to move the train; the gripping and releasing of the rope being done by a lever which loosens or tightens the jaws of the grip shank upon the rope. At cable crossings, of necessity, one rope must pass under another; and it is necessary to throw the rope entirely out of the grip upon this line, so as to permit the cable to be depressed, and the lever to go above the other cable, thus letting the car, by its own momentum, pass over without obstruction. Where the accident in question occurred, the Twelfth street cable line had the lower cable; and in order to make the crossing from east to west, as the car in question was going, the gripman would give the car momentum to carry it over Troost avenue, open his grip at a certain point, when some appliance called the "let go," removes the rope from the grip, and the rope is again caught after the crossing is made. For the protection of the Troost avenue cable, there is placed in the conduit a block of wood called the "dead man." Plaintiff claimed that the accident in question was caused by the failure of the gripman to let go of the rope at Troost avenue, while the defendant claimed there was some little obstruction, unnoticeable in its nature, that got in the slot, which caused the same to be blocked so as to suddenly stop the car. In addition, the plaintiff further claimed that, even if the train did strike some obstruction in the slot, the defendant was guilty of negligence in the management of its car, which was the cause of it. The evidence in the case was somewhat conflicting. There was testimony tending to show that the gripman in charge of the train, when he arrived at the crossing of the two cables, did not throw his cable so as to release his grip, but that he stood in his position without taking any action until he was thrown from it by the force of the collision. The evidence of the defendant tended to show that there was no defect in the appliances of the train, nor that the car or track was out of repair, but that the accident was caused by the grip running through the slot striking some obstruction, which, from its nature, was unnoticeable by the operators of the train. The cause was submitted to a jury upon the evidence, and instructions of the court. The finding and judgment were for the plaintiff in the sum of \$1,000, from which defendant appealed.

There are many grounds alleged why the cause should be reversed. In plaintiff's first instruction the jury were told that if "the said accident could have been prevented by the exercise of the utmost human skill, diligence, and foresight on the part of the defendant's" agents and employees, the jury were instructed to find for the plaintiff. It is contended that this was requiring too high a degree of care, and was in conflict with defendant's instruction No. 2, which was to the

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effect that the defendant "was not bound to use more care than was reasonably practicable." In *Furnish v. Railway Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, the court, in discussing the question, said, "The care required of a railroad towards its passengers may also be defined as the highest practicable care, caution, and diligence which capable and faithful railroad men would exercise under similar circumstances." Judge Barclay, who delivered the opinion of the court, in commenting on the instructions in that case, said: "Throughout the instructions it is asserted that the duty owing by a steam railway carrier to its passengers is to furnish reasonably safe and sufficient roadbed, track, cars, and engines, so far as human skill, diligence, and foresight could provide," and that defendant "is responsible for all injuries from slight negligence on its part." In another part of the opinion the import of the words "utmost human skill, diligence, and foresight," as used by the court, is explained to be "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." This is substantially and almost literally the same language as is approved by the text-writers of high authority in summarizing the law deducible from all the precedents. It will be seen that the words "utmost human skill and foresight" were held to be proper, with the explanation that the meaning was "such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances." Said case is not, therefore, to be considered as an unqualified authority, if authority at all, to support plaintiff's instruction objected to by defendant. In the recent case of *Feary v. Railway Co.*, 162 Mo. 75, 62 S. W. 452, the following instruction given therein was approved by the court, to wit: "If defendant's servants and employees exercised all the care and foresight that was reasonably practicable, then there is no negligence; and, in determining any issue as to negligence on defendant's part submitted to you in these instructions, you are instructed that, if there was exercised all the care that was reasonably practicable, then there was no negligence." The defendant in that case had recovered, and it was one of plaintiff's assignments of errors that said instruction was not the law of the case. Judge Marshall, who delivered the opinion of the court, after citing *Sullivan v. Railway Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Dougherty v. Railroad Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Gilson v. Railway Co.*, 76 Mo. 282; *Jackson v. Railway Co.*, 118 Mo. 199, 24 S. W. 192,—uses the following language: "The instruction under consideration requires all the care and foresight that was reasonably practicable. The law requires nothing that is unreasonable. If a carrier exercises the care so required, there will be no injuries, except in cases of inevitable or unavoidable accident. The instruction is as broad as the liability of the carrier should be made." Attention is also called to the fact

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that in *Dougherty v. Railroad Co.*, supra, the cause was reversed because of an instruction requiring of the defendant carrier to use "the utmost human foresight, knowledge, skill, and care" to prevent accidents. In speaking of said instruction, Judge Ray, who delivered the opinion, said: "It is true that instruction number three seems to have been often approved by this court and courts elsewhere, but, as often, the courts have felt and recognized the propriety, if not the necessity, of explaining and construing the same. Number three seems to state the abstract proposition too broadly as to the degree of care incumbent on the defendant." In *Gilson v. Railway Co.*, supra, the court held that an instruction was erroneous that told the jury "a carrier was liable for an injury to a passenger from a defect in his vehicle, unless he had used the greatest possible care and diligence that was necessary." In *Schaefer v. Railway Co.* (Mo. Sup.) 30 S. W. 331, an instruction was asked and refused to the effect that the burden was "upon the defendant to show to the satisfaction of the jury that its employees managing the car exercised the utmost human care in its management." The court held that the action of the trial court in refusing said instruction was proper. This short and imperfect history shows that our courts have been holding adversely on the question at issue. But it is clear from what has been said that, notwithstanding the inconsistent holdings of the supreme court of the state as to the degree of care required of a carrier towards its passengers, there can be no question of the status of the question at the present time. It therefore follows that plaintiff's instruction requiring of the defendant "the exercise of the utmost human skill, diligence, and foresight" was error, and should not have been given to the jury.

It is also contended that plaintiff's instruction No. 4 is subject to the objection that it is a commentary on the evidence. It reads: "The court instructs the jury that the plaintiff admits that one F. R. Kautz and George Byrne, if present on the witness stand, would swear to certain matters set out in an affidavit made in support of an application for continuance filed in the case by the defendant. You are further instructed that by such admission on the part of the plaintiff he does not admit the truth of such statements, but he may disprove the matters disclosed in said statements, or show any contradictory statements made by such absent witnesses in relation to the matters in issue and on trial. It is for you to say what weight you will attach to any and all testimony introduced in the trial of this cause." Section 687, Rev. St. 1899, under which such evidence is authorized, among other things, provides that "the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial." The vice of the said instruction is plain. It tells the jury that the plaintiff may "disprove the matters disclosed in said



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statements, or prove any contradictory statements made by such absent witnesses in relation to the matters in issue and on trial." The court thus, in effect, told the jury that said absent witnesses had made contradictory statements. We are further of the opinion that said instruction is of doubtful propriety in any case, taking it as a whole. The purpose of the statute was to prevent delay, and afford to parties litigant a speedy trial. But we do not think it can be seriously contended that it was the intention of the legislature to place such evidence on a different footing from the evidence of other witnesses. When once admitted, it should be subject to the same rules and considered like the evidence of any other witness,—like the evidence of a witness included in a deposition, or in an agreed written statement of the parties, which is sometimes resorted to on account of the unavoidable absence of a witness. The evidence of an absent witness is not very forceful, at best, on account of the absence of the person testifying. This fact is appreciated by the trial judges and the legal profession generally, and it is often felt that great injustice is done by forcing a party to go to trial under such circumstances; for the personality of the witness, if present, might have the effect of turning the scales of justice. And to further weaken the force of the evidence of such absent witness, in permitting the court to specially comment on his evidence, practically destroys its usefulness altogether. We do not think such an instruction should be given.

The defendant objected to instruction No. 2 given for plaintiff, which is as follows: "The court instructs the jury, that the husband is entitled to the society, health, strength, and usefulness of the wife, unimpaired by injury as the result of the negligence of another, and that the law does not furnish us any exact standard by which to measure the value of the wife's society. Therefore in the case now on trial the matter of the value of the society of Mrs. Freeman to her husband, the plaintiff, must be left to the enlightened judgment of the jury. By the term 'society,' as is here used, is meant such capacity for usefulness, aid, and comfort as the wife possessed at the time of the injury." The objection is that the instruction "assumed that plaintiff's wife was healthy and strong; that her society, health, strength, and usefulness were impaired; and that this impairment was the result of defendant's negligence." In *Young v. Webb City*, 150 Mo. 333, 51 S. W. 709, a similar instruction was held not to be subject to a similar objection. There are other cases to the same effect. But instructions of this character are only applicable where the injury complained of is not in dispute. In *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516, it was held that, where the evidence as to the injury is conflicting, such an instruction assumes that as true which is in dispute, and therefore is improper. The evidence of Dr. Jackson, the medical expert who, being appointed by the

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court for the purpose, made an examination of plaintiff's wife, and testified on the trial, that he could not find that anything was the matter with the wife, except that she was nervously affected, which he accounted for as having been brought about by suggestion. This evidence created a conflict on the question of the wife's injury. We would suggest that when the case is retried the objection to the instruction in question be obviated by one appropriate to the facts. The same objection also applies to instruction No. 3, to which there is the additional objection that the same authorized the plaintiff to recover compensation from defendant "for loss of his own time in nursing and care of the injured wife." Said instruction should have been framed so as to authorize plaintiff to recover for the reasonable value of his time as a nurse, without regard to his ability for earnings in any other capacity.

It is insisted by the respondent that, notwithstanding there may have been errors in the trial, yet, as the verdict and judgment were for the right party, the cause ought to be affirmed. But some of the errors pointed out are of such importance that we do not know what would have been the result had the law, as we hold, been followed. It might have been different.

The cause is reversed and remanded. All concur.

## NOTES.

**LIABILITY OF CARRIERS FOR INJURIES TO PASSENGERS BY JERKS AND JOLTS OF TRAINS OR CARS.**

**I. IN MAKING UP TRAINS.**

In coupling engines or other cars to cars in which there are passengers, care should be exercised to avoid concussion of such violence as to cause injury to the passengers; and the carrier must answer in damages to passengers who are injured in consequence of jars and jolts which are unusual and not ordinarily incident to the proper management of the train, whether it be a passenger, freight or mixed train, and which are caused by the carrier's negligence.

*Georgia*.—*Chattanooga, etc., R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848, 52 Am. & Eng. R. Cas. 473; *Richmond, etc., R. Co. v. Childress*, 86 Ga. 85, 12 S. E. 301.

*Iowa*.—*Quackenbush v. Chicago, etc., R. Co.*, 73 Iowa 458, 35 N. W. 523, 34 Am. & Eng. R. Cas. 545.

*Michigan*.—*Stoody v. Detroit, etc., R. Co.* (Mich. 1900), 83 N. W. 26.

*North Carolina*.—*Tillett v. Norfolk, etc., R. Co.*, 118 N. Car. 1031, 24 S. E. 111.

*Texas*.—*Runnels v. Houston, etc., R. Co.* (Tex. Civ. App. 1899), 50 S. W. 172.

*Washington*.—*Lane v. Spokane Falls, etc., R. Co.* (Wash. 1899), 57 Pac. 367, 14 Am. & Eng. R. Cas., N. S., 436.

*Wisconsin*.—*Harden v. Chicago, etc., R. Co.* (Wis. 1899), 78 N. W. 424.

See also, section VII, C, 2, of note to *Phillips v. St. Charles, etc., R. Co.*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902. Thus in a case in which it appeared that a coupling had been made by what is known as a "flying switch," a finding by the jury that the carrier was negligent has been sustained. *White v. Fitchburg R. Co.*, 136 Mass. 321, 18 Am. & Eng. R. Cas. 140. But passengers assume the risks naturally

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and reasonably incident to the operation of the mode of conveyance employed by the carrier. See sections VI, D, 3, g, (1) and VI, E, 2, a, of note to West Chicago, etc., R. Co. v. Tuerk, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1. Hence the carrier is not responsible for the consequences of concussions which are usual and ordinarily incident to the management of the train. This limitation of the carrier's responsibility, though applicable irrespective of the character of the train, is most frequently expressed in actions for injuries to passengers on freight trains; and it is said, in effect, that a passenger upon a freight train who is injured in consequence of a jolt, caused by coupling cars, which is usual and reasonably necessary in the management of freight trains, has no cause of action against the carrier. *Crine v. East Tennessee, etc., R. Co.*, 84 Ga. 651, 11 S. E. 555; *Runnels v. Houston, etc., R. Co.*, (Tex. Civ. App. 1899), 50 S. W. 172.

## II. IN STARTING, STOPPING, AND RUNNING TRAINS.

Similar principles are to be applied in determining the responsibilities of railway and street railway companies for the consequences of jars and jolts in starting, stopping, and running trains and cars. Care must be exercised in starting, stopping, and increasing or decreasing the speed of a train or car not to imperil the safety of passengers, and if improper management in these respects causes jerks and jolts which are unusual and not ordinarily incident to the operation of the train or car, the carrier is liable in damages for injuries resulting to passengers.

*California*.—*Spearman v. California, etc., R. Co.*, 57 Cal. 432, 8 Am. & Eng. R. Cas. 192.

*Georgia*.—*Garland v. Southern R. Co.*, 111 Ga. 852, 36 S. E. 595.

*Indiana*.—*Cincinnati, etc., R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241; *Indiana, etc., R. Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004.

*Missouri*.—*Smith v. Chicago, etc., R. Co.*, 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483.

*New Jersey*.—*Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30, 44 Atl. 845, 16 Am. & Eng. R. Cas., N. S., 162; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060, affirmed, without opinion, in 48 Atl. 1118.

*Pennsylvania*.—*Sweeney v. Union Traction Co.*, 199 Pa. St. 293, 49 Atl. 66.

*Texas*.—*Ft. Worth, etc., R. Co. v. White* (Tex. Civ. App. 1899), 51 S. W. 855. As to the carrier's liability for injuries to a passenger by unexpected movement of the train or street car while the passenger is getting on or off, see note to *Phillips v. St. Charles, etc., R. Co.*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

In an action in which plaintiff's evidence showed that while rightfully on the platform of a car a sudden and unusual jerk of the train, while it was running at a rate of speed prohibited by law, threw him from his balance, and that the railing gave way, and allowed him to fall to the ground, and be injured, it was held to be error to direct a verdict for defendant. *Guance v. Gulf, etc., R. Co.*, 20 Tex. Civ. App. 33, 48 S. W. 524. The responsibility of the carrier is the same whether passengers are being carried upon passenger or upon freight trains; a passenger upon a freight train may recover for injuries sustained in consequence of sudden and violent jerks and jolts which are unusual and unnecessary in the management of trains of that character when carrying passengers. *Illinois, etc., R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas., N. S., 163, 43 L. R. A. 210; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313; *Wallace v. Western, etc., R. Co.*, 101 N. Car. 454, 8 S. E. 166, 37 Am. & Eng. R. Cas. 159; *Southern R. Co. v. Vandergriff* (Tenn. 1901), 64 S. W. 481, 1 R. R. R. 104, 24 Am. & Eng. R. Cas., N. S., 104. And a similar rule is to be applied when a passenger is carried upon an engine. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510. But it is not every sudden jolt or jar, causing injury to passengers, which will authorize a recovery against the carrier; to charge the carrier with liability the movement of the train

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or car must be unusual and not an ordinary incident of the operation of conveyances of the particular kind, and must result from the carrier's negligence.

*Michigan*.—*Etson v. Fort Wayne, etc.*, R. Co., 110 Mich. 494, 68 N. W. 298; *Bradley v. Ft. Wayne, etc.*, R. Co., 94 Mich. 35, 53 N. W. 915; *Brown v. Congress, etc.*, R. Co., 49 Mich. 153, 13 N. W. 494, 8 Am. & Eng. R. Cas. 383.

*Missouri*.—*Wait v. Omaha, etc.*, R. Co. (Mo. 1901), 65 S. W. 1028, 1 R. R. R. 98, 24 Am. & Eng. R. Cas., N. S., 98; *Bartley v. Metropolitan, etc.*, R. Co., 148 Mo. 124, 49 S. W. 840; *Hite v. Metropolitan, etc.*, R. Co., 130 Mo. 132, 32 S. W. 33, 51 Am. St. Rep. 555.

*New Jersey*.—*Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30, 44 Atl. 845, 16 Am. & Eng. R. Cas., N. S., 162.

*Texas*.—*Choate v. San Antonio, etc.*, R. Co., 90 Tex. 82, 36 S. W. 247, affirming 35 S. W. 180; *San Antonio, etc., R. Co. v. Choate* (Tex. Civ. App. 1900), 56 S. W. 214; *Ebert v. Gulf, etc.*, R. Co. (Tex. Civ. App. 1899), 49 S. W. 1105.

It is no evidence of negligence in a driver of a horse car that he whipped a pair of horses when about to start a car full of passengers, unless there appears to be something unusual in the manner of his whipping them. *Rochat v. North Hudson, etc.*, R. Co., 49 N. J. L. 445, 9 Atl. 688, 10 Atl. 710, 30 Am. & Eng. R. Cas. 644, reversing 48 N. J. L. 401, 5 Atl. 276. Plaintiff, on entering an elevated railway car, lingered in the selection of a seat until after the train started, which it did with a jerk, throwing her to the floor. There was no evidence to show that the jerk was sufficient to disturb the equipage of any other passenger, and that some degree of jerk was inevitable in starting the train by means of an engine. It was held that the evidence was insufficient to show negligence on the part of the railway company, and that its motion to dismiss the complaint should have been granted. *De Lancey v. Manhattan R. Co.*, 15 N. Y. Supp. 108. The fact that a passenger, who was riding on the platform of a street car and who had stepped off the better to enable passengers to get on, was injured by the sudden starting of the street car as he was in the act of stepping back on the platform was held not to show negligence in the management of the car; "that the car 'gave a sudden movement,'" it was said, "is entirely consistent with the supposition that, having been still, the horses were started in a careful and prudent manner." *Hayes v. Forty-Second Street, etc.*, R. Co., 97 N. Y. 259, 21 Am. & Eng. R. Cas. 358.

A street railway company cannot be held liable for injuries received by a passenger in consequence of the sudden stopping of a car in the effort to avoid a collision which is not brought about by the negligence of the servant in charge of the car. *Cleveland, etc., R. Co. v. Osborn*, (Ohio 1902), 63 N. E. 604. A train upon which plaintiff and his son were passengers, having run by the station at which the son was to get off, was suddenly stopped by the conductor, and plaintiff who, being apprehensive of danger to his son under the circumstances and having gone to the door of the car, was injured by the door closing upon his hand, which he had rested upon the facing of the door for support when the train came to a stop. It did not appear that plaintiff's exposed position was known to the conductor. It was held that the injury resulted from a mere accident, and that defendant was not liable. *Hardwick v. Georgia R. & B. Co.*, 85 Ga. 507, 11 S. E. 832. But compare *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338, digested in section V of note to *Phillips v. St. Charles, etc.*, R. Co., 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

A street railway cannot be charged with negligence merely because of the up and down motion of a car which is run at a moderate rate of speed, and when there is no defect in the rails or in the roadbed. *Holland v. West End, etc.*, R. Co., 155 Mass. 387, 29 N. E. 622. And a street car company cannot be held liable to a passenger who, with articles in both hands and while standing with one foot on the lower step and one on the plat-

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form, is jolted from the car by its mere ordinary motion in crossing a railroad track. *Barry v. Union Traction Co.*, 194 Pa. St. 576, 45 Atl. 321. In an action to recover for injuries received by a passenger in consequence of being thrown to the ground by the jolting or lurching motion of street car as it returned to the main track from a siding, it was held that the evidence, since it failed to show that the jolt was unusual in degree, and caused by some defect in the car or the track, or by an unusual or dangerous rate of speed, was not sufficient to justify a finding of negligence. "Such motions of street cars are of common and frequent occurrence, and are to be expected, to a greater or lesser degree, whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the street." *Byron v. Lynn, etc., R. Co.*, 177 Mass. 303, 58 N. E. 1015.

## III. IN RECOUPLING TRAINS WHICH BREAK APART.

When a train, as sometimes happens, breaks apart, care should be exercised to recouple it in such a manner as not to cause injury to the passengers by the concussion. *Winter v. Central Iowa R. Co.*, 80 Iowa 443, 45 N. W. 737.

THEODOR MEKAARDEN.

## WEBB v. PHILADELPHIA &amp; R. RY. CO.

(Supreme Court of Pennsylvania, May 19, 1902.)

[52 Atl. Rep. 5.]

**Railroads—Frightening Horse\*—Negligence—Noise—Smoke and Steam—Nonsuit.**

Defendant's railroad, as it leaves a certain station, enters a deep cut on a curve. Just after a train left the station the whistle was loudly blown, and a considerable volume of smoke and steam emitted. Plaintiff's husband was driving on a highway above the cut, and his horse was frightened by the noise, steam, and smoke, and ran away, and he was killed: *held*, that no wantonness or negligence on the part of defendant or its employees was shown, and a nonsuit was properly directed.

Appeal from court of common pleas, Delaware county.

Action by Isabella M. Webb against the Philadelphia & Reading Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

\*See generally, notes, 1 Am. & Eng. R. Cas., N. S., 68; 5 Idem, 282; 6 Idem, 501; 7 Idem, 733; 9 Idem, 30, 724; 16 Idem, 586; Texas Mid. R. Co. v. Carvell (Tex.), 1 R. R. R. 892, 24 Am. & Eng. R. Cas., N. S., 892; Texas & P. R. Co. v. Hamilton (Tex.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884; Louisville & N. R. Co. v. Penrod (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887; Gulf, C. & S. F. R. Co. v. Milner (Tex.), 1 R. R. R. 607, 24 Am. & Eng. R. Cas., N. S., 607; Yazoo & M. V. R. Co. v. Eakin (Miss.), 1 R. R. R. 895, 24 Am. & Eng. R. Cas., N. S., 895; Kelsey v. New York, N. H. & H. R. Co. (Mass.), 1 R. R. R. 880, 24 Am. & Eng. R. Cas., N. S., 880; Lake Shore & M. S. Ry. Co. v. Butts (Ind.), 1 R. R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898; Coleman v. Wrightsville & T. R. Co. (Ga.), 23 Am. & Eng. R. Cas., N. S., 863; Patnoudé v. New York, etc., R. Co. (Mass.), 23 Am. & Eng. R. Cas., N. S., 860; Central of Georgia Ry. Co. v. Black (Ga.), 23 Am. & Eng. R. Cas., N. S., 864; Proctor v. Southern Ry. Co. (S. Car.), 39 S. E. Rep. 351, 22 Am. & Eng. R. Cas., N. S., 426, and notes at end of case; Chattanooga & D. R. Co. v. Voils (Ga.), 21 Am. & Eng. R. Cas., N. S., 302; Thompson v. Dotterer (La.), 21 Am. & Eng. R. Cas., N. S., 14; Simmons v. Pennsylvania R. Co. (Penn.), 21 Am. & Eng. R. Cas., N. S., 466.

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Albert Dutton MacDade and O. B. Dickinson, for appellant.

William B. Broomall, for appellee.

DEAN, J. George Webb, the husband of plaintiff, was driving his team on a country road parallel with defendant's railroad. He was approaching Bingen station, and about 400 feet from it. While Webb was opposite a deep cut on the highway above the railroad, the engineer of a locomotive, drawing a train, which had just left the station, and was about entering the cut, loudly blew the steam whistle. At the same time the locomotive emitted a considerable volume of smoke and steam. Webb's horse took fright, ran away, and he was killed. His widow brings this suit against the company, alleging her husband's death was caused by negligence of defendant, in that the engineer (1) blew the whistle at an improper place; (2) that there was no necessity for blowing it at all; (3) that it was blown so loudly, and smoke and steam emitted in such large volume, as to make both acts so unusual and extraordinary as to necessarily frighten the ordinary horse. From the evidence, it was not apparent to the court below that any negligence was shown on the part of defendant. Consequently a compulsory nonsuit was directed, which afterwards the court refused to take off, and we have this appeal by plaintiff.

The facts in the case do not raise a presumption of negligence against the defendant. The blowing of a whistle by a locomotive engineer is a lawful act. The emission of steam and smoke, where steam propels machinery, is a necessary incident of the use of steam, and therefore not of itself unlawful. Both the blowing of the whistle and the escape of steam and smoke may be negligent, and therefore unlawful, according to circumstances. If the circumstances themselves do not warrant an inference of unlawful use, the mere fact that an accident was caused by either is not sufficient to convict of negligence. He who alleges negligence must go further, and prove it. He must show that, an act in itself lawful, the commission of it either at the time, at the place, or in the manner, became unlawful. This is the substance of two carefully considered decisions by this court. *Railroad Co. v. Stinger*, 78 Pa. 219; *Farley v. Harris*, 186 Pa. 440, 40 Atl. 798. Both cases involved the question of negligence in blowing of steam whistles, and in both cases we carefully avoided any modification of the rule on the same subject laid down in *Railroad Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, followed by a long line of cases, down to *Simmons v. Railroad Co.*, 199 Pa. 232, 48 Atl. 1070. In each of these many cases either the undisputed facts afforded some ground for an inference of negligence, or there was express affirmative evidence of negligence. As a consequence, the cases went to a jury. In the case before us a nonsuit was directed.

Therefore we must take every fact as proven of which there was any evidence, yet on these facts the jury would not have been permitted to find a verdict against defendant. The train had stopped at Bingen station. Four hundred yards ahead of it was a deep cut, on a curve. The highway ran on top of the embankment, parallel with the railroad. When the locomotive was in the cut, the vehicle on the highway was not visible to the engineer; and the railroad in front of him was visible only for a short distance, because of the curve. As he approached the cut he blew the whistle, and blew it loudly. When entering and when in the cut, smoke and steam in large quantity escaped. The deceased being on the highway above, his horse took fright, either because of the whistle or the smoke, or perhaps because of both. Just what warning the engineer should give, under such circumstances, would be dictated by his carefulness and regard for the lives of others. There might be travelers on the highway approaching or even on the road above him. They ought to have warning, that they might be able to restrain their animals, either by stopping, going to their heads and holding them until the train passed, or by preparing for their sudden fright, and unexpected movements under fright. Those at some distance might prefer to wait until the train had passed before going on an embankment at the top of a deep cut. We leave out of view the question of signal posts altogether. The deep cut and curve were there as signals to the engineer, which could not, in the exercise of care, be disregarded by him. Then, what was in front of him, but out of sight on the track? Perhaps third persons having no business there, yet not to be recklessly run over, or track employees, who had a right to be there, and were entitled to warning of an approaching train. All the circumstances point to no conclusion of negligence in giving warning at that time and at that place. As to the allegation that the whistle was blown unusually loud, that of itself does not show negligence. How far must the sound carry, to warn those whom it was intended to reach, either on the highway or track? That would depend on the state of the atmosphere, at that time, and the knowledge of the engineer, derived from observation. No mere opinion or conjecture of those having no knowledge on the subject should be permitted to convict him of recklessness. As to emitting unusual quantities of smoke and steam, the extent of that, immediately after starting from the station, would depend on the weight of his train, and the degree of curvature of the road he must draw it over. Necessarily, it was greater with a heavy train at a curve than with a lighter train on a straight track.

Giving plaintiff's testimony all the weight and significance it is entitled to, it fails to show that defendant committed a lawful act in an unlawful manner. Therefore the judgment is affirmed.

MORFORD *v.* CHICAGO, I. & L. RY. CO.*(Supreme Court of Indiana, May 16, 1902.)*

[63 N. E. Rep. 857.]

**Railroads—Collisions on Crossings—Contributory Negligence.**

Under Burns' Rev. St. 1901, § 556 (Horner's Rev. St. 1901, § 547), providing that, when special findings of fact are inconsistent with the general verdict, the former shall control, and the court shall give judgment accordingly, where, in an action to recover for death by collision, the findings in answer to interrogatories show that deceased could have seen the headlight in time to have avoided the collision, if he had looked, and that he heard the noise of the train about 10 minutes before the collision, and could have heard the train at any time thereafter until the collision, if he had listened, it is proper to render judgment on such findings for defendant, notwithstanding a general verdict for plaintiff, since they show contributory negligence precluding recovery.

Appeal from circuit court, Hamilton county; John F. Neal, Judge.

Action by Lewis F. Morford against the Chicago, Indianapolis & Louisville Railway Company. There was a judgment in favor of defendant, and plaintiff appealed to the appellate court, from which the cause was transferred, under Burns' Rev. St. 1901, § 1337u (Acts 1901, p. 590). Affirmed.

Albert V. Hodgin, James E. Kepperly, Chas. E. Barrett, E. A. Brown, Ralph Bamberger, and Isadore Feibleman, for appellant.

E. C. Field and W. S. Kinnan, for appellee.

MONKS, J. This action was brought by appellant in August, 1899, to recover damages for the loss of services of his son, a minor, and for injuries to his horse, buggy, and harness, on the ground that the same was caused by the negligence of the appellee. The jury returned a general verdict in favor of appellant, and also answers to interrogatories submitted by the court at the request of appellee under section 555, Burns' Rev. St. 1901 (section 546, Horner's Rev. St. 1901; page 128, Acts 1897). Appellee's motion for a judgment in its favor on the answers to the interrogatories notwithstanding the general verdict was sustained, and judgment rendered against appellant. This action of the court is assigned for error.

The general verdict necessarily determined each and every proposition essential to appellant's right to recover in favor of appellant, and every reasonable presumption will be indulged in its favor, while nothing will be inferred or presumed in aid of the special findings of fact made in answer to the interrogatories. *Railroad Co. v. Hedges*, 118 Ind. 5, 8, 20 N. E. 530, and cases cited; *Telephone Co. v. Fehring*, 146 Ind. 189, 194, 45 N. E. 64. If, however, the facts found in answer to the interrogatories essential to appellant's recovery are inconsistent and in irreconcilable conflict with the gen-



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eral verdict, the court did not err in sustaining appellees' motion for a judgment in its favor on the answers to the interrogatories. Section 556, Burns' Rev. St. 1901 (section 547, Rev. St. 1881; section 547, Horner's Rev. St. 1901); *Railroad Co. v. Hedges*, 118 Ind. 5, 8, 9, 20 N. E. 530; *Frank v. Grimes*, 105 Ind. 346, 350, 4 N. E. 414, and cases cited.

As no willful injury was charged, appellant was not entitled to recover if the deceased was guilty of contributory negligence. This action was commenced after the taking effect of section 359a, Burns' Rev. St. 1901 (section 284a, Horner's Rev. St. 1901), which makes contributory negligence in such actions as this a defense provable under the general denial. *Railway Co. v. Robinson*, 157 Ind. 414, 61 N. E. 197; *Malott v. Hawkins* (this term) 63 N. E. 308. Appellee insists that the answer to the interrogatories show that the deceased was guilty of negligence which directly contributed to the injuries sued for. If this is true, there is no error in the record. The jury found, in answer to the interrogatories, that appellant's son was killed in a collision between one of appellee's locomotive engines and a buggy in which the son was riding, about 2:50 a. m. on January 30, 1899, at the crossing of appellee's track and a public highway known as Main street in the town of Carmel, about two blocks north of appellees' depot in said town. The said highway runs east and west, and appellee's track runs north and south where it crosses said highway; that from said highway crossing appellee's track runs due north for the distance of about half a mile. Said highway approaching said crossing was practically level, without any downgrade, for a distance of 75 feet or more. As the train approached the crossing, the headlight on the locomotive engine was burning; the weather was cold, and it was "snowing and blowing." At the time of the collision the deceased was riding alone in a top buggy drawn by one horse; the top was up, and the side curtains were on. The deceased was going west, and the locomotive which collided with said buggy was coming from the north, hauling one of appellee's through passenger trains, and at the time of the collision was going at the rate of about 30 miles per hour. Said train was a regular daily passenger train, and was about on schedule time that night. The deceased was, at the time, about 16 years of age, was in the full possession of all his faculties, and his hearing and eyesight were good. He was, and for a long time prior to said collision had been, familiar with said crossing, its location and surroundings, and knew that a passenger train passed said point daily a few minutes before 3 o'clock a. m. A few minutes before the accident the deceased and one Lindell left the house of one Hiatt in Carmel and went to Hiatt's barn, which was within three blocks of the Main street railroad crossing, to get appellants' horse and buggy. While they were engaged in hitching the horse to the buggy the-

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deceased heard the roar of the train which killed him, and called Lindell's attention to the fact that the south-bound train was approaching. The deceased, while he hitched up, knew said south-bound passenger train was approaching Carmel from the north and was within hearing distance of the town. It was about 10 minutes from the time the deceased heard said train at the barn until the accident occurred. After hitching up said horse, the deceased and said Lindell drove from said barn to Main street, about two blocks east of the railroad crossing, where they stopped and conversed for about 5 minutes. If deceased had listened attentively while at this point he could have heard the noise and rumble of the approaching train. After having said conversation, the deceased drove west on Main street at a good trot until he reached the house of one Peele, the west side of which was about 38 feet from the center of appellee's track. From Peele's house to the point of collision there was no evidence of the rate of speed at which the horse went. The horse was gentle and easily controlled, all of which was well known to the deceased. From about 33 feet east of the center of the railroad track at said crossing the view of appellee's track to the north for a distance of 1,200 feet was unobstructed. The deceased could have seen the headlight of the engine for a distance of one-half mile if he had looked to the north in the direction of the approaching train, at any time after he passed a point 25 feet east of the place of collision. There was nothing to obstruct the deceased's view of the approaching train after he reached a point 31 feet east of said crossing. If, as deceased approached said railroad track, he had looked to the north along the line thereof, at any point between said track and a place 33 feet east thereof, he could have seen the headlight of said approaching engine. There was no noise near said crossing to hinder the deceased from hearing the noise of the train, other than the noise made by the horse and buggy. His ears were not wrapped up, and there was nothing to interfere with his hearing the noise of said train at any time after the same was within one-half mile of said crossing, except the noise of said horse and buggy, which obstructed his hearing to some extent; and he could have heard the noise of said train at any time after said train was within one-half mile of said crossing if he had stopped and listened. If he had listened attentively when he was approaching he could have heard the noise of the train in time to have avoided the injury if he could have told the distance the train was from the crossing. The whistle of said locomotive was not sounded at any of the highway crossings before said collision.

It is settled law in this state that when a traveler approaches a point where a highway crosses a railroad track at grade it is his duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any kind, he must assume that there is danger, and act with ordinary care upon that assumption. In attempting to cross

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he must listen for signals and noise of approaching trains, notice signals put up as warnings, and look out for approaching trains, if the surroundings are such as to admit of that precaution. If he, by looking, could have seen, or by listening could have heard, an approaching train in time to have avoided injury, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. The law will assume in such cases that such person actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Railway Co. v. Frazee*, 150 Ind. 576, 579, 50 N. E. 576, 65 Am. St. Rep. 377, and cases cited; *Railroad Co. v. Stick*, 143 Ind. 449, 41 N. E. 365, and cases cited; *Oleson v. Railway Co.*, 143 Ind. 405, 411, 412, 413, 42 N. E. 736, 32 L. R. A. 149, and cases cited; *Railway Co. v. Hedges*, 118 Ind. 6, 10, 11, 20 N. E. 530. The special finding of facts made by the jury clearly shows that the deceased could have seen the headlight of the approaching locomotive in time to have avoided said injuries if he had looked, and that he heard the noise of said south-bound train, and knew it was approaching said crossing from the north, when he was at Hiatt's barn, about 10 minutes before the collision, and could have heard the noise of said train at any time thereafter until the collision if he had listened. He had an unobstructed view of the track to the north, and he either did not look and listen, or, if he looked and listened, he did not heed what he saw and heard, but took upon himself the risk of attempting to cross in front of an approaching train. *Cones v. Railway Co.*, 114 Ind. 328, 330, 16 N. E. 638, and cases cited. Such conduct is, under the authorities cited, negligence per se. See cases cited supra. It is not material, therefore, that there is no finding that he did not look, for the result is the same as if such finding had been made. As the deceased knew said train was approaching, it cannot be claimed that the failure to ring the bell and sound the whistle misled him. Appellant insists that we must indulge the presumption that the finding that it was "snowing and blowing" shows that it was a blinding snow, and shut out the view of objects a few feet away. The jury, however, found that the deceased could have seen the headlight of the locomotive for a distance of one-half mile. There is no conflict between these two findings, and we are not required to indulge any presumptions as to either that will make it conflict with the other. The two findings show that, while it was blowing and snowing, the decedent could see the approaching train at the distance of one-half mile. As the special finding of facts shows that the deceased was guilty of contributory negligence which directly contributed to his injury, the court did not err in rendering judgment thereon in favor of appellee. Section 556, Burns' Rev. St. 1901 (section 547, Rev. St. 1881; section 547, Horner's Rev. St. 1901).

Judgment affirmed.

SMITH v. MISSOURI, K. & T. RY. CO.  
*(Court of Appeals at Kansas City, Mo., May 25, 1902.)*

[68 S. W. Rep. 238.]

**Railroads—Farm Crossings—City Limits—Recovery of Expense.**

Under Rev. St. 1899, § 1105, requiring railroad companies to fence and provide farm crossings where the road runs through cultivated lands, where the owner of land inside a city limits, bordering on the right of way, which was also within the corporate limits, purchased a tract on the opposite side of the railroad, which was outside the city, and built fences and a farm crossing between such tracts, the railroad company was not liable therefor.

Appeal from circuit court, Howard county; John A. Hockaday, Judge.

Action by J. T. Smith against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

George P. B. Jackson, for appellant.

Samuel C. Major and W. M. Williams, for respondent.

ELLISON, J. This action is brought, under section 1105, Rev. St. 1899, to recover the expense of constructing a "farm crossing" over defendant's railroad. Plaintiff recovered judgment, including an attorney's fee. In 1873, the railway was constructed through the farm of Jefferson Henderson, leaving a body of his land on each side. Defendant put in a farm crossing. Afterwards Henderson sold a portion of his farm on either side of the railway to different parties, and it was cut up into small tracts; that belonging to this plaintiff consisting of two six-acre pieces; one piece being on the east, and one on the west, side of the right of way. The old farm crossing fell between these two pieces belonging to plaintiff. That crossing was taken out several years since. It is not clear whether it was done at plaintiff's request. It is certain that it met with at least his silent approval. The evidence shows that he had reasons for wishing its discontinuance. Recently he demanded that the crossing in controversy be put in, for his convenience in going from one of his tracts to the other. The evidence showed that such crossing was a necessary convenience for him. After the construction of the railway the city limits were extended so as to include the defendant's right of way and one of plaintiff's tracts of land. The manner of the Henderson sale was this: Plaintiff and Prosser and Boyd bought of him about 20 acres in the year 1883, taking the deed in the name of Prosser. Prosser afterwards conveyed the shares of plaintiff and Boyd to them; the conveyance to plaintiff being in 1884, and for six acres west of the railroad. Many years afterwards, viz., in 1899, Prosser conveyed to plaintiff the 6 acres east of the railroad. The record is indefinite as to whether the last tract was a part of plaintiff's share in the original purchase, but we think it was not. It seems to have been deeded to him by Prosser for a

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separate and independent consideration. The deeds from Prosser to plaintiff did not, together, convey to him the whole tract of ground, subject to the right of way of the railroad. The tract on each side is bounded by the line of the right of way, so that the plaintiff has no interest in the right of way. In our opinion, the foregoing facts show that plaintiff was not entitled to a "farm crossing" under the statute aforesaid. It is difficult to say how large a piece of land cut in two by a railroad should be, in order to entitle the owner to a farm crossing. But certainly it is unreasonable to suppose that the statute was intended to permit a person owning a small tract within the limits of a city to buy another small tract on the opposite side of a railway, and then compel the latter to put in a crossing, under a statute intended to preserve the convenience of farmers in getting from one portion of their farms to another.

Plaintiff criticises the case of *Stumpe v. Railway Co.*, 61 Mo. App. 357, wherein the St. Louis court of appeals decided that the statute only applied to instances where the railroad, in its original construction, divided a farm. We need not go into a discussion of the criticism, since, on the facts in the present case, we think the statute does not apply.

There is another reason why we think plaintiff should not recover. The defendant's railway lies wholly within the city limits of Fayette, and in this respect is unlike the case of *Kirkland v. Railway Co.*, 82 Mo. 466, where the railway was just without the limits, and abutted on them. The statute aforesaid as to crossings is also the statute as to fencing, and it does not compel railway companies to fence their tracks inside corporate limits, though, where there are no laid-out blocks and streets, they may do so. *Edwards v. Railroad Co.*, 66 Mo. 567-571; *Cousins v. Same*, 66 Mo. 572; *Elliott v. Same*, 66 Mo. 683; *Wymore v. Same*, 79 Mo. 247; *Rhea v. Railway Co.*, 84 Mo. 345; *Railway Co. v. Clark*, 121 Mo. 183, 25 S. W. 192, 906, 26 L. R. A. 751; *Manz v. Railway Co.*, 87 Mo. 281; *Lane v. Railway Co.*, 18 Mo. App. 555.

Our conclusion is that where, under the statute, the railway company cannot be compelled to fence, it cannot be compelled to put in farm crossings.

The judgment should be reversed. All concur.

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BYRNES v. BOSTON & M. R. R.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 20, 1902.*)

[63 N. E. Rep. 897.]

**Duty to Fence against Boys\*—Statute.**

Under Pub. St. c. 112, § 115, as amended by St. 1882, c. 162, requiring railroad companies to fence their roads to prevent the entrance of cattle

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\*See note, 18 Am. & Eng. R. Cas., N. S., 686.

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thereon, a company's omission to fence between its tracks and its freight yard, or between its yard and a street, is insufficient to charge it with negligence in an action for injuries to a boy received in crossing its tracks after passing through its freight yard.

**Injury to Trespasser—Negligence.**

Where a boy is injured on a railroad company's tracks after passing through its freight yards, and it does not appear that the company maintained any way across its yard which the public were invited to use, or was guilty of any willful or reckless misconduct, an action for the injuries cannot be maintained.

Report from superior court, Suffolk county.

Action by one Byrnes against the Boston & Maine Railroad. On report from the superior court. Judgment for defendant.

J. Weston Allen, for plaintiff.

Solomon Lincoln and John Abbott, for defendant.

LATHROP, J. The plaintiff, a boy of eight years of age, was injured while attempting to cross the tracks of the defendant's road.

The accident took place between 6 and 7 o'clock in the evening of July 16, 1899. At this time the defendant's road crossed at grade, and at their intersection, two highways in Chelsea, called Sixth street and Arlington street. East of the crossing was the passenger station of the defendant, and west of the crossing the land between the intersecting streets was divided by the tracks into two triangular parts. The northerly portion between the tracks and Sixth street was occupied and used by the defendant as a freight yard. The southerly portion between the tracks and Arlington street was occupied as a granite yard. In the freight yard, near the line of the tracks, were two posts,—one a gatepost, near the crossing, and the other a telegraph post, 60 feet from the crossing. The plaintiff, with the other boys, for the purpose of making a short cut, left Sixth street before reaching the crossing, and entered the freight yard of the defendant, intending to cross the tracks and pass through the granite yard to Arlington street. In crossing the tracks about 18 feet from the gatepost the plaintiff stumbled and fell, and one foot was cut off by a passing train, which he knew nothing of until it struck him. It appeared that there was no fence between the freight yard and the tracks, nor between the freight yard and Sixth street.

The plaintiff contends that it was the duty of the railroad, under Pub. St. c. 112, § 114, as amended by St. 1882, c. 162, to have had a fence between its freight yard and its tracks; and that the omission to comply with the statute is evidence of negligence. The object of the statute is expressed to be "to prevent the entrance of cattle upon the road"; and cases that have arisen under it are all cases of this kind. *Rogers v. Railroad Co.*, 1 Allen, 16; *Eames v. Railroad Co.*, 98 Mass. 560, 96 Am. Dec. 676; *Baxter v. Railroad Corp.*, 102 Mass. 383; *Eames v. Railroad Co.*, 105 Mass. 193; *Keliher v. Railroad Co.*, 107 Mass. 411. But the omission to fence does not

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render a railroad company liable except as against adjoining owners; and if a horse escapes from the highway onto an unfenced lot, and thence to the railroad, where it is injured, the owner cannot recover unless there was reckless or wanton misconduct on the part of those in charge of the train. *Maynard v. Railroad Co.*, 115 Mass. 458, 15 Am. Rep. 119; *McDonnell v. Railroad Corp.*, 115 Mass. 564; *Darling v. Railroad Co.*, 121 Mass. 118. We find nothing in the statute or in our cases which requires a railroad corporation to have a fence between its own tracks and its freight yard, and it is clear that it was not bound to have a fence between its yard and the street.

There is nothing in the case to show that the defendant maintained or constructed a way across its freight yard which the public was invited to use. The most that can be said on the evidence is that people were in the habit of crossing the yard in order to make a short cut. All doing so were, at most, mere licensees, to whom the defendant owed no duty except not to injure them willfully or recklessly. As there is no evidence of any willful or reckless misconduct on the part of the defendant, the ruling that the action could not be maintained was right. *Wright v. Railroad Co.*, 142 Mass. 296, 7 N. E. 866; *Donnelly v. Railroad Co.*, 151 Mass. 210, 24 N. E. 38; *Chenery v. Railroad Co.*, 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; *Brayden v. Railroad Co.*, 172 Mass. 225, 51 N. E. 1081.

Judgment for the defendant.

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SHERWIN v. RUTLAND R. CO.

(*Supreme Court of Vermont, Rutland, Nov. 29, 1901.*)

[51 Atl. Rep. 1089.]

**Accident at Crossing—Stop, Look, and Listen.\***

Plaintiff driving a gentle horse at a walk, and listening for cars, drove onto a side track at a street crossing at a point where an approaching car could not be seen until she was within 12 feet of the track, and then only for 30 feet. She neither heard nor saw a car until just as the horse stepped on the side track, and within a second the horse was struck by a rapidly moving freight car, which had been shunted from the main line. Before starting to drive across the track, she stopped and looked from a point where she could see the main track for a distance of 60 feet from the point where it intersected the side track: *held*, that the question of her contributory negligence was for the jury.

**Same—Negligence—Instruction Not Warranted by Evidence.**

Where there was no evidence that the trainman did not do all he could to avoid injuring her after he discovered that she was going on the track, or that the collision could then have been avoided, it was error to instruct the jury that from the time it became apparent that she was

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\*See notes, 10 Am. & Eng. R. Cas., N. S., 467, 489, 504; 7 Am. & Eng. R. Cas., N. S., 532, 742; 12 Am. & Eng. R. Cas., N. S., 317; 20 Am. & Eng. R. Cas., N. S., 793; 19 Am. & Eng. R. Cas., N. S., 319; 12 Am. & Eng. R. Cas., N. S., 445.

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going on the track it was the trainman's duty to do all he could to avoid injuring her; that it was for them to say whether there was then time for him to do more than he did do; and that, if there was a failure in this respect, she could recover on this ground.

**Same—Stop, Look, and Listen—Instruction Not Warranted by Evidence.**

Where there was testimony that as plaintiff approached a railway crossing, driving at a walk, she was listening for cars, and heard none, a request to instruct that there was no testimony that she drove on the crossing relying on the fact that no whistle or bell was heard or signal of any kind given, and its absence could not entitle her to recover, was properly refused.

**Appeal—Review.**

A refusal to instruct that, if plaintiff intentionally feigned pain and suffering, with the deliberate purpose to obtain damages, such fact should be considered in determining what weight should be given to her testimony, cannot be held error where the evidence on that subject is not furnished to the appellate court.

**Accident at Crossing—Negligence—Instruction—Giving Undue Prominence to Certain Facts.**

A request to instruct that the fact that the train was running at a high rate of speed, that the whistle was not blown or the bell rung, and that defendant was shunting the car over the side track, did not entitle plaintiff to recover, was properly denied, since the right to recover was not dependent on these facts alone, and to single out and give undue prominence to such facts would likely mislead the jury.

Exceptions from Rutland county court; Munson, Judge.

Argued before ROWELL, TYLER, START, WATSON, and STAFFORD, JJ.

Butler & Moloney and G. E. Lawrence, for plaintiff.

F. H. Button, Barber & Darling, and G. A. Davis, for defendant.

START, J. The action is case for personal injuries resulting from an accident upon the defendant's side track. At the close of the evidence the defendant moved for a verdict, for that from the undisputed evidence it appeared that the plaintiff's negligence contributed to the happening of the accident, and that there was no evidence that tended to show that the defendant discovered the plaintiff's peril in time to avoid the accident, or could have avoided the same. This motion was overruled, and the defendant excepted.

If the evidence fairly tended to show that at the time of the accident the plaintiff was in the exercise of the care and prudence of a prudent man under like circumstances, the motion was properly denied; and, if the evidence upon this question was such that intelligent and fair-minded men might fairly and reasonably differ, it must be held that it had such tendency. At the place where the accident happened, a side track of the defendant extends in a southeasterly and northwesterly direction, and is crossed at grade by a public highway at an angle considerably less than a right angle. On the southerly side of the highway, and westerly from the side track, and about 3½ feet therefrom, the store and barn of one Leland extend northerly and southerly along the side track for a distance of about 95 feet, and obstruct the view,



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toward the south, of a traveler approaching the crossing. The evidence in regard to the extent the view was obstructed by the buildings was conflicting. The testimony of the plaintiff tended to show that from the crossing an engine could probably be seen 20 or 30 feet, and that a person would have to be within 10 or 12 feet of the track in order to look down the track and see a train. The defendant's testimony tended to show that a person standing 10 feet from the crossing had an unobstructed view down the track for a distance of 229 feet; at 15, 150; at 20, 110; at 30, 74; and at 40, 62 feet. The plaintiff had been trading in the Leland store. She left her horse on the westerly side of the Leland barn, at a point where the defendant's main line could be seen for a distance of some 60 feet from the point where it intersects with the side track. After completing her business in the store, she went to her team, and before and after unhitching her horse looked and listened for an approaching train, but did not see or hear anything that indicated that a train was approaching. She then got into her wagon, which was a light express wagon, and walked her horse toward the crossing. As she approached the crossing, she looked and listened for a train. She did not hear one, and none was in sight. As the horse was about to step upon the track, some one halloed, "Whoa!" The horse stopped, and within a second was struck by a freight car that had been shunted from the main line. The car came very fast, and the view of it was obstructed by the Leland store and barn. The horse was kind, gentle, not afraid of the cars, and easy to rein and control. The plaintiff was 48 years old; her hearing and eyesight were good; she was familiar with the location, and had driven over the crossing many times. There was no evidence tending to show that the defendant's engine or cars were in sight, from the point where the plaintiff looked and listened before and after unhitching her horse, at any time after the plaintiff left the store, and before she started for the crossing, except the fact that the car came from behind Leland's store so soon thereafter; but we cannot say from this fact that the car or engine was in sight from the hitching post at the time she was there, and, if she had looked, she would have seen them. At this point the main line, from the point of its intersection with the side track, can be seen for a distance of about 60 feet; and while the plaintiff was turning her horse and driving to the crossing the car may have come over the 60 feet, and passed over the side track to the crossing. From this evidence the jury might fairly find that the plaintiff looked for cars before starting from the hitching post, and that none were then in sight. The plaintiff claimed that the view of the track was so far obstructed, that she could not see the car in season to avoid the accident. As we have seen, her evidence tended to show that at the crossing the view of an approaching car is obstructed until it is within 30 feet of the

crossing, and that a person has to be within 12 feet of the track in order to look past the corner of Leland's store and down the track; while the defendant's evidence tended to show that a car could be seen from a point more distant from the track, and farther down. Upon this evidence the issue of distance was for the jury, unless there was some other controlling fact that precluded a recovery. To hold otherwise, it must be said as a matter of law that a traveler approaching a railroad crossing in an express wagon drawn by a horse, when within 12 feet of the crossing, by the exercise of due care, can see, or ought to see, a car that is detached from the engine, and rapidly approaching, the view of which is obstructed until it reaches a point within 30 feet of the crossing, in season to avoid a collision. This we cannot do. The question calls for a consideration of the speed of the car, the time in which the traveler has to consider and act, and what prudent men do in like circumstances; and is one upon which intelligent and fair-minded men might reasonably differ. Therefore the case, in so far as it depended upon the question of whether the plaintiff, by the exercise of due care, could or ought to have seen the car in season to have avoided the accident, was fairly for the jury. The view of the track being obstructed, so that the plaintiff could not effectually look for approaching trains, it became her special duty to make a vigilant use of her sense of hearing, such as a careful and prudent man would make in the same circumstances. In determining whether her evidence tended to show that she was in the exercise of due care in this respect, we must consider the fact that just before she got into the wagon she looked and listened for an approaching train from a point where she could see the main track for 60 feet from the point where it intersects with the side track, and neither saw nor heard a train; that the crossing was very near the point from which she had just looked and listened; and that she was in a light express wagon, drawn by a horse that was walking, kind, gentle, perfectly manageable, and not afraid of the cars, listening for an approaching train. It does not appear that there was any noise from the wagon, or from any other source, that would prevent her from effectually listening; and, in view of the fact that the horse was walking, and the vehicle a light express wagon, such noise cannot be inferred. Under these circumstances, we cannot say, as a matter of law, that the plaintiff was not in a position to make a vigilant use of her sense of hearing to discover and avoid danger. Upon this question intelligent and fair-minded men might reasonably differ. The plaintiff had looked and listened for an approaching train just before her horse started for the crossing, and while her wagon was not in motion. In view of this fact, and all of the circumstances and conditions disclosed by the plaintiff's evidence, it was for the jury to say whether a careful and prudent man in the same circumstances would have considered

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it necessary to again stop, or to do anything that the plaintiff did not do, in order to effectually listen. The plaintiff being in a position to make a vigilant use of her sense of hearing, and having testified that she was listening for an approaching train, it was not the province of the court to say that she did not listen, and by such omission contributed to the injury complained of. The evidence did not disclose any controlling circumstances from which the court could say that she did not listen, and was therefore negligent. The fact that she did not hear the car may be a strong circumstance tending to show that she did not listen, but this is not controlling. This may have been due to the condition of the atmosphere, or to the fact that the car, being detached from the engine, and going up grade, came along comparatively noiselessly. The conditions were very different from what they would have been if the car had been preceded by an engine, and accompanied with the noise of escaping steam and the working of machinery, which is usually heard when an engine is going up grade with cars attached. These circumstances and conditions were for the consideration of the jury, and from them it was for the jury to say whether the plaintiff made a vigilant use of her sense of hearing. We therefore hold that the case was fairly for the jury on the question of contributory negligence.

The case is unlike that of *Carter v. Railroad Co.*, 72 Vt. 190, 49 Atl. 797, relied upon by the defendant. In that case the plaintiff's team was making a noise that would naturally prevent him from effectually listening. The case is more like the cases of *Manley v. Canal Co.*, 69 Vt. 101, 37 Atl. 279, and *Boyden v. Railroad Co.*, 72 Vt. 89, 47 Atl. 409. In these cases the view of the track was obstructed, and it was held that the question of contributory negligence was for the jury. The court instructed the jury that from the time it became apparent that the plaintiff was going upon the track it was the trainman's duty to do all he could to avoid injuring her; that it was for the jury to say whether there was then time for him to do more than he did do; and that, if there was a failure in this respect, the plaintiff could recover on this ground. The defendant excepted to this on the ground that there was no evidence tending to show negligence in this respect. This instruction was error. There was no evidence tending to show that the trainman, after he discovered that the plaintiff was going upon the track, did not do all that he could to avoid injuring her; and under the instruction the jury may have found for the plaintiff without considering the question of contributory negligence. They were at liberty to do so. It appears that some one hallooed "Whoa!" as the horse was stepping upon the track, and that the horse stopped, and was struck within a second thereafter. If we assume that this person was the trainman, and that he was on the car, there is nothing in the evidence which tends to show how long he

had been there; nor is there anything which tends to show that he saw or could have seen the peril to which the plaintiff was exposed until the instant he hallooed "Whoa!" nor that he could have stopped the car in season to have avoided the injury.

The defendant presented 14 requests to charge, none of which were complied with in the language of the requests, and to this omission the defendant excepted. The first and seventh requests are, in effect, motions for a verdict, and, for reasons hereinbefore stated, were properly denied. The second and third requests call for an instruction that it was the duty of the plaintiff to stop before attempting to go over the crossing. In *Manley v. Canal Co.*, 69 Vt. 101, 37 Atl. 279, it is held that a traveler approaching a railroad crossing is not bound, as a matter of law, to stop, in order to avoid an imputation of negligence. There was no controlling or conceded fact in the case that called for the instruction asked for; therefore the court rightfully omitted to comply with the requests. The sixth request asked for an instruction that there was no testimony that the plaintiff drove upon the crossing relying upon the fact that the blowing of whistle or ringing of bell was not heard by her; and, if no signal of that kind was given, its absence would not entitle her to recover. The omission to comply with this request was not error. The fact that she was listening for an approaching train, and the circumstances under which she did so and attempted to go over the crossing, have some tendency to show that she was acting in reliance upon the sounds that usually accompany or signal an approaching train. The eighth and ninth requests, in effect, called for an instruction that if the plaintiff knowingly and intentionally feigned pain and suffering, with the deliberate purpose to obtain damages, the jury should take such fact into consideration in determining what weight should be given to her testimony; and that they were at liberty to reject her evidence upon the subject of damages. We have not been furnished with the evidence upon the subject of these requests, and cannot say that the omission to comply with them was error. A refusal to single out and give prominence to particular portions of the evidence, when there are several important issues of fact for the consideration of the jury, is not usually considered error. The evidence might be such that it would be error to do so. 11 Enc. Pl. & Prac. 185. The tenth, eleventh, and twelfth requests call for instruction that the fact that the train was running at a high rate of speed, that the whistle was not blown or the bell rung, and that the defendant was shunting the cars over the side track, did not entitle the plaintiff to recover; and were properly denied. A compliance with these requests would require a singling out and making prominent particular facts that might be varied by other facts proved. The right of recovery was not dependent upon these facts alone. They would be affected

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by a finding of negligence on the part of the defendant in the running of its train, shunting of its cars, its omission to blow the whistle or ring the bell, and due care on the part of the plaintiff; and an instruction that they would not entitle the plaintiff to recover, without telling the jury the effect that other facts, if found, would have upon them, would very likely mislead the jury, and ought not to be given. The fourteenth request related to the duty of the plaintiff at the point of the accident, and the effect of negligence on the part of the defendant's trainman at that point. The court correctly stated to the jury the law upon the subject of the plaintiff's duty and the duty of the trainman, after discovering the peril to which the plaintiff was exposed, but erred in holding that there was evidence tending to show a shortage of duty in this respect on the part of the trainman. As the judgment must be reversed, and a new trial granted for this error, it is unnecessary to further consider this request. The defendant has not suggested any error in the refusal of the court to comply with the other requests, and we conclude that the exceptions taken to the omission to comply with them are not relied upon.

Judgment reversed, and cause remanded.

TAFT, C. J., concurs in the result.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. SCARBOROUGH.

(*Court of Civil Appeals of Texas, April 16, 1902.*)

[68 S. W. Rep. 196.]

#### Personal Injuries—Limitations of Action.

Act March 4, 1897, bars actions for injuries after two years. Rev. St. 1895, art. 3373, provides that the disability of minority shall not be deemed a portion of the time limited for the commencement of an action, and such persons shall have the same time after the removal of the disability as is allowed to others: *held*, that Act March, 1897, should be construed in connection with article 3373, and therefore an infant had the right to bring an action for personal injury within two years after attaining his majority.

#### Same—Projection from Car—Contributory Negligence—Burden of Proof.

Where, in an action for personal injury, a boy about 11 years old, while standing on a skidway adjacent to defendant's tracks, and owned by a third person, was struck by a timber projecting from a car in a passing train, defendant railroad company has the burden of proving contributory negligence, for the presumption of such negligence does not arise from plaintiff's standing on the skidway, free from danger if defendant's cars were properly loaded, though he was a trespasser on the third person's premises.

#### Same—Same—Liability—Instruction.

In an action for injuries, an instruction that if defendant knew, or could, by the exercise of reasonable care, have known, that people were accustomed to stand on the skidway adjacent to its track, and propelled its car along the track with a timber projecting from its sides so as to endanger the persons there, and plaintiff was standing there, and was struck by the projecting timber, and if the running of the car with the

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projection was negligence and the proximate cause of the injury, defendant would be liable, was not objectionable as making defendant absolutely liable for the defect in loading the car; for, if the proximate cause of the injury was defendant's negligence in propelling the car, the question of negligence or due care in loading it was immaterial.

**Injury to Boy—Age and Intelligence.**

In an action for injuries sustained by a boy about 11 years old, an instruction that the jury should consider the age and intelligence of plaintiff at the time of the injury in determining the issue of contributory negligence was proper.

**On Motion for Rehearing.****Damages—Life Tables.\***

In an action for personal injuries, plaintiff's earning capacity being permanently impaired, though not wholly destroyed, testimony as to the probable duration of his life according to mortality tables was admissible for the purpose of determining the amount of damages.

**Appeal from district court, Trinity county; J. M. Smither, Judge.**

**Action by Polk Scarborough against the Missouri, Kansas & Texas Railway Company of Texas.** From a judgment for plaintiff, defendant appeals. On rehearing. Judgment affirmed.

**Bean & Nelms, T. S. Miller, and Marshall Thomas, for appellant.**

**H. L. Robb and Ball, Dean & Humphrey, for appellee.**

**On Motion for Rehearing.**

**NEILL, J.** We have concluded to grant this motion, and, as the question of limitations alone was considered in our former opinion, and as it will now be necessary to consider and determine all other questions raised by the assignments, our prior opinion will be withdrawn. This suit was brought by Polk Scarborough, a minor, by his next friend, against appellant, to recover \$20,000 damages for personal injuries alleged to have been inflicted upon him by the negligence of the company. The defendant answered by general and special exceptions, a general denial, and a plea of two-years statute of limitations and of contributory negligence. The trial resulted in a verdict and judgment in favor of plaintiff for \$10,000.

**Conclusions of Fact.**

On the night of the 15th of September, 1898, just after dark, the appellee, Polk Scarborough, then a minor between 10 and 11 years of age, on his way home from Saron, went

\*See *Missouri, K. & T. R. Co. v. McGlamory* (Tex.), 3 Am. & Eng. R. Cas., N. S., 434; note, 5 Am. & Eng. R. Cas., N. S., 6; *Rooney v. New York, etc., R. Co.* (Mass.), 14 Am. & Eng. R. Cas., N. S., 425, and note at end of case; *Trott v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 391; note, 5 Am. & Eng. R. Cas., N. S., 361; *Arkansas Midland Ry. Co. v. Griffith* (Ark.), 9 Am. & Eng. R. Cas., N. S., 846; *Harrison v. Sutter St. Ry. Co.* (Cal.), 8 Am. & Eng. R. Cas., N. S., 200; *Macon, etc., R. Co. v. Moore* (Ga.), 5 Am. & Eng. R. Cas., N. S., 355, and note, p. 361.

upon and stopped on a skidway adjacent to a side track of appellant's railway, and while standing there a sufficient distance from the track to allow cars properly equipped and loaded to pass without coming in contact with and injuring him, intently watching an engine switching cars, with his face turned in the direction the engine was going, he was struck in the back by a piece of timber or some other object projecting from the side of a car attached to the engine in such a way as to sweep the skidway, and knocked from where he was standing to the ground, and his left arm run over and cut off above the elbow by the wheels of the car, and he incurred other physical injuries from the blow inflicted by the projection and fall from the skidway. The skidway was the property of Wm. Cameron & Co., who maintained and operated a sawmill at Saron. It was not constructed upon appellant's right of way, nor did appellant have any control over it, or right to prohibit or restrict the public or any individual from or in its use. It was constructed and used by the owners of the sawmill for the purpose of loading timbers on cars standing on the side track. It was in the nature of a platform, gradually sloping towards the railway track, upon which skids were placed several feet apart for heavy timbers to be placed upon and slid down and upon the cars in loading. Its lower edge extended several car lengths along and parallel to the side track, and there was a space from six inches to two feet from the side of a car standing upon or passing along the track to the lower edge of the skidway, which is several feet above the floor of a flat or box car when upon the side track. When struck by the projection, the appellee was standing back about four feet from the edge. All persons were at liberty to go on this skidway whenever they desired to do so, and there were no restrictions by the owners upon people in its use. It was used to work on, to stand down, and to walk on by people frequently, and appellant and its servants operating and switching its trains and cars knew, or by the exercise of ordinary care could have known, that persons were frequently walking or standing upon it. The car from which the timber or object projected was a stock car, constructed with lateral openings, through which timber or other material, if not properly loaded, could project. While the evidence is circumstantial, it is reasonably sufficient to show that the car was so loaded as to permit a piece of lumber to project through an opening on the side of the car, and extend therefrom in such a way and a sufficient distance as to sweep the skidway as far as where appellee was standing. It was negligence in appellant to run a car thus loaded in such proximity to the skidway as to strike and knock therefrom a person thereon with the timber or any other object projecting in such manner from the car. This negligence of appellant was the proximate cause of appellee's injury, and he was guilty of no negligence proximately contributing thereto. The appellant might rea-

sonably have anticipated that some one might be on the skidway and injured by its negligence in the way appellee was on this occasion. In view of the fact that appellee was a mere child when injured, and will have to go through life, bearing its duties and burdens, with only one arm, we are not prepared to say that a judgment of \$10,000 is more than will compensate him for the injury he has sustained by reason of appellant's negligence.

#### Conclusions of Law.

1. Appellee's petition alleges, and the evidence shows, that the injury for which the suit was brought was inflicted on the 15th day of September, 1898. His original petition was filed on the 18th day of February, 1901. The appellant specially excepted to it upon the ground that it appeared from its face it was barred by the statute of limitation. The exception was overruled, and upon the trial the jury were instructed to find against appellant on this plea upon the ground that plaintiff was a minor. The action of the court in refusing to sustain the exception and in charging the jury to find against the plea is assigned as error. In our first opinion in this case, in our desire and effort to follow the decision of the supreme court in *Voight v. Railroad Co.*, 60 S. W. 658, in construing the act of March 4, 1897, which prescribes the time when suits for personal injuries and for other injuries resulting in death shall be instituted, we reluctantly held that this assignment was well taken, and reversed the judgment of the district court, and, upon the hypothesis that appellee's action was barred when instituted, rendered judgment in favor of appellant. We were not without grave doubts as to the correctness of our opinion at the time, but it seemed to us then to be a logical deduction from that of the supreme court in the case referred to. Since reading appellee's motion for rehearing, and considering it in the light of the able argument of his counsel supporting it, we have become satisfied that we were in error. In the *Voight* Case the question was whether an action brought on the 27th day of June, 1899, for a personal injury inflicted on the 19th day of August, 1897, was barred by the statute of limitation. When the injury occurred, article 3353 of the Revised Statutes of 1895, which applied to actions of this character, was in force. On the 4th day of March, 1897, an act was passed by the legislature and approved by the governor, which fixed two years the period of limitations in such actions. This act became a law on the 20th day of August of the same year. It was conceded by the supreme court for the purpose of its opinion that the cause of action accrued before the act of March 4, 1897, took effect. But it was held that the act applied to existing as well as future causes of action, and that it could not be construed in connection with article 3377, Rev. St., and make article 3353 applicable to the time within which the action should have been brought, for the reason that the act of 1897 was not passed as



an amendment of that article. This is all that was decided in that case, and we do not, and never have, questioned the correctness of the opinion. The question before us in this case is a different one entirely. It is: "Is an action for a personal injury inflicted upon a minor barred in two years by the act of 1897, notwithstanding the minority of the injured party?" Except in certain class of actions, to which this does not belong, it is provided by article 3373, Rev. St., that if one entitled to bring an action be, at the time his cause of action accrues, under the age of 21 years, such disability shall not be deemed a portion of the time limited for the commencement of the action, and that such persons shall have the same time after the removal of the disability as is allowed to others. This has been the law in Texas since March 17, 1841, when the act of February 5th of that year took effect (Hartley, Dig. art. 2390), and is the law now governing this case, unless the act of March 4, 1897, in effect repealed it as to actions for injuries done to the person of a minor.

The legislative intent, if it can be discerned, should be given a statute in its construction by the courts; and, if the intention of the legislature is doubtful, such construction should be adopted as is most conformable to reason and justice. 23 Am. & Eng. Enc. Law (1st Ed.) p. 358. In conformity with these principles, whenever a statute is capable of two constructions,—one which would work manifest injustice, and the other work no injustice,—it is the duty to adopt the latter, as it will not be presumed that an injustice was within the legislative intention. Id. p. 361. Statutes not inconsistent with each other, which relate to the same subject-matter, should be construed together, and effect given both, although they contain no reference to each other, and were passed at different times. As is said by the supreme court of Arkansas in *McFarland v. Bank*, 4 Ark. 410, 37 Am. Dec. 761: "It is the universal rule in the construction of statutes, and a settled maxim of the common law, that all acts passed on the same subject in *pari materia* must be construed together, and made to stand, if capable of being reconciled. There is no exception to the universality of this rule." It is likewise said by the supreme court of this state that statutes in *pari materia* are to be taken and construed together, because it is to be inferred that they had one object in view, and are intended to be considered as constituting one entire and harmonious system. *Selman v. Wolf*, 27 Tex. 72. In view of these well-established principles, it would seem that the only legislative intent discoverable from the act of 1897 was to extend the period of limitation in actions of this character from one to two years. And, though the act makes no reference to the Revised Statutes, we cannot believe that it was intended that a person having a cause of action, laboring under the disability of minority, should be barred of his right of action, if not brought within two years after it

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accrued. But we believe that the legislature had in mind the legislative enactment of 1841, carried into the Revised Statutes as article 3373, which gives minors the right to bring actions of this character within two years after the removal of their disabilities; and that such act should be construed in connection with the provisions of the article referred to. We therefore hold that the court did not err in overruling appellant's exceptions to plaintiff's petition, nor in instructing the jury to find against the defendant on its plea of limitations.

2. To the general rule imposing upon the defendant the burden of proving contributory negligence, there seem to be two exceptions: (1) Where the legal effect of plaintiff's allegations *prima facie* establishes negligence on his part; and (2) where the undisputed evidence *prima facie* establishes contributory negligence of the plaintiff as a matter of law. If a case falls within the first exception, it is incumbent on the plaintiff to allege and prove such other facts as will overcome the legal presumption of negligence; if under the second, then he must prove such facts, when considered in connection with all the evidence, as will warrant the jury in finding he was not guilty of contributory negligence. *Railroad Co. v. Shieder*, 88 Tex. 162, 30 S. W. 902, 28 L. R. A. 538. Does this case fall within either exception? If it does, then the court erred, as is contended by appellant, in instructing the jury that the burden was on the defendant to prove contributory negligence by a preponderance of evidence. If it does not, then the charge simply announces the general rule, and is correct. We are unable to discover anything either in the plaintiff's pleadings or in the evidence that would take this case from the operation of the general rule, and bring it within either of the exceptions. Does any presumption of negligence arise from the fact that the boy was standing upon a skidway, where he was free from danger of appellant's cars, if they were not negligently loaded or operated? True, the place where he was standing did not belong to him; nor did it to the defendant. If one is to be viewed in the light of a trespasser because he is on premises not his own, and denied his remedy for an injury wrongfully inflicted by another, who has no interest nor control in the premises, few actions for personal injuries could be maintained. He was not trespassing on defendant's property, nor hindering nor in any way interfering with its business. To say that one can defend against his negligent injury of the person of another because the person when injured was a trespasser upon the premises of a third party, would be the enunciation of a doctrine foreign to reason and justice. But neither the pleadings nor evidence tend to show that the plaintiff was even a trespasser against the owner of the skidway. It may be he was guilty of some breach of duty to his father or mother in not going directly home, and in stopping to watch the operation of appellant's switch engine. But this was no affair of appel-

lant's, and did not relieve it of the duty of so loading and operating its cars as not to injure a person standing on the skidway far enough from the side track to insure his safety from cars properly loaded and operated thereon; nor absolve it from the consequences of a breach of such duty. This case is not brought, by the pleading or evidence, within either of the exceptions stated to the general rule which fixes the burden of proving contributory negligence on the defendant.

3. The fifth paragraph of the charge states a principle of law which is abstractly correct, but not applicable to the pleadings and facts of this case. It is, however, a mere abstraction, and is not carried into the paragraphs which submit to the finding of the jury the questions of fact raised by the pleadings and evidence, and announce the principles of law to be applied by the jury to such facts, if proven. It is apparent, when the portion of the charge which submits the material issuable facts and the law applicable to them is considered, that the jury could not have been influenced nor the appellant prejudiced by the part of the charge embodied in appellant's sixth assignment of error.

4. Stripped of its redundancy of verbiage, the effect of the tenth paragraph of the charge is to instruct the jury that if persons without restraint were accustomed to resort to and stand upon the skidway, and appellant's servants knew, or by the exercise of ordinary care could have known, it was so used by the people, and propelled its car along the adjacent side track with a piece of timber projecting from its side far enough to endanger persons upon the skidway, and appellee was standing thereon when the car was so propelled, and was struck, knocked off, and injured by the projection, and if the running the car by appellant with the projection extending over the skidway was negligence, and such negligence the proximate cause of appellee's injury, then the appellant would be liable. This is the only part of the charge that permits the jury to find a verdict in favor of plaintiff, and, it must be presumed, in favor of the verdict, that the jury found in favor of the plaintiff all the issues of fact submitted by it, and that the verdict excludes all other facts, save those relating to the measure of damages, and, necessarily, rests alone upon those submitted in this paragraph. The seventh assignment of error complains of this part of the charge upon the ground that it makes the appellee absolutely liable for the defect in loading the car, whether reasonable care was used or not, or whether it knew or ought to have discovered such defects. It was propelling the car so loaded that a piece of timber or other substance projected from it as to sweep the skidway that proximately caused appellee's injury. As to whether its propulsion in this manner was negligence was the question to be determined, and not whether reasonable care was used in loading. In determining the efficient cause it is not required to go back and find out whether the cause which produced it

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flowed from the consequence of a negligent act of the defendant. When the proximate cause of the injury is ascertained, and the facts constituting that cause are found to be negligent, all is done that reason and justice require. The chain of causation may be endless; its link which is the efficient and proximate cause of an injury complained of must be found and examined; but it is wholly unnecessary to take up and view the links of the chain preceding it. If, then, as the jury found, the appellant was negligent in propelling its car over a track adjacent to a skidway, where it knew people were accustomed to resort, with a piece of timber projecting in such a manner as to strike and injure one there, it is immaterial whether it was negligent or not in some preceding act. Charged with the knowledge that members of the public were liable to be where they would in all probability be injured by projections from cars if propelled along its track, it was appellant's duty to save the public from such danger by seeing that the cars were free from such projections. Failing in this duty, it cannot be heard to say that it did not know of the projection, or raise the issue, when it knows the safety of the public is imperiled by it, as to the degree of its negligence. One who fires a cannon so loaded that it will rake with chain shot a place where he knows people are liable to congregate, cannot, in defense of the injury he may have inflicted, be heard to say that he thought it was loaded with a blank cartridge, and would do no harm. He should have known how it was loaded before he fired it. The law holding railway companies liable for injuries to a member of the public inflicted by projections from trains propelled along its road is well settled. *Railway Co. v. Gee*, 66 S. W. 78, 3 Tex. Ct. Rep. 706; *Railway Co. v. Davis* (Ky.) 58 S. W. 698; *Dobiecki v. Sharp*, 88 N. Y. 207; *Sullivan v. Railroad Co.* (La.) 2 South. 586; *Hicks v. Railroad Co.*, 64 Mo. 430, 1 Am. & Eng. R. Cas., N. S., 255; *Archer v. Railroad Co.*, 106 N. Y. 589, 13 N. E. 318. The authorities all hold a railroad responsible to persons who are injured when they were where they had a right to be, and where the company might reasonably have expected them to be, by the projection of anything from a car over where such persons were standing. *Shear. & R. Neg.* § 458. There is no error in the tenth paragraph of the charge of which appellant has any right to complain.

5. There was no error in the refusal of the court to give special charge No. 4 requested by appellant. Its substance was given in paragraph 12 of the main charge. Besides, we think the evidence was not such as would authorize the special charge referred to.

6. Upon the issue of contributory negligence, it was proper for the court to instruct the jury to consider the age and intelligence of plaintiff at the time of the injury in determining such issue.

7. Our conclusions of fact disposed of the assignments as

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to the insufficiency of the evidence to support the verdict.

There is no error requiring a reversal of the judgment, and it is affirmed.

On Motion for Rehearing.

It has recently been decided by the supreme court that where, as in this case, the capacity of the party injured to earn money is partially, though permanently, impaired for life, mortality tables are admissible in evidence for the purpose of determining the amount of damages sustained. *Railway Co. v. Mangham*, 67 S. W. 765. We therefore hold that appellant's assignment complaining of the admission in evidence of such tables by the appellee is not well taken. All other questions presented have been fully considered and passed upon in the opinion by us in this case.

The motion for a rehearing is overruled.

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DOWNEY v. MISSISSIPPI RIVER & B. T. RY. CO.

(*Court of Appeals of St. Louis, Mo., April 15, 1902.*)

[67 S. W. Rep. 945.]

**Fences—Tracks within Town.\***

A railway company is required to fence its tracks within the limits of an incorporated town, if it can do so without obstructing the streets, except where it is necessary to keep them open, within reasonable switch limits, for the convenient transaction of its business, and the safety of its employees in handling cars.

**Same—Same—Necessity.**

It is for the jury, or for the court sitting as a jury, to determine throughout what distance it is necessary to leave the tracks unfenced, and an appellate court cannot interfere with the decision rendered unless the testimony the other way is undisputed.

**Same—Same—Same.**

Refusal of a declaration that a railroad company was not bound to fence its tracks at a particular point in an unincorporated town, if there were parallel tracks at that point, and a public road crossing 170 yards distant, was not ground for reversal, where the evidence did not show conclusively that it was necessary for the convenient transaction of the company's business, etc., to keep the tracks open.

Appeal from circuit court, St. Francois county; Dearing, Judge.

Action by John Downey against the Mississippi River & Bonne Terre Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carter, Huff & Sleeth, for appellant.

Merill Pipkin and R. C. Tucker, for respondent.

GOODE, J. This action was begun to recover double damages for the killing of a sow belonging to the plaintiff by

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\*On proposition regarding a railroad company's duty to fence its track within corporate limits, see *Ryan v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas., N. S., 647, and note at end of case. Also, see *Evans v. Sherman S. & S. Ry. Co. (Tex.)*, 5 Am. & Eng. R. Cas., N. S., 184, and note at end of case.

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one of the defendant's trains. The accident occurred about 140 yards south of the depot or station at Desloge, an unincorporated town on the defendant's line. It is not possible for an appellate court to gather from the evidence in the record any distinct understanding of the vicinity of the spot where the animal was killed; but it does appear the defendant's main track, and also two side tracks, run parallel at that point, and for a considerable distance north and south of it; also that land on the east of the track is laid out in town lots, with some houses built on them, while on the west no lots are platted immediately opposite the point where the sow was struck, but some are platted a little to the south. The evidence is uncontradicted that no streets cross the railway tracks any nearer to said spot than 60 feet from the station, where it seems there was a crossing. One hundred and seventy yards north of the station (that is to say, about 310 yards from where the sow was struck), a country road crosses the track. Much of the testimony, and perhaps all of it, goes to show the switches spoken of were only used for handling cars, and that freight and passengers were not received or discharged anywhere along the tracks, except at the station. The right of way was unfenced at the time of the accident, but the company was preparing to fence it, and it has since done so.

The defense urged is that, as the animal was killed within the defendant's switch limits, it is not liable; and complaint is made of the refusal of the court to give the following declarations of law, which were requested by the defendant: "The court declares the law to be that if the evidence shows that the defendant's road at the point where the sow in question was killed was paralleled by side tracks which extended from said point both north and south, and that said road and one or both of said switches were crossed by a public road, then the defendant was not bound to fence said road at said point, though the place where the accident to plaintiff's sow occurred was as much as one hundred and seventy yards from where the public road crosses the defendant's road. The court declares the law to be that, if the evidence shows that the sow in question was killed by one of defendant's trains at a point about one hundred and forty yards south of the depot station of Desloge, a regular station on defendant's road, and that at said point the main line of defendant's road is paralleled by two switches extending for some distance north of said depot, past the same, and also past the point at which the sow was killed, and that said switches were in constant use by the defendant in handling and switching its cars from one to the other and onto the main track, and that on both sides of said track and switches the property was divided into town lots and blocks (though the town was not incorporated), and if the evidence further shows that said track and switches were crossed by a public road north of said depot, and about one hundred and seventy or one hundred and eighty yards from the point where the sow was killed,

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then the plaintiff cannot recover." The vice of the foregoing declarations is that instead of propounding a legal theory concerning the defendant's right to leave its tracks unfenced within its switch limits, if fencing them would have discommoded it in receiving and discharging freight or passengers, or have increased the peril of its employees in handling trains, they asked the trial court to declare the law to be that the company was not bound to fence within 170 yards of where the public road crosses the defendant's right of way, if it had three parallel tracks along there, which it used in handling and switching cars, and if the land on either side was divided into towns lots and blocks. There is no such rule of law as that. Certain propositions material to the determination of the case are well settled. A railway company does not have to fence its tracks within the limits of a city or town, whether incorporated or not, if the streets and highways of the town would be obstructed thereby; but, if the town is unincorporated, it must fence, if it can do so without obstructing the streets, except where it needs to keep its tracks open within reasonable switch limits for the convenient transaction of business, and the safety of its employees in handling cars. But the company is not the sole judge of the space which it may leave unfenced for a yard or switch limits. It is for the jury, or the court sitting as a jury, to say throughout what distance it is necessary to leave the tracks unfenced. *Brandenburg v. Railroad Co. (St. L.)* 44 Mo. App. 224. Of course, sometimes the evidence may show without dispute that a necessity did exist for the tracks to be uninclosed at the point where an animal was killed; and when this is so, an appellate court may reverse a judgment against the company on an examination of the testimony. *Jennings v. Railway Co. (K. C.)* 37 Mo. App. 652; *Crenshaw v. Railway Co. (K. C.)* 54 Mo. App. 233. But in the present case it is by no means a necessary inference from the evidence that the defendant was bound to have open tracks where the plaintiff's sow was killed. Indeed, the natural inference is the other way; for it was beginning to inclose them at the time, and has since done so. Hence there is no warrant for us to reverse the judgment on account of the court's refusal to give the foregoing declarations, in which it was asked to say peremptorily the defendant was not bound to fence the road where the animal was killed if there were parallel tracks at that point, and a public road crossing 170 yards distant. We cannot interfere with the trial court's ruling on the declarations unless we are prepared to decide that the undisputed evidence established the necessity of open tracks at that point, which we cannot do, because, instead of the evidence showing such necessity without contradiction, the evidence to show it was necessary to keep the tracks open there was slight.

The judgment is therefore affirmed.

BLAND, P. J., and BARCLAY, J., concur.

ST. LOUIS, I. M. & S. RY. CO. *v.* JAMES.*(Supreme Court of Arkansas, April 26, 1902.)*

[68 S. W. Rep. 153.]

**Railroad—Killing of Stock—Action—Venue—Proof.**

Where, in an action against a railroad company for the killing of a mule, the witness who testified to the killing described the place as "this side of Germantown," and the place where he was testifying was the county seat of C. county, and the place known as "Germantown" was within such county, the proof sufficiently showed that the injury occurred in C. county, within Sand. & H. Dig. § 6322, declaring that actions against railroad companies for stock killed by trains should be brought in the county where the injury occurred.

Appeal from circuit court, Conway county; Wm. L. Morse, Judge.

Action by Henry James against the St. Louis, Iron Mountain & Southern Railway Company. From judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action brought by Henry James against the St. Louis, Iron Mountain & Southern Railway Company before a justice of the peace of Conway county. The plaintiff, for cause of action, alleged that the defendant company, while operating its road, "negligently ran over and killed a certain mule, the property of plaintiff, and of the value of one hundred dollars," whereupon he asked judgment for that amount. The plaintiff recovered a judgment, and the defendant appealed to the circuit court. On the trial in the circuit court the plaintiff again recovered judgment, for the sum of \$75, and the company appealed.

Dodge & Johnson, for appellant.

C. C. Reid, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment rendered by the Conway circuit court against the defendant railway company for damages caused by the killing of a mule owned by the plaintiff. The only question raised on the appeal is that the evidence does not show that the court had jurisdiction. The statute requires that actions against railway companies for injuries to stock by trains shall be brought in the county where the injury occurred. Sand. & H. Dig. § 6322. And defendant contends that the evidence does not show that this mule was killed in Conway county. But we are of the opinion that this contention must be overruled. The witness who testified that the mule was killed by the train, in describing the place of the accident, said that the mule was killed at a culvert "this side of Germantown." Now, we can take judicial notice of the fact that Germantown is a village in Conway county, on the line of railway shown to have been operated by the defendant. As the case was tried by the Conway circuit court, we know that the witness, while testifying, was at Morrilton, the



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county seat of that county. His statement that the mule was killed at a culvert "this side of Germantown" showed that the injury occurred at a point between Morrilton and Germantown, which must have been in Conway county, as both of those points are in that county.

Judgment affirmed.

GULF, C. & S. F. RY. CO. v. MOORE *et al.*

(*Court of Civil Appeals of Texas, March 29, 1902.*)

[68 S. W. Rep. 559.]

**Personal Injuries—Survival of Action.**

Under Rev. St. 1895, art. 3353a, providing that causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death shall not abate by reason of the death of such party, the survival of the cause of action does not depend upon the bringing of suit thereon by the injured party in his lifetime.

**Injury to Engineer—Defective Track—Assumption of Risk.\***

In an action against a railroad company the evidence showed that the engineer got off his engine while it was moving very slowly, to see what was rattling underneath, and as he attempted to get back it struck a bad joint caused by a short rail, and gave a lurch, which caused him to fall under the wheels and lose his foot. There was no evidence that the track along the line was in bad condition, or that this particular defect was known: *held*, that a charge, requested by the defendant, that, if the track along the line was in bad condition, and the fact was known to the engineer, he assumed the risk although he did not know of the particular defect, was properly refused.

**Same—Same—Instructions.**

A requested charge that, if the defect in the track was open to ordinary observation, and the engineer knew or must have known the condition of the track, he assumed the risk by continuing in the service of the company, was properly refused where the court charged that the engineer had a right to rely on the assumption that the track was in a reasonably safe condition, and did not assume the risk arising from negligence of the company, but that, if he knew or should have known of the defect, and nevertheless attempted to mount his engine as he did, the company was not liable, although it had been negligent in failing to repair the track.

**Same—Same—That Duty to Observe Track.**

An engineer of a railroad locomotive is not bound, for the purpose of personal safety, to keep a lookout along the track to see whether the company has performed its duty in keeping the track in repair, as he has a right to presume that it has done so.

**Same—Damages—Evidence of Suffering.**

In an action for personal injuries, evidence that before the accident the disposition of the injured party was pleasant, and that after the

\*See *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 474, and extensive note at end of case. See also, generally, 5 Rap. & Mack's Dig., 126 et seq.; *Atchison, T. & S. F. R. Co. v. Tindall* (Kan.), 6 Am. & Eng. R. Cas., N. S., 557; *Ladd v. Brockton St. Ry. Co.* (Mass.), 1 R. R. R. 342, 24 Am. & Eng. R. Cas., N. S., 342; *Lindsay v. N. Y., N. H. & H. R. Co.* (C. C. A.), 1 R. R. R. 378, 24 Am. & Eng. R. Cas., N. S., 378; *Hurst v. Kansas City P. & G. R. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 899; *Durand v. New York & L. B. R. Co.* (N. J.), 21 Am. & Eng. R. Cas., N. S., 208.

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injury he was depressed and melancholy, was admissible to show that he suffered physical pain and mental anguish on account of his injuries.

**Same—Survival of Cause of Action—Physical and Mental Suffering.**

Under Rev. St. 1895, art. 3353a, providing for the survival of causes of action for personal injuries other than those resulting in death, recovery may be had for the physical pain and mental anguish suffered by the injured party up to the time of his death.

On Rehearing.

**Bill of Exceptions and Statement of Facts.**

When the bill of exceptions shows that certain testimony was admitted, but the agreed statement of facts does not contain such testimony, the latter should control, and the assignment of error as to that point, based on the bill of exceptions, should not be considered.

Appeal from district court, Johnson county; Wm. Poin-  
dexter, Judge.

Action by Louisa Moore and others against the Gulf, Col-  
orado & Santa Fe Railway Company. From a judgment for  
plaintiffs, defendant appeals. Affirmed.

J. W. Terry and Ramsey & Odell, for appellant.

J. A. Stanford and D. M. Watkins, for appellees.

TEMPLETON, J. This case comes before us on appeal from a judgment recovered by the wife and children of Thomas Moore, deceased, on account of personal injuries sustained by him which did not result in his death. Moore did not sue on the said cause of action in his lifetime, this suit having been instituted by appellees, as his heirs, after his death. Appellees base their right to recover on article 3353a, Rev. St. 1895, which reads as follows: "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party and against the person, receiver or corporation liable for such injuries and his legal representatives; and so surviving such cause of action may be hereafter prosecuted in like manner and with like legal effect as would a cause of action for injuries to personal property." Appellant contends that the statute applies only where the injured party has sued on his cause of action in his lifetime, and that, as Moore never sued, the cause of action abated upon his death, and did not survive to his heirs. Appellant insists that the language of the statute is susceptible of no other construction than that for which it contends, and that, according to the rule laid down in *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262, such construction must be accepted as indicating the intention of the legislature. The soundness of the rule of law insisted upon is unquestioned,

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but we cannot concur in the contention that the language of said article is capable of no other construction than that proposed. The act provides that "causes of action upon which suit \* \* \* may hereafter be brought by the injured party for personal injuries other than those resulting in death" shall not abate by reason of the death of such party. This language may be construed to mean that it was the intention of the legislature to provide against the abatement of causes of action upon which the injured party had the right to sue. That construction should be adopted which is in harmony with the intention of the legislature as disclosed by a consideration of the entire act, keeping in view the old law, the evil, and the remedy. The act, as originally passed, was entitled "An act to provide for the survival of causes of action for personal injuries other than those resulting in death and for the enforcement thereof." Acts 1895, c. 89. It will be observed that in the caption of the act the purpose of the law is declared to be to provide for the survival of such causes of action, and not to prevent the abatement of suits brought thereon. In the body of the act it is provided that the cause of action shall not abate, and that the cause of action shall survive, nothing being said about the abatement or revival of suit brought on such cause of action. The act, considered as a whole, shows that the cause of action was the subject with which the legislature was dealing, and forbids the construction that it was intended simply to prevent the abatement of suits brought on such causes of action by the injured party in his lifetime. At the time the act in question was passed, causes of action for injuries not resulting in death did not survive to the heirs of the injured party, but abated upon his death. By the policy of the common law such causes of action were considered as being so purely personal in their nature that they ought to be held to die with the injured party and constitute no part of his estate. The legislature considered this condition of the law as an evil, and passed the aforesaid act as a remedy therefor. Clearly, the principal question before the legislature was whether the policy of the common law should be adhered to or a new policy, at variance therewith, adopted and followed. A conclusion adverse to the wisdom of the old policy was reached, and the bar against the survival of such causes of action removed. It was within the power of the legislature to have provided only for the survival of such causes of action as had been sued on by the injured party, but such an act would have been a legal anomaly. We know of no case in the history of legislation where this has been done. Many of the states have abrogated the common-law rule in these cases, but in none of them is the survival of the cause of action made to depend on the bringing of suit thereon by the injured party in his lifetime. If our legislature had intended to adopt a policy at variance both with that of the common law and that of the states which had repudiated

the rule at common law, such intention would have been manifested in no uncertain and doubtful way. In *Railway Co. v. Miller* (Tex. Civ. App.) 53 S. W. 709, it was held that a transfer, by the injured party, before suit brought, of a cause of action for personal injuries not resulting in death, was legal and binding. The holding can be sustained only on the theory that the survival of the cause of action did not depend on the bringing of suit thereon by the injured party in his lifetime. The point here involved is, in effect, decided in that case. Our conclusion is that the contention of appellant is without merit, and that under article 3353a, Rev. St. 1895, the cause of action sued on herein did not abate upon the death of Moore.

At the time of the accident Moore was an engineer in the employ of appellant, and had been so employed for four or five years. As such engineer he made a daily trip from Cleburne to Weatherford and return, and did the necessary switching in the yards at Weatherford. On the day of the accident, while he was pulling his train very slowly along in the yards at Weatherford, he heard something rattling under the engine. Without stopping the train, he got off the engine and down on the ground beside it for the purpose of looking under the engine to see what was the matter. After he had made the necessary inspection, he started to get back on the engine. Just as he placed his foot on the step, the engine struck a place in the track where there was a short rail, which was not properly joined to the other rails, thereby making some low joints and an uneven track, on account of which condition of the track the engine gave a lurch, causing Moore to lose his footing. He fell, and was caught under the wheels of the engine, his leg being crushed and mangled to such extent as to necessitate amputation. Appellant requested the court to charge the jury that if its track along its line of road from Cleburne to Weatherford and in the yards at Weatherford was in a bad condition, and the fact was known to Moore, or if in the ordinary discharge of his duties he must have known it, then he assumed the risk of injury on account of the condition of the track, even if he did not know of the particular defect which caused the accident. The court refused to give the requested charge. There was no attempt to show that the track of the Weatherford branch of appellant's road was in a generally bad condition, thereby rendering it unsafe and dangerous to operate a train over it. The testimony as to the bad condition of the track was confined, practically, to the very point of the accident. It was not shown that there was another short rail on the entire line of road, nor that there were any other joints in such condition as to render it hazardous to run a train over same. No other accident is shown to have occurred in the yards or near the place where Moore was injured. The conductor of the train in question had served in that capacity for years, and had

never noticed the short rail or the defective joints. In this state of the evidence the requested charges were properly refused. Moore could not be held to have assumed the risk of an unknown defect in the track, unless the generally known condition of the track was such that he ought to have anticipated the existence of the particular defect. It is clear that the evidence presents no such case.

Appellant requested a special charge, which was refused, to the effect that, if the track at the point of the accident was defective, and such condition was patent and open to ordinary observation, and Moore knew the condition of the track, or in the ordinary discharge of his duties must have known thereof, and voluntarily continued in the service of appellant, he assumed the risk of injury on account of such defect, and the plaintiffs could not recover. The court instructed the jury, in substance, that Moore, when he entered the service of appellant, had a right to rely on the assumption that the track was in a reasonably safe condition, and was not required to see whether it was or not; that he did not assume the risk arising from the failure of appellant to use ordinary care to keep the track in a reasonably safe condition, but that if the track at the point of the accident was defective or unsafe, and if Moore knew that fact, or if, in the ordinary discharge of his duties as engineer, he must necessarily have acquired such knowledge, then in such case he assumed all the ordinary risks incident to attempting to mount the engine under the circumstances; that, if the track at said point was defective, unsafe, and dangerous, and Moore, at or before the time of his injury, knew the fact, or if, in the ordinary discharge of his duties as engineer, must necessarily have acquired such knowledge, and nevertheless attempted to mount the engine in the manner he did, and was thereby injured, then the jury should find for the defendant, even though the defendant may have been negligent in failing to repair the track, or to have it in reasonably safe condition. The charge follows a long line of approved precedents. It is in almost the exact language of the law as announced in *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508. It rendered unnecessary the giving of the requested charge. The only criticism of the charge which requires notice is that which questions its correctness on the ground that it was Moore's duty as engineer to keep a lookout, and that he was therefore bound to use ordinary care to learn the condition of the track, and could not rely on the assumption that the track was in a reasonably safe condition. The proposition is untenable. Moore had a right to suppose that the company had performed its duty to use ordinary care to have the track in a reasonably safe condition; and while he was bound to keep a lookout in order to secure the safety of his train, the lookout was not kept for the purpose of ascertaining whether the company had performed its duty, but for obstructions on the track, and for conditions

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which the care of the company could not provide against. He was not a track inspector, and appellant owed him the duty to use ordinary care to furnish him with a reasonably safe track to run over. He had a right to presume that the company had discharged its said duty, and did not assume the risk of its failure to do so.

The court charged the jury fully and correctly upon the issue of contributory negligence. In submitting this issue the court did not, as contended by appellant, require the jury to find that the act of Moore in attempting to mount the engine, if the same was negligent, was the proximate cause of the injury, and did not, therefore, violate the rule laid down in the Rowland Case, 90 Tex. 365, 38 S. W. 756.

Appellant complains of the admission, over its objections, of testimony to the effect that before the accident Moore's disposition was pleasant, bright, and sunny, and that after he was injured he was depressed in spirits and melancholy. The evidence was admissible as tending to show that he suffered physical pain and mental anguish on account of his injuries. The charge of the court did not permit the jury, in assessing damages, to allow anything on account of his depression and melancholy.

Appellant contends that the appellees, if entitled to recover at all, could not recover for the physical pain and mental anguish suffered by Moore up to the time of his death. By the terms of the statute the entire cause of action, and not merely a part thereof, survived to Moore's heirs, and the contention must be held to be without merit. Rev. St. 1895, art. 3353a; Busw. Pers. Inj. § 20.

Appellees were permitted, over the objections of appellant, to prove that when Moore was seized with the sickness which resulted in his death he called in a physician, who examined and prescribed for him; that he told the physician, in response to questions propounded as a basis for treatment, that he suffered pain in his side, and had so suffered ever since he was injured. The information was sought by the physician in order to enable him to properly diagnose the case, and the court correctly permitted him to state the same to the jury as a part of the facts upon which he based his opinion as an expert as to the cause of death. *Railway Co. v. Rose* (Tex. Civ. App.) 49 S. W. 133. The testimony was admissible for the purpose indicated, and appellant did not ask a special charge instructing the jury that it should be considered only for the purpose for which it was admitted.

The verdict was not excessive, and, there being no error in the judgment, it is affirmed. Affirmed.

On Rehearing.

(May 24, 1902.)

Appellant's motion for a rehearing is accompanied by an able argument in support of the contention that we erred in

holding there was no error in the action of the trial court in admitting the testimony of Dr. Yater, the physician who treated Moore in his last sickness, to the effect that Moore stated to him that he had suffered pain in his side from the time he was injured. There is a bill of exceptions in the record which shows that Dr. Yater, who was called to treat Moore in his last sickness, was permitted, over the objections of appellant, to testify that Moore, in response to a question propounded by him, said he had suffered from a pain in his side from the time he was injured. This bill was approved by the trial judge with the explanation that the evidence was admitted on the issue as to whether the injury caused Moore's death. We find, on re-examining the question, that the statement of facts which was agreed to by the parties does not contain any such testimony as that shown by the bill of exceptions to have been admitted. In this state of the record the statement of facts will control, and the assignment of error based on the bill of exceptions should not be considered. *Scott v. Childers* (Tex. Civ. App.) 60 S. W. 776, and cases there cited. It follows that it was unnecessary for us to decide whether the evidence was properly admitted, and what we have said on that point may be regarded as dictum. As bearing upon the correctness of our holding, see *Whart. Ev.* § 268, where it is said: "So, when the nature of a party's sickness or hurt is in litigation, his instinctive declarations to a physician or nurse, during such sickness, as to the cause of the sickness, his object being to explain his symptoms, may be received as part of the testimony, and explanatory of the conclusions of such physician or nurse. \* \* \* Declarations to prove past pain have also been held admissible when made to a physician or nurse for the purpose of enabling him to form his opinion of the case. But this exception should be jealously guarded, and such declarations ought to be rejected when self-serving; and declarations of pain made to a physician have been rejected where their object was to post him for testifying." See, also, *Barber v. Merriam*, 11 Allen, 324; *Quaife v. Railway Co.*, 48 Wis. 524, 4 N. W. 658, 33 Am. Rep. 821; *Railroad Co. v. Newell*, 104 Ind. 271, 3 N. E. 836, 54 Am. Rep. 312. It is shown by the evidence in this case that Dr. Yater was called to treat Moore when he was seized with the sickness which caused his death, and it appears from the bill of exceptions quoted above that the statement complained of, to the effect that Moore had suffered with a pain in his side from the time he was injured, was brought out by a question propounded by the physician as a basis for treatment. At the time the statement was made, if it was ever made, Moore was very sick, and was suffering intense pain. No suit was pending, nor, so far as we can judge, was contemplated. It was shown by the uncontradicted evidence of other witnesses that Moore had complained of pain in his side continually from the time of the accident up to the time

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of making the alleged statement. These remarks are made to elucidate and explain what was said in the original opinion, and we do not desire to be understood as deciding whether the statement made by Moore to Dr. Yater, if made at all, was admissible.

The motion for rehearing is overruled.

## CHICAGO, I. &amp; L. RY. CO. v. REED.

(Appellate Court of Indiana, May 14, 1902.)

[63 N. E. Rep. 878.]

**Accident at Crossing—Failure to Look.\***

The road along which plaintiff was traveling crossed defendant's track at an acute angle, and at the time the train was 1,000 feet and plaintiff 50 feet from the crossing. Plaintiff was driving at the rate of three miles an hour, and at that point there was nothing to prevent her from seeing the approaching train had she looked. When the locomotive was 660 feet away, it commenced sounding the alarm whistle, and continued to do so until it reached the crossing. There was nothing to prevent the noise of the train being heard. Plaintiff had good eyesight and hearing, and was familiar with the crossing. She testified that she watched both ways, and listened for the train, but did not hear it until she got to the track, when her horse became frightened, and she did not remember what she did until struck: *held*, that plaintiff's failure to look and observe the train at a point where she could have seen it in time to have avoided the danger was negligence per se precluding recovery.

**Same—Same—Failure to Give Statutory Signals.†**

The failure of a railroad company to give statutory signals as it approaches a crossing is no excuse for the plaintiff's contributory negligence, and will not justify a recovery where the accident was caused by the plaintiff's failure to look and listen.

Appeal from circuit court, Carroll county; Truman F. Palmer, Judge.

Action by Martha M. Reed against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. C. Field, W. S. Kinnan, and Pollard & Pollard, for appellant.

Million & Palmer and M. A. Ryan, for appellee.

\*See note, 12 Am. & Eng. R. Cas., N. S., 444. See also, Vincent v. Morgan's L. & T. R. & S. Co. (La. Ann.), 5 Am. & Eng. R. Cas., N. S., 463; Pyle v. Clark et al. (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 431.

†See Baltimore & O. S. W. R. Co. v. Young (Ind.), 6 Am. & Eng. R. Cas., N. S., 349; Baltimore & O. S. W. Ry. Co. v. Conoyer (Ind.), 9 Am. & Eng. R. Cas., N. S., 348; Philadelphia & R. R. Co. v. State (N. J.), 9 Am. & Eng. R. Cas., N. S., 241; English v. Sou. Pac. R. Co. (Utah), 4 Am. & Eng. R. Cas., N. S., 63; Central Texas & N. W. R. Co. v. Nycum (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 435; Texas & P. R. Co. v. Spradling (U. S.), 3 Am. & Eng. R. Cas., N. S., 435; Miller v. Terre Haute & I. R. Co. (Ind.), 3 Am. & Eng. R. Cas., N. S., 442; Strother v. South Car., etc., R. Co. (S. Car.), 5 Am. & Eng. R. Cas., N. S., 430; Louisville & N. R. Co. v. Vittitoe's Adm'r (Ky.), 8 Am. & Eng. R. Cas., N. S., 666; Czech v. Great Northern Ry. Co. (Minn.), 7 Am. & Eng. R. Cas., N. S., 374; Illinois Cent. R. Co. v. Mizell (Ky.), 6 Am. & Eng. R. Cas., N. S., 337.



ROBINSON, P. J. Suit for personal injuries. Appellee approached the crossing from the south upon a highway running north and south, and crossing at an acute angle the railroad, which ran in a northwesterly and southeasterly direction, and was struck by a train going north. She attempted to cross the track in about the center of the highway. Loose gravel at the crossing extended south for five or ten feet from the west rail of the track. She was in a top buggy, drawn by a gentle horse, but which was afraid of the cars, which she knew. The buggy was without side curtains, but had the back curtain down. It was a still, clear day, about 9 o'clock in the morning, in the month of August. Appellee was about 62 years old, had good eyesight and hearing, was familiar with the crossing, and had been for some time familiar with the highway and the location of the buildings and obstructions along the same. The train was a regular daily train, about on schedule time, was running 60 miles an hour, and did not give the statutory signals as it approached the crossing. There were no noises near the crossing to hinder appellee hearing the noise of the train. A hedge fence parallel with the highway and between it and the railroad extended north to within about 150 feet of the crossing. The north end of the hedge fence was about 16 feet from the railroad track, and for 10 or 12 feet back from the end it was  $4\frac{1}{2}$  to 5 feet high. The locality is in a practically level country, the bed of the railroad and the center of the highway both being a few inches above the general level of the ground. Going south from the crossing, the railroad track is straight for a distance of about 1,000 or 1,100 feet, and at this point there is a slight curve to the east, stated by the engineer to be a 20-minute curve. Appellee's line of vision was about 7 feet above the level of the highway. The highway crosses the railroad track at an acute angle, so that a point in the center of the highway 50 feet south of the center of the crossing is 15 feet west of the center of the railroad track. There was no obstruction between the end of the hedge fence and the railroad east of it that would obstruct the view southeast along the track for a distance of more than 1,000 feet if the person was in the center of the highway at a point as near to the railroad track as was the end of the hedge; so that, if a person was at a point in the center of the highway 50 feet south of the center of the crossing, he could see southeast along the track more than 1,000 feet. The evidence and findings show that when appellee was 50 feet from the crossing the locomotive was 1,000 feet to the southeast, and that when she was 20 feet from the crossing the locomotive was 400 feet to the southeast. The alarm or danger whistle of the locomotive sounded continuously from a point about 40 rods southeast up to the point of collision.

We have taken the foregoing facts from the findings of the jury and from evidence which seems to be undisputed.

Appellee testified: That as she approached the crossing she watched both ways, and listened for the train. That near the end of the hedge she slowed her horse into a walk, and at that point she looked back down the track, and did not see any train, and that she listened, and did not hear any train. That she had not heard the whistle of any train up to that time. That, after she slowed her horse into a walk, she went on, watching down the track both ways, "and when I got to the track, then I heard the screams of the train." That the horse walked to the crossing. That she heard the screams of the whistle. "I was so near the track, I thought I was on the track,—that the horse was on the track. \* \* \* I looked for the train immediately, and saw the train." "Of course, I was very frightened, and the horse was the same. She was always afraid of the cars, and she started, and it is hard to tell just whether I tried to check her or what I did do, but I know that she went on in spite of me. She would go,—she would not have stopped if I had tried. Of course, I tried to urge her then, thinking my safety laid in crossing the track. \* \* \* When I heard the scream of the whistle, I couldn't stop to look right or left. I could only go where the horse took me." The engine struck the back wheel of the buggy as appellee passed over the crossing. Upon cross-examination appellee testified: "Q. Did the horse slack until he reached the loose gravel? A. That is my impression now. Q. Isn't it a fact that he slacked when he reached that loose gravel at the crossing,—isn't that right? A. Yes, sir. Q. Up to that time he had gone along on a trot? A. He had. \* \* \* I did not strike the horse with the whip, that I can remember of, at all. I just drove on until I got clear upon the track until I heard the train. Then I think the horse was frightened. I was dreadfully frightened, and the horse was frightened, and she gave a jump; and whether I tried to check her, I can't tell; only I know that I began to feel that my safest way was to cross the track." The jury answered that the horse went continuously in a trot at the rate of five miles an hour up to the loose gravel at the crossing, which extended from 5 to 10 feet from the west rail of the track; also that the horse trotted a distance of 200 feet, up to within 10 feet of the crossing, at the rate of four miles per hour; also that for 50 feet before entering upon the crossing the horse walked at the rate of three miles per hour. It is not controverted that the end of the hedge fence was 16 feet from the track, nor is it controverted that a point in the center of the highway 50 feet south of the center of the crossing is 15 feet from the center of the track. There is nothing in the record to show that there were any obstructions to prevent a view southeast along the track a distance of more than 1,000 feet by a person on the highway when he had reached a point as near directly west of the track as the end of the hedge fence was to the track; that is, when a person was in the center of the high-

way at a point 50 feet south of the center of the crossing, the record fails to show that there were any obstructions to a view southeast along the track a distance of more than 1,000 feet. If we take the answer of the jury most favorable to appellee,—that she was driving at the rate of three miles an hour,—she was going one-twentieth as fast as the train. And the jury find that when she was 50 feet the train was 1,000 feet from the crossing. At that time there was nothing to prevent appellee seeing the approaching train had she looked. The law assumes that a person actually saw what he could have seen had he looked, and heard what he could have heard had he listened. The jury also find that when she was 20 feet from the crossing the locomotive was 400 feet away. It commenced sounding the alarm whistle when 660 feet away, and continued until it reached the crossing. It was a still, clear day. She was acquainted with the crossing and its surroundings. The country was comparatively level. There were no noises to prevent the noise of the train being heard. Continuously from the time appellee was 50 feet from the crossing up to the crossing the train was where it could be seen had she looked, and from the time she was 30 feet away the noise of the train and the alarm whistle could have been heard had she listened. Why she did not or could not see or hear it is unexplained. Had she looked for the train at any time from the time she came within 50 feet of the crossing up to the crossing she must have seen it, and had she listened for it she must have heard it, before she reached a place of danger. It is true there is some evidence to show that when she first heard and saw the train she was in a place of danger, and that she believed her only safety lay in passing over the crossing. But if she saw the train before passing upon the crossing, and concluded she could pass over before the train reached her, she simply miscalculated her chances, and took the risk upon herself. However, it is unexplained why she did not see or hear the train before she reached a place of danger. She was approaching a place where it was her duty to assume that there was danger, and to act with care and prudence upon that assumption. As this record comes to us, we cannot escape the conclusion that, had appellee looked, she could have seen the train, and that, had she listened, she could have heard the train, in time to have avoided the injury. "If a traveler," said the court in *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270, "by looking could have seen an approaching train in time to avoid injury, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is negligence per se." See *Cones v. Railway Co.*, 114 Ind. 328, 16 N. E. 638; *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Mann v. Railroad Co.*, 128 Ind. 138, 26 N. E. 819, and cases cited; *Thornton v. Railroad Co.*, 131 Ind. 492, 31 N. E. 185, and cases cited. It is true the

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locomotive did not give the statutory signal as it approached the crossing. Yet this did not excuse appellee from using her senses of sight and hearing in order to ascertain the fact for herself. *Mann v. Railroad Co.*, supra; *Thornton v. Railroad Co.*, supra.

Judgment reversed, with instructions to sustain appellant's motion for judgment.

PEDIGO'S ADM'R v. LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, May 27, 1902.*)

[68 S. W. Rep. 462.]

**Railroads—Backing of Vehicle against Train\*—Cause of Injury.**

Where a horse hitched to a buggy in a village became frightened by a passing train, and while the driver was standing in the road, pulling the lines, backed the buggy against the train after the engine had passed, throwing the driver under the train, and killing him, neither the speed of the train nor the failure to keep a lookout was the cause of the death, and therefore the company, though it may have been negligent in those respects, is not liable.

Appeal from the circuit court, Hart county.

"Not to be officially reported."

Action by Thomas Pedigo's administrator against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

S. M. Payton, for appellant.

Edward W. Hines and James A. Mitchell, for appellee.

PAYNTER, J. As a freight train going north, consisting of more than 40 cars, was passing through the village of Rowletts over appellee's track, it collided with Thomas Pedigo, inflicting injuries from which he immediately died. This action was instituted by his personal representative to recover damages for the destruction of intestate's life. At the conclusion of plaintiff's testimony, the court gave peremptory instructions to the jury to return a verdict for the defendant, which was accordingly done. Rowletts is a small village, containing two dry goods stores, two drug stores, post office, hotel, blacksmith shop, and some residences, the number not appearing. There is a county road, sometimes called a street, running across the railroad track. It passes between Leech's store and Loche's store, each of which fronts on the

\*See *Lawrence v. Pendleton St. R. Co.*, 1 Cin. Sup. Ct. 180.

Failure to obey statutory requirements as to signals, and speed at crossings. See note, 11 Am. & Eng. R. Cas., N. S., 857.

Whether rate of speed is negligence, question for jury, see note, 12 Am. & Eng. R. Cas., N. S., 322.

See also, *Edwards v. Atlantic Coast Line R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 38; *Hook v. Missouri Pac. Ry. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 787. See generally, note, 1 R. R. R. 842, 24 Am. & Eng. R. Cas., N. S., 842.

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railroad right of way. From a parallel line running from the front of Loche's to a point in front of Leech's store it is about 30 feet to the railroad track. Some minutes (the exact time not appearing) before the freight train arrived, Pedigo brought his horse and buggy from the east side of the track over the crossing made at the intersection of the railroad and the county road, and stopped them, so that the rear wheels of the buggy rested near the parallel line referred to as running from Loche's to Leech's store. The horse's head was turned westwardly. Pedigo left it in charge of some one, and went to some place in the village. Just when he returned and took charge of the horse, it does not appear. After the train had partially passed, he was discovered standing on the ground, south of the horse and buggy, holding the buggy lines. As to how the accident happened is best told by witness Curtis Leech. He said: "My attention was first called by a fellow by the name of Brewer, who was standing there. He said, 'That horse is going to run away,' and I commenced looking, and I didn't see any horse, and he said, 'It is Mr. Pedigo's horse out here on the road,' and about that time I got around where I could look around and see out,—I had to move a little,—and when I looked out the horse was standing there, sorter trembling like a horse would when scared, I guess a half minute, or something like that; and Mr. Pedigo raised his lines up some way. I don't know whether he had them in one or both hands. He slapped the horse with the lines, and the horse ran forward or jumped forward; and he kept pulling on the lines, and the horse kept backing nearly to where he was standing; and he just kept pulling; and it looked like to me—the way I imagine—he thought he had hold of the reins, and the lines was through the saddle of the harness, and the more he pulled on the reins the more he pulled the horse back, rather than forward; and he backed back, and came in contact with the car, and that threw the horse sorter south, and threw Mr. Pedigo off of his feet, and he regained himself, and commenced pulling back on the lines like again, and when he pulled him the second time it threw him around, and when it threw him around the second time the horse's head was thrown to the side of the car and Mr. Pedigo was thrown against the car,—threw him in between the horse and car; and as the truck came along it caught him, and threw him over, and he fell across the track and was killed. Some way—I can't say exactly—it struck him across the face, or something like that. That is the way I saw it." At the time he was struck by the train, a greater part of it had passed over the crossing. It appears from the testimony that while the train was passing the horse stood "trembling," as if frightened, whereupon Pedigo attempted to start him forward by slapping him with the lines. He jumped forward, and the deceased restrained him, when he began to back. The deceased continued to pull him and the horse continued to back until the

buggy was struck, which was thrown to the north, the horse's head south to the side of the car, and the deceased against the side of the car, when he was caught by a truck, and thrown across the track and killed. There was no testimony offered by the plaintiff which tended to show that the accident happened in a way other than that described by Leech. On the contrary, the other testimony tends to support his statements as to the circumstances attending the accident. The evidence shows that the deceased did not think his horse was much frightened at the cars, or he would have taken hold of the bridle, and stood at his head. If he did think he was frightened, it was the exercise of a bad judgment to have tried to control the horse in the manner in which he did. He voluntarily placed himself in the position where he was brought in collision with the cars without the slightest fault on the part of those in charge of the train. Those in charge of the train were no more responsible than they would have been if the deceased had voluntarily walked against the truck and been thrown upon the track. If the engineer had discovered, as the engine passed, that the horse was "trembling" through fright, he would have had no reason for believing that the horse would run away, or that the owner would be placed in a position to be thrown against the train. If the engineer had discovered that the horse was trembling from fright, he could not have stopped the train, so as to have relieved the horse from it. After the engineer had passed the crossing, it was not his business to look back to see what might be transpiring in the county road. It is said that the train was running 30 or 35 miles an hour, and that it was negligence in those in charge of it to run it at that speed. It is therefore urged that the accident would not have happened, except that the train was running at that rapid rate of speed. The rate of speed of the train had nothing to do with the conduct of the horse, nor was it the direct or remote cause of the deceased being placed in such close proximity to the train that he was struck by it. We conclude that the speed of the train had nothing whatever to do with the collision which resulted in the unfortunate death of the deceased, but that it resulted from his own act. We are unable to see that the case of *Railroad Co. v. Keelin's Adm'r* (Ky.) 62 S. W. 261, has any bearing upon this case. The court in that case follows a number of other cases in which the court held that it is the duty of the railroad employees to keep a careful lookout along its track in cities or towns where persons are likely to be found trespassing thereon. Although the agents and servants of defendant failed to keep a lookout along its track, that failure had nothing to do with the appellee's negligence in coming in contact with the train. Had the appellee's agents and servants discovered him after he placed himself in a perilous position, neither they nor any human agency could have saved him. Recognizing the rule to be that when a state of facts is such that rea-

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sonable men may fairly differ upon questions as to whether there was negligence or not the determination of the matter is for the jury, still we are of the opinion that the court properly gave the jury peremptory instructions. We do not think that reasonable men could fairly differ on the question in this case.

The judgment is affirmed.

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JAMES *et al.* v. FLORIDA, CENT. & P. R. CO.

(*Supreme Court of Georgia, April 25, 1902.*)

[41 S. E. Rep. 585.]

**Action for Wrongful Death\*—Evidence of Damage.**

The injury complained of occurred in Florida, and the action was brought under the laws of that state, and the plaintiffs failed to introduce evidence sufficient to furnish the jury a basis for any estimate of the plaintiffs' damages. The verdict for the defendant was therefore demanded, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by E. B. James and others, by their next friend, against the Florida, Central & Peninsular Railroad Company. Judgment for defendant, and both parties bring error. Judgment on main bill of exceptions affirmed; on cross bill dismissed.

David C. Barrow, for plaintiffs.

Denmark, Adams & Freeman, for defendant.

SIMMONS, C. J. Suit was brought against the Florida, Central & Peninsular Railroad Company by Etheline B. James and others, minors, by their next friend, for damages for the homicide of their father. The injuries by which his death was alleged to have been caused occurred in the state of Florida, and the Florida laws were especially invoked in the plaintiffs' petition. The jury found for the defendant. Plaintiffs moved for a new trial, and, when their motion was overruled, excepted. The motion for new trial contained a number of grounds, but it is unnecessary to discuss them, as we think the verdict was demanded. There was no evidence before the jury to furnish a basis of recovery for the plaintiffs, and no data from which they could legally deduce the plaintiffs' damages. The law of Florida, as set out in the petition, provides that in every action such as this "the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed." It was, therefore, incumbent upon the plaintiffs to show the amount of pecuniary damages they sustained by reason of their father's death. There was evidence as to the father's earning capacity,

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\*See note, 12 Am. & Eng. R. Cas., N. S., 712.

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but none whatever as to his expenses. He boarded at least half of his time in a city other than that of his residence; but it does not appear what board he paid. There is no evidence as to any of his other expenses. As a result, we think it was not possible for the jury to have made any legal estimate of the plaintiffs' damages. There was no data as to the amount the deceased had spent upon his children, or as to what he would probably spend upon them. We think that for these reasons, if for no other, the jury could have found no verdict other than one for the defendant. While it is impracticable to determine accurately the amount of damage in a case like this, the burden is upon the plaintiffs to give some data upon which an estimate can be based.

It is unnecessary to consider any of the special grounds of the motion for new trial. All of them except two complain of the charge of the court. As the verdict was demanded, no error in the charge should work a new trial. The other two grounds complain of the form of the verdict, and of the absence of the judge at a time when the jury wished to be recharged. For the same reason it is immaterial whether there was error here. The refusal to grant a new trial must therefore be affirmed. As this finally disposes of the case, it is unnecessary to consider the cross bill of exceptions filed by the defendant in error.

Judgment on main bill of exceptions affirmed; on cross bill dismissed. All the justices concurring, except LEWIS, J., absent on account of sickness.

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RIDER v. SYRACUSE RAPID TRANSIT RY. CO.

(*Court of Appeals of New York, May 13, 1902.*)

[63 N. E. Rep. 836.]

**Collision between Vehicle and Street Car\*—Remote Negligence of Injured Party.**

Plaintiff's decedent drove in front of an electric car approaching from six to nine miles an hour, and was fatally injured. The wagon was carried some distance along the track before it was overturned: *held*, that the motorman did not act willfully or carelessly, since the act of the driver and the conduct of the motorman were so substantially concurrent that it would be impossible to separate the conduct of the injured person from the injury itself, so that the doctrine that the remote

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\*See generally, note, 12 Am. & Eng. R. Cas., N. S., 372 et seq.; 3 Rap. & Mack's Dig., 11 et seq. See also, *New York S. & W. R. Co. v. Moore* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 462; *Dalton v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460; *Hook v. Missouri Pac. Ry. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 787; *Cook v. Los Angeles & P. Elec. Ry. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 69; *Merritt v. Foote* (Mich.), 23 Am. & Eng. R. Cas., N. S., 43; *Tacoma Ry. & Power Co. v. Hays* (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 58; *Kelly v. Wakefield & S. St. Ry. Co.* (Mass.), 23 Am. & Eng. R. Cas., N. S., 67; *Born v. Philadelphia & R. R. Co.* (Pa.), 22 Am. & Eng. R. Cas., N. S., 723.



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negligent act of the injured party would not bar recovery is not applicable.

**Same—Remote and Proximate Cause.**

The same test must be applied to the conduct of both parties in determining whether the cause of an action is proximate or remote.

**Same—Same.**

Where a driver negligently drove on the track of a rapidly approaching electric car, the accident may properly be attributed to his negligence, though the vehicle was carried some distance along the track before it was overturned and the injuries inflicted.

**Same—Rule for Protection of Person Guilty of Contributory Negligence.**

Where a driver attempts to cross the track of an electric railway diagonally when an approaching car is so near as to render attempt dangerous, the rule that a railway car may not run into a person though he is on the track through his own negligence is not applicable.

Bartlett, Martin, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, Fourth department.

Action by Jane Rider against the Syracuse Rapid Transit Railway Company. From a judgment of the appellate division (72 N. Y. Supp. 1125) affirming a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Reversed.

Charles E. Spencer, for appellant.

Frank C. Sargent, for respondent.

O'BRIEN, J. The plaintiff recovered a verdict of \$5,000 against the defendant in an action wherein the latter was charged with negligently causing the death of George H. Rider, the plaintiff's husband and intestate, on the 17th of December, 1900. It is alleged that the deceased, who was riding in a covered delivery wagon, while crossing over defendant's street car tracks at the intersection of two streets, was struck by one of defendant's electric cars, which caused him to be thrown to the pavement in such a severe and violent manner as to subsequently cause his death. The judgment entered upon the verdict has been unanimously affirmed by the appellate division, and hence the only questions presented by the appeal are those raised by exceptions to the charge of the learned trial judge as made, and to his refusal to charge as requested by defendant's counsel.

The case was tried and submitted to the jury upon the theory that, even though the deceased had been guilty of contributory negligence in driving upon the track under the circumstances disclosed by the evidence, yet such negligence on his part would not bar a recovery if the jury found that the accident could have been avoided by the motorman in charge of the car. In other words, the charge of the court, in substance, was that, although deceased negligently drove upon the railway track, yet the plaintiff could recover if the jury was satisfied that the motorman, upon seeing that the deceased was about to cross, could, by the exercise of reason-

able care, have brought the car to a stop before the collision which resulted in the injury. In order to clearly disclose the theory upon which the case was submitted to the jury, it will be necessary to state the substance of the charge. The learned trial judge stated that, assuming the plaintiff's evidence to be correct as to where the car was when the deceased attempted to cross the track,—which was from 35 to 80 feet back of him,—he was chargeable with knowledge that it was there, and, the act of the deceased being such as to show an intention to cross the street, the rule of law was that, if then, in view of that distance of the car, he had reasonable ground to suppose that he could cross in safety, he would not be chargeable with contributory negligence as matter of law, and it would be the duty of the motorman to furnish him a reasonable opportunity to cross; that if the jury should find that he did, in view of that distance, have reasonable ground to believe that he could cross in safety, and if then the motorman did not afford him a reasonable opportunity to cross, the jury would have the right to say that he was negligent, and that, if such negligence was the cause of the accident, that would furnish a basis of liability against the defendant. He also called the attention of the jury to the evidence on the part of the defendant which tended to show that the car was only 15 or 20 feet away when the deceased started to cross, and that, if such was the fact, the deceased ought not to have attempted to cross. The car was moving at the rate of six to nine miles an hour, and if, under these circumstances, the deceased attempted to drive upon the track in front of the car only 15 feet away, he was chargeable with negligence. He further instructed the jury substantially as follows: Assuming that the deceased was careless or guilty of negligence in trying to cross the track when the car was so close that he knew, or ought to have known, that he would be hurt if the car kept on at the ordinary speed, still it did not follow that there could be no recovery against the defendant, for the law is that, if there had been negligence on the part of the deceased that would really bring about the result, still if the defendant could, in the exercise of reasonable care, have avoided the accident, it was its duty to do so. "It is a question whether, in such a case, the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence; and in this case the question is whether, when it became apparent to the car driver that the decedent had the intention of crossing, and was in the act of crossing, if at that time the car was at such a distance that, if managed with the exercise of ordinary and reasonable care, the collision could have been avoided, there would be a basis for saying that the defendant was still liable, although the man was negligent in trying to cross the track." The only basis for this theory of the case is found in the evidence upon the part of the plaintiff, which tends to show that the deceased did

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not sustain the injury at the very moment that the car came in contact with the vehicle, but that it struck the rear end of the carriage, and then carried it for some distance along the track, when it was overturned, and thus the injury resulted. This accident differs from all such accidents at street crossings only in this respect; that the injury was not inflicted upon deceased at the instant when the car struck the vehicle, but after carrying it forward upon the track for a distance, which is claimed by plaintiff to be from 25 to 40 feet, the carriage was overturned, and the driver injured. It is claimed on the part of the plaintiff, that the motorman could have stopped the car within the space of 8 feet of the vehicle, while on the part of the defendant the evidence tended to show that it could not be stopped in less than from 50 to 60 feet. It will thus be seen that the case turned largely, if not entirely, upon the ability of the motorman to stop a car moving at the rate of from six to nine miles an hour before the collision, and before the carriage in which the deceased was riding was overturned. The defendant's counsel excepted to the charge of the court with reference to the negligence of the deceased in case he drove upon the track when the car was anywhere from 35 to 80 feet away, and he requested the court to charge that he was not permitted to take even doubtful chances as to whether there was sufficient opportunity for him to cross. The court declined to charge that proposition, and the defendant's counsel excepted. The defendant's counsel also excepted to that part of the charge wherein the jury were instructed that there might be a recovery notwithstanding the fact that the deceased was guilty of negligence in driving upon the tracks, and he asked the court to instruct the jury that, in case they should find the deceased guilty of negligence in driving upon the tracks as he did, there could be no recovery in the action. The court refused to so charge, and the defendant's counsel excepted. It will be seen, therefore, that the jury were permitted to find a verdict against the defendant notwithstanding any negligence on the part of the deceased in driving upon the tracks, provided that they could find that the motorman could have stopped the car before it upset the carriage in which the deceased was riding.

The general rule is that in an action to recover damages for personal injuries founded upon negligence it is incumbent upon the plaintiff to prove negligence on the part of the defendant and the absence of contributory negligence on the part of the injured party. The courts have, however, ingrafted upon this rule an important exception, which the learned trial judge evidently sought to apply to the facts in the case, and that is that the contributory negligence of the injured party which will bar an action in his behalf must be the proximate, and not a remote contributing, cause of the injury. The plaintiff's contributory negligence, it is said, must not only be a contributing cause, but a prox-

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imate, and not a remote, cause of the injury. The proximate cause of an event must be held to be that which, in a natural sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. The plaintiff's fault will not affect his cause of action unless it proximately contributed to his injury. It must be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give a right of action. *Shear. & R. Neg. (4th Ed.)* §§ 26, 94, and notes. Contributory negligence, however great, is no defense to an action for damages for an injury which was reckless, willful, or wanton. When the negligence of the deceased is but a remote cause, or antecedent of the injury, while the negligence of the defendant is made the proximate cause of it, then the plaintiff will not be debarred from prosecuting his claim by his negligence, nor will the defendant be excused from the consequences of his. 2 *Thomp. Neg.* § 1995, and notes.

The question in this case is whether this rule can be applied to the facts here in any reasonable or practical way. The contributory negligence of the injured party cannot be taken from the jury except in cases where it is clear that there was some new act of negligence on the part of a defendant that was the proximate cause of the injury. The negligence of the deceased, if any, was substantially concurrent with that of the defendant, if any. It is impossible to separate that part of the transaction which took place after the first contact of the car with the vehicle from what took place before. It was all one transaction, and to attempt to divide it into fragments, and impute one part of it to the negligence of both parties and another part to the defendant's negligence alone, would, as it seems to us, entirely subvert the law of contributory negligence as applied to accidents of this character. If the theory upon which this case was tried and submitted is to be sanctioned, it must, we think, follow that in every case based upon such an accident the result must turn, not upon the general rule as stated, but upon the exception; or, in other words, the inquiry must be, not whether the injured party was negligent, but whether it was reasonably possible for the defendant to have avoided the accident. It does not seem to us that the exception to the general rule in cases of this character was properly applied to the facts in this case. There is no doubt that it is a well-recognized exception to the general rule, but its application will be best illustrated by a reference to some of the leading cases upon the subject.

One of the leading cases in the English courts is *Davies v. Mann*, 10 *Mees. & W.* 546. The plaintiff sued the defendant for killing a donkey which the former had fettered and turned into a highway to graze. It appeared at the trial that the plaintiff, having fettered the forefeet of the donkey, turned it into a public highway, and at the time of the accident the donkey was grazing on the off side of a road about eight yards

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wide, when the defendant's wagon, with a team of three horses, coming down a slight descent at what the witness termed a "smartish" pace, ran against the donkey, knocked it down, and, the wheels passing over it, it died soon after. The donkey, as already stated, was fettered at the time, and it was proved that the driver was some little distance behind the horses. The learned judge instructed the jury that, though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable, and the jury found a verdict for the plaintiff. Upon a review of the case it was held that the instructions of the trial judge were correct, the court holding that: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." So that all the case decides is that the negligent act of the owner of the donkey in turning it fettered into the highway to graze some days before the injury was the remote, but not the proximate, cause of its death. This case is a good illustration of what is meant by the exception to the general rule, since it appears that, although the owner of the animal was originally negligent in turning it into the road, yet this negligence was only a remote, and not a proximate, cause of the injury.

The rule and its application is illustrated in the case of *McKeon v. Railway Co.*, 20 App. Div. 601, 47 N. Y. Supp. 374. In that case it appeared that the injured party drove his horse and truck up to the doorway of his employer's house, and, finding the gate locked, with a view of departing, so backed up his horse into the street that the rear end of the truck projected over the eastern-bound track of the defendant's trolley railroad in that street. He then saw an approaching car upon the track, and proceeded to get upon the wagon to drive away. Before he was able to do so, the car collided with the rear end of the wagon, causing the horse to run away. The plaintiff was thrown from the wagon when upwards of 200 feet from the place of collision, and fell upon the same track. He was then unconscious, and was injured by another car of the defendant, going in the same direction, a few minutes later. Two young daughters of the plaintiff, seeing the condition of the horse and wagon, looked for and discovered the plaintiff on the track. One of them, while making an ineffectual effort to pull him from the track, saw the approaching car, and both of them screamed. Their screams were heard by the motorman and some others on the

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car, which did not stop until after it had struck the plaintiff and had passed the place where he was lying. The court reversed the judgment in favor of the defendant, and Judge Bradley stated the principle applicable to the case in these words: "The negligence of a plaintiff which is effectual to relieve a defendant from liability for the consequences of his negligence must be proximate in such sense as to contribute concurrently to the result complained of. Although the injury may not have occurred but for the negligence of the former, his antecedent negligence may not be concurrent or simultaneous in such sense as to relieve the latter from the consequences of his negligence." It will be seen that that case turned upon the point that, although the driver of the truck might have been originally guilty of negligence in backing up on the railroad track, yet that negligence was the remote cause of the injury only, and not concurrent or simultaneous with that of the defendant. In other words, after the negligence of the injured party, there was a change in the situation, and a new act of negligence was imputable to the motorman, which the court held to be the proximate cause of the injury.

In *Wasmer v. Railroad Co.*, 80 N. Y. 212, 36 Am. Rep. 608, it appeared that the plaintiff's intestate was killed by a collision with one of the defendant's cars while he was engaged in securing his horse and wagon, which had run upon the track from a point in the street where he had negligently left it. Here it will be seen that the negligence of the deceased consisted entirely in leaving the horse and wagon in the street. The deceased, when injured, was upon the railroad, trying to catch his horse, which had run away; and it was shown that the railroad could have avoided the accident by the exercise of reasonable care on the part of the engineer, who saw the deceased and his horse upon the track in time to avoid the accident. There the negligent act of the deceased consisted entirely in allowing his horse to stand in the street untied, hitched to a wagon, which resulted in the horse becoming frightened and running away. He followed the horse and wagon, and found them on the railroad track, and while attempting to secure them the train ran upon them when he was in full view, and it could have been stopped in time to avoid the accident; and so it was properly held that the negligence of the deceased in leaving the horse untied was the remote, and not the proximate, cause of the injury, while the act of the engineer of the train in running upon him when so engaged, and when he could have been discovered in time to stop the train, was the sole proximate cause of the injury. The principle is frequently illustrated by the case of an intoxicated person who lies down upon a railroad track when no train is in view. That is unquestionably a negligent act, but if he is injured by a passing train, after being discovered by the engineer in time to stop the train and avoid injuring him,

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then the injury may be imputed solely to the negligence of the railroad as the sole proximate cause, his own negligence being so remote as not to preclude a recovery. If, however, the same person had gone upon the track in full view of an approaching train, when there was no reason to suppose that his presence could be discovered by the engineer in time to control the train and avoid injuring him, then the act of the injured party would be regarded as the proximate contributing cause of the injury, and a bar to any recovery.

But we are unable to see how this exception to the general rule, as illustrated by the cases cited, can be applied to the facts of this case, where there was no claim that the motorman acted willfully or recklessly. The claim is that he could have stopped the car within the space of eight feet, and thus avoided the result of the negligence of the deceased. The negligence, if any, was substantially concurrent with that of the motorman, if he was negligent at all. The whole collision was the work of but a moment of time, and to attempt to separate what took place before the contact of the car with the vehicle from what took place afterward would be to create distinctions and refinements that in the end would practically abrogate the rule in such cases that the injured party cannot recover when his negligence is a contributing cause of the injury. In this case, if the deceased was in fact negligent in driving upon the track, when the approaching car was so near as to render the act dangerous, then such negligence cannot be regarded as remotely connected with the accident, within the meaning of the rule stated, but a proximate concurrent cause which precludes a recovery. Unless the character of the accident is such that it can be fairly said that the negligence of the injured party is but a remote cause, the exception is not applicable. It is admitted that upon the assumption that the act of the deceased in driving upon the track was negligent, there could be no recovery if the injury resulted from the first contact of the car with the wagon. But since it did not, and the pressure of the car upon the wagon was not relaxed until some inappreciable space of time thereafter, when the horse and wagon were carried forward for some distance, the negligence of the deceased could be eliminated from the inquiry, and the defendant held liable, upon the sole ground that the motorman was negligent in not bringing the car to a stop before he did; in other words, that under such circumstances the negligence of the motorman was the sole proximate cause of the injury, while that of the deceased was too remote to operate as a defense. This theory left nothing to the jury but the conduct of the motorman, based upon nice calculations as to the distance of the car from the crossing when the deceased turned to drive upon the track, the speed of the car, and the ability of the motorman to stop it in a moment of time. The practical result of this theory is to hold that at the moment of the first contact the negligence of

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the deceased was proximate and contributory, while a moment afterwards it became remote and immaterial. This involves a refinement of reasoning and a process of speculation that is scarcely practical or possible in the determination of the rights of parties in controversies of this character. It permitted the jury to divide a transaction which was in itself indivisible, and to attribute the injury to the conduct of the motorman after the first contact without regard to the negligence of the driver in creating the situation. It was, we think, a mistaken application of the doctrine that a remote act of the injured party, though negligent, does not bar a recovery for the injury, since there was no place for its proper application to the facts of the case. There must, undoubtedly, be a causal connection between the negligence of the injured party and the injury itself; but his fault is deemed to be the juridical cause of the injury when it consists of such an act or omission on the part of a responsible human being as in ordinary and natural sequence immediately results in such injury. This is what is meant by the term "proximate cause" in any inquiry as to the connection of the negligent act with the resultant injury. We may not confound the act with its execution, nor the entire act with the last part or the final consummation, and by that means make the immediate cause the remote cause. Whart. Neg. 1874, §§ 73, 155, 323. The defendant's responsibility could not have been determined by looking merely at the consummation of the injury, but the transaction should be viewed in its entirety, and, if the deceased was guilty of negligence, its effect upon the right of action could not be eliminated from the case after the first contact of the car with the wagon. We recognize fully the force of the rule that the negligence of the injured party is no defense to an action in his behalf when such negligence is connected with the accident only in some remote way, and is not a proximate concurrent cause. But this rule, or rather this exception to a general rule, has no application to a case like the one at bar, where the act of the deceased and the conduct of the motorman were substantially concurrent, and where it is practically impossible to separate the conduct of the injured party in driving upon the track from the injury itself. Therefore we think that, in so far as the learned trial court refused to charge that, if the jury found that the deceased was negligent in going upon the track as he did, there could be no recovery, and that he was not permitted to take doubtful chances as to whether it was safe to cross, the ruling was erroneous, and the request should have been charged.

The question of remote and proximate cause in actions of negligence opens a favorable field for refined and speculative reasoning, as will be seen from the discussions to be found in the books, much of which seems to border closely on casuistry. But there are some general principles, as to which all agree, that will furnish a safe guide in the solution of the ques-



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tions presented by this appeal. One is that in determining whether the cause of the accident is proximate or remote the same test must be applied to the conduct of the injured party as is to be applied to the defendant. The conduct of the latter cannot be judged by one rule and that of the former by some other rule. If, in this case, the motorman had been injured by the collision, instead of the driver of the wagon, and the former had sued the latter for the injury, and the court had refused to charge that the motorman could not recover if his want of due care in the management of the car contributed to the injury, we would then have practically the same question as we have now, and I venture to suggest that there would then be little doubt with respect to the view the court would take in regard to an exception to such a ruling. Assuming that the driver negligently drove upon the track, and at the first moment of contact of the car with the wagon the motorman was killed or injured, could there be a recovery in his behalf irrespective of his neglect to manage the car with due care? Would it then be said, as it is now, in regard to the driver, that, though the motorman was negligent, yet it was only the remote and proximate cause of the injury? It is also the settled rule in all actions of negligence that, where several proximate causes contribute to an accident, and each is an efficient cause, without which the accident would not have happened, it may be attributed to all or any of them, but it cannot be attributed to a cause unless without its operation the accident would not have happened. *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66; *Ruppert v. Railroad Co.*, 154 N. Y. 90, 47 N. E. 971. Assuming that the act of the deceased in driving upon the track in view of the approaching car was at least one of the causes of the accident, without which it would not have happened, it is difficult to see why the defendant's counsel was not entitled to have the court charge the request as made. The question in this case turns upon the exception taken to the refusal of the learned trial judge to charge the general rule that the contributory negligence of the injured party will defeat a recovery. Conceding, as we do, that in some cases it will not, we do not think that this is such a case. It cannot reasonably be asserted that there was any new act of negligence on the part of the motorman that could deprive the defendant of the benefit of the general rule. In the discussion to be found in the books upon this question some expressions are used, which, when applied to the facts of this case, are quite misleading. It is often said that a railroad may not run into a party though he is on the track through his own negligence, or run over him, or run him down. No one questions that proposition when we bear in mind that these expressions imply a willful act, or at least an act which clearly might have

been avoided by the exercise of due care. It would be somewhat of an exaggeration to apply these expressions to the facts of this case. The motorman did not run into the driver of the wagon, or run over him, or run him down, within any fair or proper meaning of those terms as used in the law of negligence. What happened was this: The driver attempted to cross the track diagonally when the approaching car was so near as to render the attempt dangerous. He took the chances on the alertness of the horse and his own capacity to so manage him as to get out of the way of the car. The motorman had reason to believe that the driver would succeed, so he did not stop the car, but took some chances, just as the driver did; and it turned out that they both made a mistake in their calculations, since the hind wheel of the wagon did not get entirely over the track when the car collided with it. A few inches more, and the wagon would have cleared the track, and it is probable that these few inches were lost by the diagonal course that the driver took. To say that under such circumstances the motorman ran the driver down, or ran into him, or ran over him, is simply to describe an accident in very extravagant language. But it is said that such was the finding of the jury, and such the import of the verdict. Grant that all that is so, still the fact remains that they reached that conclusion under a charge from the court which permitted them to disregard entirely the negligent conduct of the driver in taking such chances as he did, and to consider only the question whether it was reasonably possible for the motorman to avoid the consequences of the driver's negligence. The case was thus made to turn upon the mistake of the motorman in assuming that the driver would get out of the way in time, and the conduct of the driver in going upon the track in the immediate presence of danger was thus eliminated from the case.

The form in which the case comes here is somewhat embarrassing. While the learned court below unanimously affirmed the judgment, it certified that there were questions of law involved which should be reviewed in this court; but there was no opinion, and hence we have not the benefit of the views of the court in regard to any of the questions in the case. All the questions of law presented by the record are involved in the exceptions which we have considered. In view of the plaintiff's theory that after the first contact of the car with the wagon it still kept up the speed, and carried both the wagon and the horse farther on upon the track to the extent of 40 feet or more, and then for the first time injured the deceased, there was a fair opportunity for the court below to reverse upon the facts in view of the evidence upon this point. But we must take the case as we find it, and, as the court unanimously affirmed the judgment, the sufficiency of the proof to support the plaintiff's theory of the facts cannot be considered. The exceptions, however, fairly

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presented the question whether the contributory negligence on the part of the deceased—that is to say, his act in driving upon the track, if negligent—was, under the circumstances of the case, a defense to the action; and, since we think there is nothing in the case to take it out of the operation of the general rule, the defendant was entitled to have the jury so instructed.

The judgment should be reversed, and a new trial granted; costs to abide the event.

VANN, J. In giving my reasons for dissenting from the conclusion reached by the majority of the court, I will first state some of the leading facts, which the jury is presumed to have found: On the 17th of September, 1900, at about 6 p. m., George H. Rider, the plaintiff's intestate, was seated in a covered delivery wagon, slowly driving a single horse southerly on the west side of the double tracks of the defendant's railroad in Cortland avenue, Syracuse. As he approached a street which intersects said avenue at an acute angle, he turned to the east, going diagonally across the tracks, in order to enter Raynor avenue. The grade at this point was practically level, the rails were dry, and the street in good order. As he started across, he looked back to the north toward a car of the defendant approaching from behind, which was then from 35 to 100 feet away, according to the varying estimates of the different witnesses. After looking toward the car, he whipped his horse with the lines, but before he got across the tracks the car struck the wagon in the rear as it was moving in a diagonal direction to the east. The motorman, as his car came up to the wagon, was looking in the face of a man standing on the front platform, with whom he was engaged in conversation. The car was moving at the rate of six or eight miles an hour, and the motorman made no effort to check its speed until about the time of the collision. He was then moving so slowly that when he hit the wagon it was not overturned at first, but was shoved along on the track. The horse fell, sprang up, jerked himself loose, and ran away. Although the danger of Mr. Rider was obvious to the motorman, and he could have stopped the car within 8 feet, as there was evidence tending to show, he did not stop, but kept shoving the wagon along for a distance of 20 or 30 feet, when it tipped over. After thus capsizing the wagon, the car kept on for from 5 to 15 feet farther, shoving the wagon along on its side, before it stopped. When the wagon was overturned, Mr. Rider fell out, the wagon fell upon him, and he was under it as it was shoved forward on the track by the advancing car. When the car stopped, his right arm was through the front wheel of the wagon, his left arm was caught in the fender of the car, his skull was fractured, and he soon died from the injuries thus received. The question presented is whether the plaintiff can recover, even if her intestate was negligent in driving upon the tracks, provided, after he had thus reached

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a place of danger, the defendant, by the exercise of reasonable care, could have avoided running over him.

Passing by the conflict in the evidence, as to whether the deceased was negligent in getting on the track, and assuming that he was negligent in this respect, it does not follow that the defendant was absolved from all care, and could run over him with impunity. There was evidence tending to show that after the collision the car, under the circumstances, could have been stopped in 8 feet, but it did not stop until it had shoved the wagon along for at least 20 feet to the point where it tipped over, and even then the car did not stop until it had shoved the wagon on its side, with the deceased under it, for 15 feet farther, as we must assume the jury found. Can we say, as matter of law, that the motorman was justified in not stopping the car, when a human life was in such imminent peril, and he could have stopped it in time to prevent the fatal result? Such a rule would be a reproach to jurisprudence, and an encouragement to reckless conduct. As I understand it, our law is not subject to this imputation, but, on the other hand, the humane rule is in force that, notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury. *Costello v. Railroad Co.*, 161 N. Y. 317, 322, 55 N. E. 897; *Bittner v. Railway Co.*, 153 N. Y. 76, 82, 46 N. E. 1044, 60 Am. St. Rep. 588; *Wasmer v. Railroad Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Silliman v. Lewis*, 49 N. Y. 379; *Austin v. Steamboat Co.*, 43 N. Y. 75, 82, 3 Am. Rep. 663; *Haley v. Earle*, 30 N. Y. 208; *Weitzman v. Railroad Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905; *McKeon v. Railway Co.*, 20 App. Div. 601, 47 N. Y. Supp. 374; *Bump v. Railroad Co.*, 38 App. Div. 60, 55 N. Y. Supp. 962, affirmed on opinion below, 165 N. Y. 636, 59 N. E. 1119; *Kenyon v. Railroad Co.*, 5 Hun, 479; *Radley v. Railway Co.*, 1 App. Cas. 754; *Davies v. Mann*, 10 Mees. & W. 546; *Isbell v. Railroad Co.*, 27 Conn. 393, 404, 71 Am. Dec. 78; *Trow v. Railroad Co.*, 24 Vt. 487, 495, 58 Am. Dec. 191. If the decedent had been injured at the time that the car first came in contact with the wagon, then, upon the assumption that he was negligent in getting on the tracks, there could have been no recovery. His own negligence in that event would have been a concurring, and hence a proximate, cause, even if the defendant had negligently run against the wagon. But the injury was not inflicted when the car struck the wagon. A new act of the defendant, committed after the first contact, was the cause of the injury. It was the shoving of the wagon along, after the motorman knew of the decedent's peril, without stopping, when, by the use of due care, he could have stopped in time to save him, that caused his death. If the negligence of the decedent was the remote, and the negligence of the defendant was the proximate, cause of the accident, it is con-

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ceded that the plaintiff was entitled to recover. Causes are not measured by time, but by events. A proximate cause, juridically considered, is an efficient act of causation with no cause intervening before the effect, while a remote cause is one that is separated from the effect by an intervening cause. The law looks at the proximate cause only. "In jure non remota causa, sed proxima spectatur." What was the proximate cause of the injury in question? It was the failure of the motorman to stop his car, after he saw that it had collided with the wagon, in time to prevent the accident. When the car came in contact with the wagon, it was his duty to stop as soon as he could; and he could have stopped in eight feet, as the jury is presumed to have found, upon sufficient evidence. He not only failed to stop, but he shoved the wagon along for more than three times the distance within which he could have stopped, and the death of the intestate was the natural and probable result. The fact that he had time to stop, but did not, shows that the negligence of the decedent and that of the motorman were not concurrent. The one preceded the other by time enough for the motorman to discharge the duty of prompt action, which the circumstances required. The negligence of the motorman intervened between the negligence of the decedent and the infliction of the injury, and thus became the proximate cause thereof. The negligence of the decedent was remote, as, between it and the injury, another cause intervened, without which the injury would not have been inflicted. The law regards the last cause, without which the accident could not have happened, as the proximate cause. If the motorman had time, after he knew that the decedent was in a dangerous situation, to think and act, and thereby prevent the casualty, the jury could find him guilty of negligence, and that negligence, being nearest to the time of the injury, was proximate, and not remote. The prior negligence of the deceased did not excuse the subsequent negligence of the motorman, not make the latter a remote cause of the accident, because he had the last clear chance to avoid the sacrifice of life. While but few seconds intervened between the two causes, they were as effective as so many hours would have been to make the latter cause proximate, provided there was time enough to exercise the care which would have prevented the latter cause from coming into existence. As we recently held in an important case: "The proximate cause of an event is that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred; and the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it." *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216. In *Costello v. Railroad Co.*, *supra*, which is analogous in fact and principle to the case now before us, Judge Bartlett said: "Even if contributory negli-

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gence is assumed for the argument's sake, the question remains whether the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. \* \* \* Was the plaintiff's alleged contributory negligence the direct proximate cause of the accident? It was for the jury to say whether this injury of the plaintiff would have happened if the motorman had vigilantly discharged his responsible duties in the premises." Page 322, 161 N. Y., and page 899, 55 N. E. In a late case in the supreme court of the United States it was held that: "Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. \* \* \* The jury might well be of opinion that, while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury." *Coasting Co. v. Tolson*, 139 U. S. 551, 558, 559, 11 Sup. Ct. 653, 655, 35 L. Ed. 270. In a still later case the same court said: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 Mees. & W. 546); that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." *Railroad Co. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, 687, 36 L. Ed. 485. The elementary writers are equally emphatic. "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. \* \* \* It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of

then the injury may be imputed solely to the negligence of the railroad as the sole proximate cause, his own negligence being so remote as not to preclude a recovery. If, however, the same person had gone upon the track in full view of an approaching train, when there was no reason to suppose that his presence could be discovered by the engineer in time to control the train and avoid injuring him, then the act of the injured party would be regarded as the proximate contributing cause of the injury, and a bar to any recovery.

But we are unable to see how this exception to the general rule, as illustrated by the cases cited, can be applied to the facts of this case, where there was no claim that the motorman acted willfully or recklessly. The claim is that he could have stopped the car within the space of eight feet, and thus avoided the result of the negligence of the deceased. The negligence, if any, was substantially concurrent with that of the motorman, if he was negligent at all. The whole collision was the work of but a moment of time, and to attempt to separate what took place before the contact of the car with the vehicle from what took place afterward would be to create distinctions and refinements that in the end would practically abrogate the rule in such cases that the injured party cannot recover when his negligence is a contributing cause of the injury. In this case, if the deceased was in fact negligent in driving upon the track, when the approaching car was so near as to render the act dangerous, then such negligence cannot be regarded as remotely connected with the accident, within the meaning of the rule stated, but a proximate concurrent cause which precludes a recovery. Unless the character of the accident is such that it can be fairly said that the negligence of the injured party is but a remote cause, the exception is not applicable. It is admitted that upon the assumption that the act of the deceased in driving upon the track was negligent, there could be no recovery if the injury resulted from the first contact of the car with the wagon. But since it did not, and the pressure of the car upon the wagon was not relaxed until some inappreciable space of time thereafter, when the horse and wagon were carried forward for some distance, the negligence of the deceased could be eliminated from the inquiry, and the defendant held liable, upon the sole ground that the motorman was negligent in not bringing the car to a stop before he did; in other words, that under such circumstances the negligence of the motorman was the sole proximate cause of the injury, while that of the deceased was too remote to operate as a defense. This theory left nothing to the jury but the conduct of the motorman, based upon nice calculations as to the distance of the car from the crossing when the deceased turned to drive upon the track, the speed of the car, and the ability of the motorman to stop it in a moment of time. The practical result of this theory is to hold that at the moment of the first contact the negligence of

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the deceased was proximate and contributory, while a moment afterwards it became remote and immaterial. This involves a refinement of reasoning and a process of speculation that is scarcely practical or possible in the determination of the rights of parties in controversies of this character. It permitted the jury to divide a transaction which was in itself indivisible, and to attribute the injury to the conduct of the motorman after the first contact without regard to the negligence of the driver in creating the situation. It was, we think, a mistaken application of the doctrine that a remote act of the injured party, though negligent, does not bar a recovery for the injury, since there was no place for its proper application to the facts of the case. There must, undoubtedly, be a causal connection between the negligence of the injured party and the injury itself; but his fault is deemed to be the juridical cause of the injury when it consists of such an act or omission on the part of a responsible human being as in ordinary and natural sequence immediately results in such injury. This is what is meant by the term "proximate cause" in any inquiry as to the connection of the negligent act with the resultant injury. We may not confound the act with its execution, nor the entire act with the last part or the final consummation, and by that means make the immediate cause the remote cause. Whart. Neg. 1874, §§ 73, 155, 323. The defendant's responsibility could not have been determined by looking merely at the consummation of the injury, but the transaction should be viewed in its entirety, and, if the deceased was guilty of negligence, its effect upon the right of action could not be eliminated from the case after the first contact of the car with the wagon. We recognize fully the force of the rule that the negligence of the injured party is no defense to an action in his behalf when such negligence is connected with the accident only in some remote way, and is not a proximate concurrent cause. But this rule, or rather this exception to a general rule, has no application to a case like the one at bar, where the act of the deceased and the conduct of the motorman were substantially concurrent, and where it is practically impossible to separate the conduct of the injured party in driving upon the track from the injury itself. Therefore we think that, in so far as the learned trial court refused to charge that, if the jury found that the deceased was negligent in going upon the track as he did, there could be no recovery, and that he was not permitted to take doubtful chances as to whether it was safe to cross, the ruling was erroneous, and the request should have been charged.

The question of remote and proximate cause in actions of negligence opens a favorable field for refined and speculative reasoning, as will be seen from the discussions to be found in the books, much of which seems to border closely on casuistry. But there are some general principles, as to which all agree, that will furnish a safe guide in the solution of the ques-



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care. Such a rule puts life and limb in peril, and withholds from the citizen the protection which it is the duty of courts to provide. My vote is in favor of affirmance.

PARKER, C. J., and GRAY and HAIGHT, JJ., concur with O'BRIEN, J. BARTLETT and MARTIN, JJ., concur with VANN, J.

Judgment reversed, etc.

SHARPE v. SOUTHERN RY. CO.

(*Supreme Court of North Carolina, June 10, 1902.*)

[41 S. E. Rep. 799.]

**Carrier—Negligence in Delivering Machinery—Special Profits—Measure of Damages.\***

Where in an action against a railroad for negligently failing to deliver machinery, which caused the shutting down of a flouring mill, the complaint did not allege nor the evidence show that any definite profit was lost, nor that the contract was such as to inform defendant that any loss of special profit would ensue, it was error to admit evidence showing what the special profit would have been during the time the mill was shut down, as the proper measure of damages was the legal interest on the capital invested, and such other damages as were the direct and necessary result of defendant's negligence.

Appeal from superior court, Iredell county; Coble, Judge. Action by Jas. M. Sharpe against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

L. C. Caldwell, for appellant.

Long & Nicholson, for appellee.

COOK, J. Profits become a measure of damages only when they are within the contemplation of the contracting parties and the data of estimation so definite and certain that they can be ascertained reasonably by calculation; in which case the party in fault must have had notice, either of the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance. *Railroad Co. v. Ragsdale*, 46 Miss. 458; *Pender Lumber Co. v. Wilmington Iron Works* (at this term) 41 S. E. 797; *Mace v. Ramsey*, 74 N. C. 11. It is not alleged in the complaint nor shown by the proof that plaintiff lost any definite and certain profit by the stopping of his mill; nor that the contract was such as to inform defendant that any loss of special profit would ensue to plaintiff by its breach in negligently delaying the shipment and delivery of the machinery,—cogwheel and cogs. The

\*See *Missouri Pac. R. Co. v. McGrath* (Kan.), 3 Am. & Eng. R. Cas., N. S., 424; *Swift River Co. v. Fitchburg R. Co.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 512; *Brown & Haywood Co. v. Pennsylvania Co.* (Minn.), 2 Am. & Eng. R. Cas., N. S., 640. See also, note, 8 Am. & Eng. R. Cas., N. S., 514.

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injury sustained is alleged to have resulted from plaintiff's inability to operate his flouring mill for the want of a cog-wheel and some cogs which he had ordered to be sent to him from the factory in Pennsylvania, and which were negligently delayed in their delivery by defendant company. His mill had been in successful operation, but the cogwheel and some cogs broke, and he did not have others to supply their place, and could get such as he needed only from the factory. By reason of the alleged negligence of defendant the mill was stopped from work a month or more, causing a loss to plaintiff on account of expenses incurred in trying to get his machinery, idleness of his mill, expense of keeping his laborers, etc. To show his loss resulting from the nonuse of the mill, his honor admitted evidence, over defendant's objection, to show what the profits of the mill would have been during that time if the mill had been at work, as appears from the following questions; and answers, viz.: "Q. What was the damage to you in stopping mill from the 3d of February to 23d of March? What would have been your net profits on your capital during this particular time, counting your capital invested, the custom you had at suspension, wheat on hand, deliveries to be made, and condition of things at the mill at this time? A. The lightest months are from May up till harvest. This would be two months and a half. Witness means by 'harvest' threshing time. Witness would say his net profits during this particular time would have been about 12½ per cent." R. R. Hill, plaintiff's witness, testified: "Q. Taking into consideration the capital invested, your opportunity to know the custom and business operation of the mill, the character of the mill site, and everything you know in connection with the value of the property and its operations, state your judgment as to the loss likely to be incurred by plaintiff if mill was suspended from 3d of February to 23d of March. A. Witness should think, from witness' knowledge of the work he was doing, that \$250 or \$300 per month would be a very low estimate." For the error in admitting this evidence a new trial must be awarded. What the profits would have been during that interim would have depended upon the quantity and quality of grain brought to it, regularity with which it was brought, convenience and caprice of the patrons, price of the flour, opportunity of selling and collecting the price for same, and other contingencies, all of which were uncertain, conditional, and indeterminate, and failed to furnish data upon which a reasonably accurate estimate might be made. The facts in this case are very similar to those in *Foard v. Railroad Co.*, 53 N. C. 235, 78 Am. Dec. 277, where a part of the machinery—a steam pipe—was negligently delayed by the railroad company, on account of which the mill was left idle for some length of time. There the court held that the profits which the mill would have made would be too vague, indeterminate, and uncertain to be

*Texas & P. Ry. Co. v. McCarty*

correctly estimated, and held the measure of damages to be the legal interest on the capital invested, expenses incurred in endeavoring to get the delayed machinery, of unemployed employees, and such other damages as were the direct and necessary result of defendant's negligence; to which rule we still adhere. Therefore his honor erred in admitting evidence to show such special or extraordinary profits or income, but should have allowed legal interest on the capital invested, etc., as is held in *Foard v. Railroad Co.*, *supra*.

For the error in admitting such evidence, a new trial is awarded. New trial.

*TEXAS & P. RY. CO. et al. v. MCCARTY.*

(*Court of Civil Appeals of Texas, June 4, 1902.*)

[69 S. W. Rep. 229.]

**Connecting Carriers—Liability for Injury on Connecting Line—Contract.\***

A railway company contracting to ship cattle over its own and a connecting line to a certain point was liable for injury occurring on the connecting line.

**Same—Same—Judgment Over.**

A railway company contracting to ship cattle over its own and a connecting line, and sued for injury occurring on the connecting line, could not complain of a judgment over in its favor against the connecting company.

**Same—Same—Same.**

The connecting company could not complain, since it was primarily liable.

**Service of Process—Presumptions—Waiver of Defect.**

Where, in an action against a railway company, citation was served on its traveling passenger agent, and, before the appearance term, had passed into the hands of the attorneys of another defendant, who negotiated for and obtained a continuance on behalf of both defendants, stating to plaintiff's counsel that they would either represent such company, or have some one else do so, at the next term, it should be presumed that the citation was sent to such attorney by the proper officer of such company; and the defect, if any, in the service of such citation, was waived by such voluntary appearance in the action.

**Appeal—Review—Damages.**

Where, in an action against a railway company for damages to cattle shipped over its road, default is taken against such company, with writ of inquiry, and no objection is made to the testimony of witnesses as to the extent the cattle were damaged, in dollars,—the market value not being mentioned,—it cannot object on appeal that the proper measure of damages was not considered.

Appeal from Van Zandt county court; John W. Davidson, Judge.

Action by J. M. McCarty against the Texas & Pacific Railway Company, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

\*See foot-note appended to *Chicago, etc., Ry. Co. v. Western Hay & Grain Co.* (Neb.), 2 R. R. R. 953, 25 Am. & Eng. R. Cas., N. S., 953; *Hartley v. St. Louis, K. & N. W. R. Co.* (Iowa), 1 R. R. R. 559, 24 Am. & Eng. R. Cas., N. S., 559.

## Texas &amp; P. Ry. Co. v. McCarty

- Cate, Geddie & Bruce, for appellants.  
W. B. Wynne and W. C. Blanks, for appellee.

JAMES, C. J. This is an action for damages to cattle shipped from Wills Point, Tex., to Roff, Ind. T. The line of the Texas & Pacific Railway Company carried the cattle to Sherman, and from there to Roff the connecting carrier was the St. Louis & San Francisco Railway Company. Both railway companies were sued, and the judgment rendered was against both companies for \$1,000, with judgment in favor of the Texas & Pacific Railway Company over against the other. Both defendants have appealed.

The points for reversal advanced by the Texas & Pacific Railway Company are: (1) That the judgment should not have been against it, because the petition and the testimony showed that all the damage occurred on the line of its codefendant; and (2) that the court erred in refusing to correct the judgment, upon this appellant's request, for the reason that there was no pleading to support the judgment which was rendered in its favor against its codefendant. The latter objection to the judgment is also raised by the St. Louis & San Francisco Railway Company.

The petition alleged that plaintiff contracted with the Texas & Pacific Railway Company at Wills Point to ship the cattle over both lines to Roff, Ind. T. The testimony sustained this allegation, and there is nothing in the petition or evidence to indicate that the Texas & Pacific Railway Company undertook to limit its liability to its own line. Regardless of the statute of 1899 (p. 214), which it is contended would impose liability on the Texas & Pacific Railway Company, but which is an erroneous interpretation of that act,—it dealing, as we believe, simply with venue,—the general rules of law make said company liable for injury done the cattle on the line of its connecting carrier, under the pleading and evidence in this record.

Upon the other point: Upon the undisputed evidence, the St. Louis & San Francisco Railway Company was primarily liable. The Texas & Pacific Railway Company has no legal ground upon which to object to the judgment against it. It is not injured by the judgment awarded it against its codefendant, as it has it in its power to refrain from availing itself of the benefits of such judgment, if it desires. Hence it cannot well complain, and it has no need of invoking judicial action to set aside a judgment, the enforcement of which is entirely under its own control.

The judgment over being against the other defendant, it has more substantial ground for complaint. But we do not see how it is prejudiced by the form of the judgment. Certainly, under the evidence, it could not have complained if the judgment had been against it alone, and the Texas & Pacific Railway Company exonerated. Nor do we see how it can complain of the judgment as rendered, because as to it the

effect is the same as if judgment had been against it alone. Instead of a judgment against it alone, the court has also rendered judgment against the Texas & Pacific Railway Company, and in doing this it practically, and in effect, subrogated the Texas & Pacific Railway Company to the plaintiff's judgment against the St. Louis & San Francisco Railway Company, in the event the former shall have been required to satisfy plaintiff. It was inherent in what the court had before it, and proper in equity, for the court, when it rendered judgment against the Texas & Pacific Railway Company, upon its constructive or secondary liability, to protect it by giving it judgment over; and of this the other company, which was primarily liable, has no reason to complain, although this was not asked for in any pleading.

The appellant the St. Louis & San Francisco Railway Company complains of the taking of a judgment against it in the absence of proper service upon it. The judgment recites that, the appellant having been duly served with citation and failed to appear, the court gave judgment against it by default, with writ of inquiry. The case was tried, the Texas & Pacific Railway Company having appeared and defended; and upon the testimony the court gave judgment against both defendants, as above stated. It is shown by the record that the citation for the St. Louis & San Francisco Railway Company was served upon Mr. Tuley, its traveling passenger agent at Dallas, who, it is contended, was a proper person upon which to serve it. We pretermitt this question, because not necessary, in view of facts which appear. The citation served on Tuley was, prior to the appearance term, in the hands of the local attorneys of the Texas & Pacific Railway Company at Wills Point. It was sent by the general attorneys of the Texas & Pacific Railway Company to the latter's said local attorneys, with request for the latter to answer in the case for the St. Louis & San Francisco Railway Company. How it found its way to the general attorney of the Texas & Pacific Railway Company is not shown, but it could be presumed that it was sent him by the proper officer of the other company. From the motion for new trial it appears that there was an agreement between the general attorneys of the two companies which would account for their direction given these attorneys to represent the St. Louis & San Francisco Railway Company in this suit. They did not file any pleading for either defendant at that term, but negotiated for and obtained a postponement or continuance of the case for that term on behalf of the defendants, as they could not get ready for trial at that term. They stated to counsel for plaintiff at the time that they did not want to represent the St. Louis & San Francisco Railway Company, but would either represent it themselves, or have some one else to do so, at the next term. The postponement was evidently thus secured in behalf of both defendants. An appearance is said to be strictly

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voluntary when, without the service of process, a defendant in some manner indicates his intention to submit his person and cause to the jurisdiction of the court. *York v. State*, 73 Tex. 655, 11 S. W. 869. We think the facts above shown must be held to constitute a waiver of any defect in the service, and an appearance in the case by attorneys. *Auspach v. Ferguson* (Iowa) 32 N. W. 249; *Cook v. Bank* (N. C.) 39 S. E. 746. Not having filed or presented any pleadings, there was no error in rendering judgment against it by *nil dicit* or default, with a writ of inquiry.

The cattle were shipped to the territory to be placed in pasture, and not for immediate sale. The market values of the cattle as they arrived and as they should have arrived, as held to be the proper method of determining the damage in *Railway Co. v. Stanley* (Tex. Sup.) 33 S. W. 109, was not what was shown. The extent which the cattle were damaged, in dollars, as estimated by witnesses, was shown. It is observed that the Texas & Pacific Railway Company made no objection to the testimony concerning damages, and makes no point here in that regard. But the St. Louis & San Francisco Railway Company, against which default was taken, with writ of inquiry, makes the objection that the correct measure of damages was not adopted in arriving at the amount. The difference in values was taken, but not by evidence of market values. There was no testimony that the cattle had a market value at Roff. Nothing was said in the motion for new trial about market values. Besides, this defendant was not cut off by the judgment by default from appearing in the writ of inquiry and objecting to the testimony which was offered to show the extent of damages, and we do think it now has no right to complain of the verdict, unless it be palpably excessive, which is not the case.

The judgment is affirmed.

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PORTER v. CHARLESTON & S. RY. CO.

(*Supreme Court of South Carolina, March 24, 1902.*)

[41 S. E. Rep. 108.]

**Constitutionality of Statute Providing Penalty for Failure to Pay Damage on Freight.\***

22 St. at Large, p. 443, providing a penalty on common carriers for failure to pay or refuse to pay damages on freight within 60 days, is not in violation of Const. U. S. Amend. 14, as denying equal protection of law.

Same.

22 St. at Large, p. 443, providing a penalty on carriers for failure to pay damages on freight within 60 days, is not unconstitutional as in violation of the interstate commerce clause of the constitution.

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\*See *Louisville & N. R. Co. v. Com.* (Ky.), 4 Am. & Eng. R. Cas., N. S., 193.

Porter v. Charleston & S. Ry. Co

Appeal from common pleas circuit court of Beaufort county.

Action by H. H. Porter against the Charleston & Savannah Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The decree upon questions involved on appeal is as follows:

"This action comes before this court upon an appeal, brought by defendant, from the judgment of Magistrate H. D. Burnet, rendered herein. On page 443 of the twenty-second volume of the Statutes of South Carolina, among the acts of 1897, we find an act entitled 'An act to require all common carriers to pay all loss of or damages for loss, damage and breakage of any article shipped over their lines or to refuse to do so within a certain time.' 'Section 1. Be it enacted by the general assembly of the state of South Carolina, that from and after the approval of this act, all common carriers doing business in this state shall be required to pay for, or refuse to pay for, all loss, breakage or damage from breakage, damage or loss of articles shipped over the lines of said common carriers, within sixty days from the time a claim for the said articles so lost, broken or damaged, shall be made. Sec. 2. That in case the said common carrier shall not pay, or refuse to pay, said claim for said loss, breakage or damage, as set out in sec. 1 of this act, within the sixty days therein provided for, then the said common carrier shall be liable for the sum of fifty dollars for each offense as penalty, in addition to the amount of said loss or damage, to be collected of the claimant in any court having jurisdiction of the same. Sec. 3. All acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.'

"The amended complaint alleges, inter alia, that defendant is a common carrier; that on or about the 18th day of December, 1900, defendant did receive a certain lot of plows in Charleston, S. C., to be conveyed to Ridgeland, S. C., and that the plows were damaged in transit; that plaintiff, through his attorney, filed a claim for said damage with defendant on the 31st day of December, 1900; and that defendant has neither paid nor refused to pay said claim in sixty days after the claim was filed with defendant, and demands judgment for \$50, the penalty as provided by the aforesaid act.

"The answer admits several of the allegations of the complaint, but denies the allegations of the complaint as to the alleged filing of the claim, and that it is liable for the penalty provided by the act, and for a further defense: '(1) Defendant alleges that the act of 1897, referred to in the complaint, requiring railway companies to pay, or refuse to pay, claims within sixty days after presentment, and imposing a penalty of \$50 for noncompliance, is unconstitutional—First, on the ground that it discriminates against common carriers, and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of their state; and, secondly, on the ground that it cannot apply to interstate shipments.'

"Judgment for \$50, the penalty provided in the act, was rendered in the magistrate's court in favor of plaintiff and against defendant.

"Defendant's first ground of appeal reads: 'Because the act of 1897 requires of railway companies to pay, or refuse to pay, claims within sixty days after presentment, and imposing a penalty of \$50 for noncompliance, is unconstitutional—First, on the ground that it discriminates against common carriers, and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of their state; second, on the ground that the act cannot apply to interstate shipments.'

"This exception, like the answer, charges that the act is unconstitutional; but it does not specify what article, chapter, section, or provision of the constitution it violates. The answer alleges that the act 'discriminates' against common carriers; but makes no reference to any section of the constitution, nor provision thereof. The answer and the exception is all that I have before me. An act of the general assembly is presumed to be constitutional, and when it is alleged to be unconstitutional the party attacking it should clearly and specifically allege what article and section of the constitution prohibits or inhibits the enactment. The courts will and must sustain the constitutionality of an act, unless the act is specifically assailed, and it appears that the act in question is in violation of some provisions of the constitution. What provision of our constitution does the act in question violate? Upon this subject the defendant is silent. It will be noted that the exception under consideration refers to the act of 1897 and to railroad companies. The act does not, in terms, mention railroad companies, and includes 'all common carriers doing business in the state.' Railroads are included in the term 'common carriers,' just as common carriers by water are. The answer alleges that the act is unconstitutional because it discriminates against common carriers, and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of the state. The answer does not state the terms of the act in full. The common carrier is liable for the penalty if it 'shall not pay, or refuse to pay,' the claim. The act evidently is intended to prevent an evil. Counsel for plaintiff in argument asserted that the purpose and intent of the act was to break up a custom and habit of common carriers of 'pigeon holing' such claims, and forcing claimants to wait for compensation a most unreasonable time, at the will and pleasure of the common carrier. I don't know the special evil or evils legislated against; nor is it necessary for the court to go behind the act. Its terms are plain, easily understood, and it is the duty of the court to enforce the law, if it is constitutional.

"Common carriers serve the public, are an important factor in a state. In many respects they differ from other



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citizens or corporations. The regulation provided in the act of 1897 seems to be reasonable, proper, and legal, and the penalty provided for an infraction of such regulation also appears to be reasonable and legal. What practical result would follow from the regulation, if its provision could not be enforced? And I can see no objection to the method provided in the act. The act in question does not go as far as do the acts in regard to the refusal of a railroad company to furnish to consignees itemized statements of freight charges or the settlement of freight charges. Rev. St. 1893, §§ 1652, 1653, and 1654. I might refer to other acts, but it is not necessary. The acts have stood for years, and, so far as I am aware, have been enforced. I can, upon their appeal, only hear such matters as were passed upon by the magistrate and duly certified to, neither the answer, exceptions, nor the record of the case showing ruling of the magistrate to the effect that the act is not in violation of any provision of the constitution. The decision rendered by the magistrate does not necessarily include any ruling upon the constitutionality of the act; because, as we have seen, the answer raised no issue such as he could pass upon. I fail to see the effect of the exception, 'that the act cannot apply to interstate shipments.' The act refers to all common carriers in their state. Ridgeland is in Beaufort county, in this state. It was there the claim was made of defendant company; it was there the freight was to be delivered; it was there the plaintiff found his plows in the depot broken; and it was there the penalty attached, if it attached anywhere. No reason has been given in support of their exception, and, as I am aware of no good reason for supporting it, it is overruled. If the act is in contravention of any act of congress, or supposed to be so, the answer should, by appropriate allegations, have raised the issue. This exception is overruled. \* \* \*

The defendant appeals on the following exceptions:

"First. That his honor should have held that the act entitled 'An act to require all common carriers to pay all loss of or damages for loss, damage and breakage of any articles shipped over their lines or to refuse to do so within a certain time, approved 25th day of February, A. D. 1897,' was unconstitutional, null, and void, and in violation of article 1, § 5, of the constitution of the state of South Carolina, in that it operates to deprive common carriers of property without due process of law, and denies to them the equal protection of the law.

"Second. That his honor should have held that the act entitled 'An act to require all common carriers to pay all loss of or damages for loss, damage and breakage of any articles shipped over their lines or to refuse to do so within a certain time, approved 25th day of February, A. D. 1897,' was unconstitutional, null, and void, and in violation of article 14, § 1, of the constitution of the United States, in that it operates to

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deprive common carriers of property without due process of law, and denies to them the equal protection of the law.

"Third. That his honor should have held that the act entitled 'An act to require all common carriers to pay all loss of or damages for loss, damage and breakage of any articles shipped over their lines or to refuse to do so within a certain time, approved 25th day of February, A. D. 1897,' has no application to interstate shipments of freight by common carriers.

"Fourth. That his honor should have held that the act entitled 'An act to require all common carriers to pay all loss of or damages for loss, damage and breakage of any articles shipped over their lines or to refuse to do so within a certain time, approved 25th day of February, A. D. 1897,' was unconstitutional, null, and void, and in violation of article 1, § 5, of the constitution of the state of South Carolina, in that it discriminates against common carriers, and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of this state."

Mordecai & Gadsden, for appellant.

G. M. Buckner, E. F. Warren, and A. M. Boozer, for appellee.

McIVER, C. J. (after stating the facts). This action was instituted in a magistrate's court, and carried thence by appeal to the court of common pleas, and from the judgment of the last mentioned court this appeal has been taken. The object of the action was to recover the penalty imposed by the second section of an act entitled "An act to require all common carriers to pay all loss of or damage for loss, damage and breakage of any article shipped over their lines or to refuse to do so within a certain time," approved 25th February, 1897. 22 St. at Large, p. 443. The pleadings in the case were more formal than is usual in a magistrate's court, the plaintiff having filed a regular complaint setting forth his cause of action, to which the defendant filed a formal answer setting up two defenses; the latter being that the act of 1897, upon which the plaintiff's action was based, is unconstitutional for two reasons, which are thus stated in the answer: "First, on the ground that it discriminates against common carriers and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of this state; second, on the ground that it cannot apply to interstate commerce." The case was heard by the magistrate, who rendered judgment in favor of the plaintiff without in any way alluding to the constitution at question presented by the answer. From this judgment defendant appealed to the circuit court upon the two grounds set out in the "case," the two grounds upon which the first exception is based being identical with those stated in the answer, and the second ground of appeal, which is not involved in this appeal, need not be stated here. The

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circuit judge rendered judgment dismissing the appeal and affirming the judgment of the magistrate, and from such judgment of the circuit court this appeal has been taken upon the several exceptions set out in the record. The judgment of the circuit judge as it appears in the "case" (except so much thereof as relates to the second exception to the magistrate judgment), together with the exceptions thereto, will be embraced in the report of this case by the reporter.

(Question of pleading omitted.)

This brings us to the consideration of what is the real question in this case, viz., whether the act of 1897 is in conflict with the provisions of the constitution either of this state or that of the United States. The provisions with which the act is claimed to be in conflict are that contained in section 1, article 14, of the constitution of the United States, and that contained in section 5, article 1, of the constitution of this state. As these provisions are practically identical, both prohibiting the denial to any person of the equal protection of the laws, these two constitutional provisions need not be considered separately. The argument is, as we understand it, that by the provisions in the act of 1897 subjecting common carriers to a penalty for not paying or refusing to pay a claim for any loss of, or damage to, any article intrusted to them for transportation within 60 days from the time when such claims shall be made, the act comes in conflict with the constitutional provision above referred to, and thus, it is contended, discriminates against common carriers, by subjecting them to a liability not imposed upon any other person, or any other class of persons, and thus denying them the equal protection of the laws. It is quite true that the act of 1897, above referred to (a copy of which is set out in the judgment of the circuit court, which is embraced in the report of this case, and, therefore, need not be repeated here) applies only to persons or corporations engaged in the business of common carriers, and has no application to any other person or class of persons; but this does not necessarily bring the act into conflict either with the constitutional provision of this state or that of the United States, as has been held by this court in *McCandless v. Railroad Co.*, 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440, and *Blum v. Richland Co.*, 38 S. C. 291, 17 S. E. 20, and by the supreme court of the United States in the cases cited by Mr. Justice Brewer in the case of *Railway Co. v. Ellis*, 165 U. S., at page 155, 17 Sup. Ct., at page 257, and 41 L. Ed., at page 666. These cases establish the doctrine that, while the object of these constitutional provisions, both federal and state, is to prevent discriminatory legislation, yet they cannot be so construed as to deprive the lawmaking department of the government of the power to make a classification of its citizens; so that laws may be passed which, if applicable alike to all persons, natural or artificial, belonging to a given class, are not violative of the provisions of the

constitution forbidding a denial to any person of the equal protection of the laws. As is said by Mr. Justice Brewer, in delivering the opinion of the court in *Railway Co. v. Ellis*, at the page above cited, "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undoubtedly true (citing numerous cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." The classification made by the act of 1897, the validity of which is here questioned, is that of common carriers, and the provisions of the statute apply alike to every person, natural or artificial, engaged in the business of a common carrier. If, therefore, this is not an arbitrary classification, but rests upon distinctive differences between the business of a common carrier and that of any other class of persons, then the fact that the provisions of the act apply alone to one class of persons, common carriers, will not render the act obnoxious to the constitutional provisions above referred to. That there are well marked distinctions between the kind of business carried on by a common carrier and that of any other class of business is manifest, and has always been recognized. As is said by the late Judge Cooley, in his valuable work on *Constitutional Limitations*, at page 390 of the second edition, "The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens,"—and the distinguished author proceeds to give common carriers as one of the instances in which this may be done. In addition to this, it will be observed that the default for which the penalty is imposed is, not in failing to pay a debt, but in failing to pay, or refusing to pay, a claim of a character peculiar to common carriers, to wit, a claim for the loss of or damage to articles shipped over the lines of such common carrier. It was, therefore, not a debt of any character which might be contracted by any one, but it was a liability of such a character as none but a common carrier would be likely to incur. The case of *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, from which we have quoted

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above, seems to be largely, if not mainly, relied upon by counsel for appellant to sustain his contention that the act of 1897 is unconstitutional. We think, however, that this case differs widely from that; for here the act of 1897 applies to all common carriers, while in the case cited, the Texas statute, which was there under consideration, did not apply to all common carriers, but was limited in its application to one subdivision of the class known as common carriers, to wit, railway corporations. Again, the Texas act applied to any claim made "for personal service rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," etc., and was not limited to such claims as were peculiarly incident to the business of a common carrier, as in the case of our act of 1897. This is quite sufficient to differentiate that case from this. We are of opinion that our act of 1897 was passed, not for the purpose of enforcing more speedy payment of claims against common carriers, but for the purpose of enforcing more prompt action on the part of common carriers in passing upon the validity of claims presented against them, and that the time allowed by the act—60 days after presentation of any claim—is reasonable, and sufficient to afford an opportunity to investigate the propriety and legality of the claims; and that though the provisions of the act are applicable only to claims of a certain specified character against common carriers, and do not apply to any other class of persons, yet that does not bring the act in conflict with any constitutional provision, either state or federal, and hence the circuit judge could not have properly held the act of 1897 to be unconstitutional; and the exceptions raising this point must be overruled.

It only remains to consider the appellant's third exception, which imputes error to the circuit judge in not holding that the act of 1897 has no application to interstate shipments of freight by common carriers. In the first place, we are unable to perceive anything in the record before us showing that this was an interstate shipment of freight. On the contrary, the allegation in the complaint is that the defendant company did, "on the 18th day of December, 1900, receive a certain lot of plows in the city of Charleston, S. C., consigned to above-named plaintiff, at Ridgeland, S. C., and that the plows were damaged in transit." But, even if it had appeared to have been an interstate shipment, we do not see wherein our act of 1897 conflicts with the interstate commerce clause of the constitution of the United States, or with any act of congress upon that subject. No such act has been cited, and we do not see any suggestion of conflict. The act of 1897 does not purport to regulate or in any way interfere with interstate shipments of freight. It simply imposes a certain duty upon "all common carriers doing business in this state,"

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which in no way relates to the transportation of the freight, but relates to a duty required of the common carrier after the transportation is completed. We do not think that appellant's third exception can be sustained.

The judgment of this court is that the judgment of the circuit court be affirmed.

COMMISSIONER OF RAILROADS *v.* GRAND RAPIDS & I. RY. CO.

(*Supreme Court of Michigan, April 8, 1902.*)

[89 N. W. Rep. 967.]

**Reorganization by Purchaser under Mortgage—Application of Statute Fixing Rates.**

Under 2 Comp. Laws 1897, § 6224, providing in case of foreclosure and sale of a railroad under a mortgage the purchasers may organize a corporation for management of it, and such corporation shall have the same rights as secured to the original company, and on filing of a certain certificate the corporation shall become complete, "with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject," the new company is subject to provisions of the railroad law fixing rates of transportation, though the old company might not be so subject.

**Same—Same—Impairment of Property Rights.**

Amendment of 1889 to the railroad law, withdrawing right of bondholders to reorganize, in case of foreclosure of a railroad under a mortgage, except on condition of submission to rates of transportation fixed by the statute, is not an impairment of property rights, even in case of mortgage already given; reorganization being only part of the remedy of the bondholder, and not being essential to enable the purchaser at foreclosure sale to operate the road in accordance with the franchise of the original company.

Certiorari to circuit court, Kent county; Alfred Wolcott, Judge.

Mandamus, on the relation of the commissioner of railroads against the Grand Rapids & Indiana Railway Company. Peremptory writ issued, and respondent brings certiorari. Affirmed.

T. J. O'Brien and James H. Campbell, for appellant.

Horace M. Oren (Roger Irving Wykes, of counsel), for appellee.

MONTGOMERY, C. J. This is certiorari to review proceedings of the circuit court, in which a mandamus was issued, requiring respondent to reduce its fare. It appears that the respondent was organized as a corporation on the 15th of July, 1896, under the railway law then in force, which, in part 9 of section 9 (2 Comp. Laws 1897, § 6234) fixes the rate of fare of railroad companies whose passenger trains earn more than \$2,000 per mile at 2½ cents per mile. The respondent comes within this provision. The respondent company was organized, however, by purchasers of the property of the Grand Rapids & Indiana Railroad Company, on foreclosure of a mortgage given on the 1st day of August, 1884. At the time

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this mortgage was given the only limitation on the power to fix rates of fare was that it should not exceed three cents per mile. It is the respondent's contention that under 2 Comp. Laws 1897, § 6224, being section 2 of the railway act, it succeeded to all the rights and privileges of the Grand Rapids & Indiana Railroad Company. The answer states that the rate of fare of 2½ cents per mile is unreasonable and inadequate, and, as this statement is admitted by demurrer to the answer, it is the respondent's contention that such provision would be invalid as against the original railroad company, and that, as the respondent has succeeded to the rights of the railroad company, it is equally invalid as to it. The contention that a statute fixing unreasonable rates would constitute an impairment of the property rights of the old company, is based upon numerous decisions of the federal supreme court and of this court. The subject was discussed in *Smith v. Railway Co.*, 114 Mich. 460, 72 N. W. 328, and the rule was recognized in both opinions in that case that legislation, the effect of which is to deprive a corporation of its property, cannot be sustained under the power to alter, amend, or repeal. See, also, *Attorney General v. Looker*, 111 Mich. 498, 69 N. W. 929; *Detroit v. Plank Road Co.*, 43 Mich. 140, 5 N. W. 275. And that the fixing of unreasonable rates is an infringement of property rights of an existing corporation, within the meaning of the fourteenth amendment, appears to have been determined by the federal supreme court in *Railway Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; and *Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. The question in this case, however, is whether the defendant corporation stands in the same position in this respect as would the original company have occupied had there been no foreclosure. The briefs contain an elaborate discussion of the question as to how far and in what respect a charter or a law authorizing an incorporation is a contract. We do not find it necessary to discuss this question at length, for, in our view, it cannot admit of doubt that corporations formed under an existing law will not be heard to question the rates fixed by the statute. They cannot avail themselves of the provisions of the law which give them the right to do business and disregard those provisions which are onerous. This was the view taken by this court in *Jackson & S. Traction Co. v. Commissioner of Railroads* (Mich.) 87 N. W. 133, and has the support of authority in other jurisdictions. See *Thomp. Corp.* § 5257, and cases cited. The case turns upon the question of whether the respondent is in position to insist that it occupies precisely the same ground that the former corporation would but for the foreclosure. 2 Comp. Laws

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1897, § 6224, provides that: "In case of the foreclosure and sale of any railroad or any part of any railroad, under any trust deed or mortgage, \* \* \* it shall be competent and lawful for the parties who became purchasers and such others as they may associate with themselves, to organize a corporation for the management of the same, and issue stock in the same in shares of one hundred dollars each, to represent the property in said railroad; and such corporation, when organized, shall have the same rights, powers and privileges as are or may be secured to the original company, whose property may have been sold under and by virtue of such mortgage or trust deed." The section then provides for a declaration or certificate of the purchasers at the sale, setting forth the description of the property, etc., the amount paid, and the stockholders to whom stock is to be issued, which shall be addressed to the secretary of state, and proceeds: "And being filed and recorded in his office, the said corporation shall become complete, with all the powers and rights secured to railroad companies under this act, to all the provisions of which, and amendments thereto, it shall be subject." When the mortgage in question was given, the section fixing the rates contained no limitation except that they should not exceed three cents per mile. It is contended that the legislature could not, by the amendment of 1889, enacted after the mortgage was made, withdraw from the bondholders the right to reorganize, except on condition of submitting to the rates fixed by the statute. This question would seem to depend upon whether the legislation affected the bondholders' remedy simply, or affected the right of property. It may be urged with some force that, if the legislature might prohibit any incorporation, except on the terms of acceptance of unreasonable rates, the bondholders would be remediless, and that the right to reorganize is, in effect, a part of the mortgage contract, and that the rights and franchises of the debtor corporation vest in the purchaser on reorganization. If this view be adopted, and particularly if it be said that the purchasers could not, except through the instrumentality of a corporation, conduct the business of the corporation, it would be difficult to say that the amendment affects the remedy merely. Its effect would be, under such construction, to cut off the remedy, pro tanto at least; and, if the rates are so far unreasonable as to make the operation of the road a burden, the effect would be to cut off the remedy wholly, thus rendering the franchise valueless. This would be beyond the power of the legislature. *Mundy v. Monroe*, 1 Mich. 68; *Cargill v. Power*, Id. 369. But is this the effect of the amendment? May it not be said that the rights and property of this corporation vested in the purchaser upon the foreclosure sale, and that, independent of any express statutory authority to operate, the purchaser was authorized to maintain his property rights, and to operate this railroad in accordance with



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the franchise of the original company, and under precisely the same conditions? If this be so, the authority to incorporate was not essentially a part of the property right, but was a privilege granted by the state, which might be withdrawn. This latter view is enforced by the fact that under the constitution the legislature possessed the power to alter, amend, or repeal this statute; and by the further fact that under section 2, as it has always existed, the right to reorganize by the purchaser at a foreclosure sale was limited by the provision that the corporation should be vested with the powers and rights secured to railroad companies under the act, to all the provisions of which, and the amendments thereto, it should be subject. More than this, the legislature possessed the power, under the constitution, to repeal the statute. It could do this one day before the reorganization or the next day after. While, by this means, it could not cut off the mortgage, or divest the mortgagee of his property rights, it could deprive him of the power of reorganization.

We think the legislation was not unconstitutional, and the order of the circuit court is affirmed, with costs.

LONG, J., did not sit. The other justices concurred.

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MEARS *et ux.* v. NEW YORK, N. H. & H. R. CO.

(*Supreme Court of Errors of Connecticut, July 18, 1902.*)

[52 Atl. Rep. 610.]

**Carriers of Freight—Limiting Liability to Own Line—Construction of Shipping Receipt.**

A shipping receipt providing that "no carrier or party in possession" should be liable for any damage by wet should be read as providing that no carrier should be liable for damage by wet not due to its own negligence or that of its servants.

**Same—Damage by Water—Burden of Proof.**

The burden is on a carrier, where goods are injured by water, to show that the injury was not due to its negligence.

**Limiting Liability—Reduced Rate.**

A provision in a shipping receipt that no carrier shall be liable for damage by wet not due to its own negligence or that of its servants is binding where entered into in consideration of a reduced rate of shipment.

**Same—Same—Connecting Carrier Entitled to Benefit.**

A connecting carrier, though not especially named in the receipt, is entitled to the benefit of the provision.

**Shipping Receipt as a Contract.**

Objection that the instrument is a mere receipt, and not a binding contract, is untenable.

**Damage by Water—Negligence.**

A jury need not infer negligence in a common carrier from the mere fact that goods are wet while in its possession, but such point may be considered in connection with the other evidence in the case.

**Shipping Receipt—Presumption as to Condition of Goods.**

A shipping receipt for boxed goods, reciting that they are received "in apparent good order except as noted [contents and condition of contents

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of packages unknown],” raises no presumption that the goods are received in good condition.

**Damage by Water—Consignee Not Estopped.**

A consignee of goods employed an express company to cart the goods to his home, and its agent at the depot looked at the box containing the goods, and signed a “clear” receipt, making no complaint: *held* not to preclude the consignee from showing that the goods were wet.

**Same—Evidence.**

In an action against a railroad company for damage to freight by water, defendant was properly allowed to show that the expressman receipting for the goods at the depot looked at the box containing them, and made no complaint.

**Same—Same.**

The man who carted the goods to plaintiff’s house testified that the weather was clear at the time. It appeared that it rained later in the day: *held*, that a question asked him by defendant as to the care he took on rainy days was properly excluded.

**Same—Same—Records of Weather Bureau.**

Defendant was properly allowed to introduce the records kept by the United States weather bureau at Boston, to show the state of the weather at the place of shipment, which was 10 miles distant; it appearing that that was the nearest weather bureau.

**Same—Same.**

Evidence that the person shipping the goods was offered two modes of shipment, one called “owner’s risk,” at a certain rate, and the other “shipper’s risk,” at a higher rate, and chose the former, was admissible.

Appeal from court of common pleas, New Haven county; Leverett M. Hubbard, Judge.

Action by Carl A. Mears and wife against the New York, New Haven & Hartford Railroad Company for injury to goods received for transportation. Judgment for defendant, and plaintiffs appeal. Error.

George E. Beers and Harry W. Doolittle, for appellants.

George D. Watrous, Harry G. Day, and John W. Edgerton, for appellee.

BALDWIN, J. The plaintiffs employed one McDonald, in Waltham, Mass., to pack and box there a piano, and to make a contract with the Boston & Maine Railroad Company for its shipment to New Haven, Conn., at the most reasonable rate. McDonald, having packed and boxed it, delivered it to the railroad company on October 10th, taking a paper entitled a “shipping receipt,” signed by the local freight agent, which described it as “1 piano, boxed, \* \* \* received \* \* \* in apparent good order, except as noted [contents and condition of contents of packages unknown].” This paper contained the following provision: “It is mutually agreed, in consideration of the rate of freight to be paid for this service, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, shown or indorsed hereon [see rules and conditions on back

hereof], and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns, as just and reasonable." One of the indorsed conditions was that "no carrier or party in possession" of the goods shipped should be liable for any damage thereto by wet. On October 12th the railroad company delivered the car containing the piano to the defendant at Northampton, Mass., and on the next day the defendant sent the car on to New Haven, where it arrived before October 16th. As soon as the plaintiffs were apprised of its arrival, they employed an express company to cart the piano to their house. When received by them, the box was wet without and within, and the piano badly injured by water. The express company had an agent at the freight depot, who had looked at the box while stored there, and signed a "clear" receipt for it, making no complaint as to its condition.

The plaintiffs' complaint alleged a delivery of the piano by them at Northampton to the defendant, as a common carrier, to be transported to New Haven, and its injury by water, while in transit, through the defendant's default. The answer denied any negligence, and set up the shipping receipt as being the contract of shipment. The reply denied the authority of McDonald to enter into any such contract. The court of common pleas instructed the jury that, if they found his action to have been either authorized or ratified, then the shipping receipt was a valid contract, between the parties to it, which exempted the defendant from liability for damage by wet not due to its own negligence or to that of its servants, and the plaintiffs could not recover without showing by a fair preponderance of evidence that the wetting was due to such negligence. In this there was error. If the special contract bound the plaintiffs, the defendant was nevertheless chargeable if, having received the piano dry, it delivered it to them wet, unless it could show affirmatively that the wetting occurred without its fault. A common carrier receiving goods for transportation under a special limitation of liability is a common carrier still. *Railroad Co. v. Lockwood*, 17 Wall. 357, 376, 21 L. Ed. 627. The condition in the shipping receipt is to be read precisely as if it provided in terms, as it did in law, that no carrier on the route should be liable for any damage by wet not due to its own negligence nor to that of its servants. *Welch v. Railroad Co.*, 41 Conn. 333, 342.

The complaint was for a breach of a common carrier's duty. The plaintiff, in such an action, who shows that his goods were damaged, need not offer proof that the defendant was negligent. There was no claim that the injury was due to the act of God or to a public enemy. The plaintiffs denied what the defendant alleged in its answer, that there were special limitations of liability. If they proved that they shipped the piano dry, and received it wet, they thus made out their case, unless the defendant could both show that

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there were such limitations in its favor and that the wetting fell within them. To do this, it was bound to prove that the wetting occurred without its fault and without its servants' fault.

As the plaintiffs' position in pleading is consistent throughout, there is no ground for a claim of variance, whether they were or were not bound by the terms of the shipping receipt which was set up by the defendant. *Coupland v. Railroad Co.*, 61 Conn. 531, 540, 23 Atl. 870, 15 L. R. A. 534, 55 Am. & Eng. R. Cas., N. S., 380. In view of the fact that the conditions which this receipt imposed were introduced and accepted in consideration of a less charge for transportation than would otherwise have been made, the court of common pleas did not err in instructing the jury that, if McDonald was authorized to assent to its terms, it bound the plaintiffs, and was a just and reasonable contract.

That the defendant was not named in it, and the Boston & Maine Railroad Company might have forwarded the car over some other line, was immaterial. Whatever connecting carrier in fact received it from the first carrier was entitled to the benefit of its stipulations.

Nor was there anything in the contention of the plaintiffs that the jury should have been told that this paper might have been given and received simply as a receipt, and, if so, its terms could not affect the defendant's liability. It was both a receipt and a special contract as to the conditions of transportation.

The trial court committed no error in declining to charge the jury that, should they find the piano was injured by wet while in the possession of the defendant, they might infer therefrom that it was chargeable with negligence; and, instead of this, in instructing them that the fact, if found, that such an injury so occurred, should be given such weight as they might think it fairly entitled to in connection with all the other facts and circumstances bearing upon the case. It might have been exposed to rain by the sudden act of a casual trespasser. The jury had all the evidence before them, and were to consider all. *Button v. Frink*, 51 Conn. 342, 347, 50 Am. Rep. 24.

The plaintiffs' request for a charge that the shipping receipt raised a presumption that the piano was delivered at Waltham in good condition was properly refused. Being boxed, the description of the goods received "as in apparent good order except as noted [contents and condition of contents of packages unknown]" could only have referred to the condition of the exterior of the box.

There was error in the refusal to instruct the jury that the "clear" receipt given by the express company at New Haven was not conclusive, and that the plaintiffs could nevertheless show by other evidence that the piano was then wet and

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damaged. Such a receipt by a consignee is a mere piece of evidence, and does not necessarily preclude him from afterwards proving what was really the fact.

The defendant was properly allowed to show that Morton, the express company's agent who receipted for the piano at New Haven in behalf of the plaintiffs, looked at the box, though from a position where he could not see all its sides, when it was pointed out to him by the defendant's delivery clerk, and made no complaint. If it was then wet it would have been natural for one who was there to act for the plaintiffs to remark upon it, and his silence was some evidence that he observed nothing amiss in its condition, and so that there was nothing amiss to be observed.

One Woods, a piano mover employed by Morton, carted the box to the plaintiffs' house, and testified, in behalf of the plaintiffs, that the weather was clear at the time. Evidence having been given by them that it rained later on that day, he was asked what care he took in moving pianos on rainy days; the claim being that the jury might find that it rained while the piano was in his cart. This question was properly excluded. Care taken on rainy days did not show the care taken on fine days, nor did proof of the care he generally took on rainy days legitimately tend to show the care he actually took on any particular rainy day. *Laufer v. Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533, 7 Am. & Eng. R. Cas., N. S., 787-788.

Having first introduced expert testimony that the weather records kept by the United States weather bureau at any place would as a general rule be the true record for the surrounding country, the defendant was allowed to lay in the weather records so kept at Boston, on the day when the piano was shipped, as evidence of what the weather then was at Waltham, the place of shipment, which was 10 miles distant. There was no weather bureau at Waltham, and none as near to it as that at Boston. The records were properly admitted. The objection of remoteness went simply to their weight.

The evidence introduced, in defense, of the negotiations between the freight agent of the Boston & Maine Railroad Company at Waltham and McDonald leading up to his acceptance of the shipping receipt, was plainly relevant. It showed that he was offered the choice of two modes of shipment, one called "owner's risk," at a rate named, and the other called "shipper's risk," at a higher rate, and chose the former, to which the receipt conformed. This bore directly upon the question whether the conditions imposed by that paper were just and reasonable.

There is error, and a new trial is ordered. In this opinion, the other judges concurred.

FT. WORTH & R. G. RY. CO. *v.* REESE *et al.*

(*Court of Civil Appeals of Texas, May 28, 1902.*)

[68 S. W. Rep. 1019.]

Transportation of Live Stock—Delivery to Connecting Carriers—Damages.

Where a traffic arrangement by a carrier with a connecting carrier as to the interchange of freight between them provides that all damages that may accrue to any car or its contents shall be paid for by the party in whose possession the same may be, and it appears, in an action against them for damages to live stock, in which a separate judgment is rendered against each, that the damages for which the connecting carrier was held liable were caused by its negligence after the freight had come into its exclusive possession, a judgment cannot be rendered in favor of such connecting carrier over against the other for the amount of the former's liability to the plaintiff.

Appeal from Brown county court; R. P. Connor, Judge.

Action by J. H. Reese and others against the Ft. Worth & Rio Grande Railway Company and another. There was a judgment in favor of plaintiffs, and a judgment over in favor of the Texas & Pacific Railway Company against the Ft. Worth & Rio Grande Railway Company, and it appeals. Affirmed as to plaintiffs' judgment, and reversed as to other judgment.

West, Smith & Chapman, for appellant.

G. N. Harrison, for appellees.

KEY, J. This case is submitted in this court on the following conclusions of fact:

"(1) The plaintiffs made a contract with the Ft. Worth & Rio Grande Railway Company, in writing, covering the shipment of the car load of horses in this suit from Brownwood to Ft. Worth, Texas, destined to Longview, Texas. Under the terms of the written contract the Ft. Worth & Rio Grande road agreed to haul the car of horses from Brownwood to Ft. Worth, and deliver them to connecting line leading to destination, and specially limited its liability for any damage or injury to its own line.

"(2) That the Ft. Worth & Rio Grande Railway did haul said car of horses from Brownwood to Ft. Worth, and delivered them to the Texas & Pacific Railroad, which line of road connects with the Ft. Worth & Rio Grande Railway, and runs from Ft. Worth to Longview, Texas.

"(3) That after delivery of said horses to the Texas & Pacific Railway by the Ft. Worth & Rio Grande Railway, one of the plaintiffs, J. H. Reese, being in charge thereof, called upon the local freight agent of the Texas & Pacific Railway in Ft. Worth, and requested that the Texas & Pacific Railway forward the car of horses from Ft. Worth to destination, Longview, and the agent of the Texas & Pacific agreed to do so.

"(4) That the Ft. Worth & Rio Grande Railway Company

made delivery to the employees of the Texas & Pacific Company of the car load of horses on its arrival in Ft. Worth.

"(5) That during the transportation of the shipment on the line of the Ft. Worth & Rio Grande Railway, by the broken and defective condition of the car in which the horses were carried, five head were injured, substantially as alleged in plaintiffs' first amended original petition, while on the line of the Ft. Worth & Rio Grande Railway; and, by reason of the condition in which said car arrived in Ft. Worth, it was necessary for the horses to be unloaded out of it, and reloaded in another car.

"(5½) That the plaintiff Reese, in charge of the stock, after its arrival in Ft. Worth requested the local agent of the Texas & Pacific Railway to have the horses unloaded out of the defective car, and reloaded in a good car, and forwarded to Longview, Texas.

"(6) That the Texas & Pacific Railway Company took charge of the car of horses in Ft. Worth, and switched it to the Texas & Pacific stock yards, and unloaded the horses therefrom.

"(7) That after the local agent or some employee of the Texas & Pacific road had unloaded said horses, said Texas & Pacific Railroad refused to reload and forward the horses immediately, unless plaintiff in charge thereof would leave out two or more head of the horses, claiming that the car was overloaded, which demand by the employees of the Texas & Pacific Railway the plaintiff in charge thereof, J. H. Reese, declined to comply with, and demanded that all the stock be reloaded in the same-size car in which they arrived, and forwarded to destination, Longview; that the employees of the Texas & Pacific Company refused to ship said horses for a period of twenty-four hours after they were unloaded in its pens at Ft. Worth, and until ordered by the officers of the Texas & Pacific general office, in Dallas, to forward said stock in one car.

"(8) That the car in which said horses arrived at Ft. Worth and the car in which they left Ft. Worth were sufficiently large to properly accommodate the stock, and that the stock were not overloaded in either car.

"(9) That after said car of horses arrived in Ft. Worth, and was delivered by the Ft. Worth & Rio Grande road to the Texas & Pacific Railway Company, the employees of the Texas & Pacific Railway Company never communicated with the Ft. Worth & Rio Grande Railway Company about what should be done with said horses, or whether they should be reloaded in one car, or when they should be reloaded, or when forwarded, but that the said Texas & Pacific Railway Company's employees in Ft. Worth took up the question of whether the horses should be reloaded in the same-size car with the general office of the Texas & Pacific Railway in Dallas."

"(11) That so far as the facts disclosed, the only reason

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why the plaintiffs' horses were held in the Texas & Pacific stock yard at Ft. Worth after the time required to unload them out of the broken car and reload them in a good car, was caused by the demand of the Texas & Pacific Railway Company on the plaintiff that he dispose of or leave out two or more of his horses, under the claim that there were too many head to be loaded in one car, and his refusal to comply with said demand.

"(12) That after the horses were reloaded by the Texas & Pacific Railway in Ft. Worth, and started to Longview, they reached there in a reasonable time, and without accident of any kind or character occurring.

"(13) That at the time of the shipment in question the Texas & Pacific Railway and the Ft. Worth & Rio Grande Railway were obliged to each other under the following written contract:

"This contract and agreement made and entered into this the 1st day of May, 1900, between the Texas & Pacific Railway Company, a railway corporation, hereinafter called the "Texas Company," and the Fort Worth & Rio Grande Railway Company, a railway corporation, hereinafter styled the "Rio Grande Company," witnesseth: That for and in consideration of the covenants, conditions, and payments hereinafter mentioned, to be made, kept, and performed by the Rio Grande Company, the Texas Company agrees to furnish the said Rio Grande Company certain facilities in the city of Fort Worth, to wit: For and in consideration of the sum of one hundred dollars (\$100) per month, payable on the first day of each and every month, in advance, the Texas Company agrees to furnish the depot facilities necessary for doing the freight business of the Rio Grande Company in Fort Worth, Texas, and for and in consideration of the additional sum of three hundred dollars (\$300) per month, payable on the first day of each and every month in advance, the Texas Company agrees to do all the switching and furnish all the labor necessary for handling the freight business of the Rio Grande Company in the city of Fort Worth, Texas. It is further expressly agreed and understood that the Rio Grande Company shall be solely responsible for any and all loss, damage, or injury to its own separate property while being handled by the Texas Company, and shall be solely and alone responsible for any and all loss, damage, or injury that may happen to any freight traffic or employee growing out of the handling of its business by the Texas Company under this contract, including its own telegraph business, loss or damage to freight or other property at said station or in cars, and the said loss or damage shall be borne and paid by the said Rio Grande Company individually, as though the business was being handled by their own separate employees; the employees of the Texas Company being treated as the employees of the Rio Grande Company while handling the business of said company. It is



further agreed that any damage or loss that may occur through the negligence of the joint agent at Fort Worth station shall be adjusted with the agent direct by the company interested; it being further agreed that the agent shall be responsible, under his separate bond, for the care and accounting of the separate property of each company, and any default or loss of money or other property that may occur on the part of said agent shall be a matter of adjustment with said agent by the company interested. It is further expressly agreed and understood that the Rio Grande Company shall be solely and alone responsible for any and all personal injuries that may result or grow out of the handling of its business under the terms of this contract, and shall be solely and alone responsible for any loss or damage that may occur to any of its freight or other property while in the possession of the Texas Company under this contract.

“Car and Contents Handled under This Agreement. In order to define the responsibility of each party hereto, separately, for cars and their contents handled under this agreement, and to fix the time when the car and contents shall be considered as in the possession of the Texas Company, and not being handled under this agreement, it is agreed that the station agent at Fort Worth, Texas, shall, with due diligence, and without prejudice, ascertain when each party and every loaded car of either party hereto is ready to be switched into the trains of the other party, to be forwarded from Fort Worth; and, as soon as any car and its contents are ready for such delivery, such joint agent shall place, or caused to be placed, in the proper designated place, to be fixed by the Texas Company, without delay, a regular waybill or train waybill for such car and its contents; and the actual placing of the regular waybill or train waybill in the designated place, as above provided, shall constitute the actual delivery from either party to the other hereto; and all losses and damages that may occur to any car or its contents, or to either of them, shall be settled and paid for by the party hereto in whose possession said car and its contents may be, as determined by the above rule relative to the delivery of cars; and delivery of all freights in less than car-load lots shall be considered as made between the parties hereto when said freight shall have been unloaded from the car in which it was received at Fort Worth station.

“It is further expressly agreed and understood that the Rio Grande Company shall take care of, and be responsible for, the condition of its own rolling stock that may be handled under and by virtue of the terms of this agreement.

“This agreement shall take effect on the day and date first above written, but it is expressly understood and agreed that either party may terminate same by giving written notice to the other party of its intention so to do for sixty days prior to the date it desires said contract to terminate.

“In witness whereof, the parties hereto have hereunto set

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their names and affixed their seals on the day and date first above written.

“The Texas & Pacific Railway Company,

“By [signed] L. S. Thorne,

“Third Vice Pres't & Gen'l Manager.

“Fort Worth & Rio Grande Railway Company,

“By [signed] H. C. Wicker,

“President.”

“(14) That the injury done plaintiffs' horses by reason of the negligence of the Fort Worth & Rio Grande road from the time they were loaded in Brownwood until they were unloaded in the Texas & Pacific stock pens at Ft. Worth amounted to one hundred and twenty-five dollars (\$125).

“(15) That the injury or damage done to the plaintiffs' horses while in the Texas & Pacific stock pens, and after the time they should have been reloaded and forwarded until they were reloaded and forwarded, amounted to one hundred and twenty-five dollars.”

The trial court rendered judgment for the plaintiffs against each defendant separately for \$125, and judgment over in favor of the Texas & Pacific Railway Company against the Ft. Worth & Rio Grande Railway Company for \$125. The latter judgment is the only subject of complaint in this court; and we sustain the first assignment, which charges that the court erred in holding that the Texas & Pacific Railway Company, under the terms of the contract, was entitled to judgment over against the other company for the amount of the former company's liability to the plaintiffs. Under the facts found, we are of the opinion that the damages for which the Texas & Pacific Railway Company was held liable were caused by the default and negligence of that company after the property shipped had come into its exclusive possession, and ceased to be the property or business of the Ft. Worth & Rio Grande Railway Company, and that, such being the case, the latter company, under the terms of the contract, is not liable to the Texas & Pacific Railway Company.

The judgment in favor of the plaintiffs against both railway companies will be affirmed, but the judgment in favor of the Texas & Pacific Railway Company against the Ft. Worth & Rio Grande Railway Company will be set aside, and judgment here rendered in favor of the latter company on the issues involved between the two companies.

Affirmed in part, and reversed and rendered in part.

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ADAMS EXP. CO. v. CARNAHAN.

(Appellate Court of Indiana, Division No. 2, June 25, 1902.)

[64 N. E. Rep. 647.]

Carriers of Freight—Limiting Liability—Construction of Contract.

Though contracts limiting the liability of common carriers are strictly construed against the carrier, evidence and findings in cases involving

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the construction of such contracts are not measured by any different rules than in cases to which carriers are not parties.

**Same—Same—Rates.**

In the absence of evidence to the contrary, it will be presumed that, where a shipment of goods is accepted by a carrier under a contract limiting its liability to an agreed valuation, the freight rate is based on the valuation.

**Principal and Agent—Ratification.**

A principal who adopts the act of one professing to act for him must adopt it in toto, and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden.

**Same—Contract of Shipment—Limiting Liability.**

Authority of agent to ship goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability.

Petition for rehearing. Overruled.

For former opinion, see 63 N. E. 245.

ROBY, J. And afterwards, to wit, on the 25th day of June, 1902, the court being fully advised in the premises, overrules the petition for a rehearing heretofore filed by appellee, with an opinion as follows:

The special finding, in addition to the facts enumerated in the opinion, shows that Mrs. Tibbetts paid defendant, as its express charges upon said package, the sum of 35 cents; that appellant, by its agent, concurrently with the delivery of said package to it, and at the time of its acceptance for carriage, executed and delivered to said Mrs. Tibbetts the written contract heretofore set out. The appellee did not see said contract or know of its contents until after it had been executed and delivered.

Contracts limiting the liability of common carriers are strictly construed against the carrier. Evidence and findings delivered and made in such cases are not measured by any different rules than in cases to which carriers are not parties. A reasonable construction of the facts stated in the finding show that the valuation placed upon the package was contractual. In *Hart v. Railroad Co.*, the court said: "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight as expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation." "The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed; and the rate of freight was based on that valuation, and was fixed on the condition that such was the valuation, and the liability should go to that extent, and no further." *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 721; *Duntley v. Railroad Co.* (N. H.) 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610; *Durgin v. Express Co.* (N. H.) 20 Atl. 328, 9 L. R. A. 453, 45 Am. & Eng. R. Cas., N. S., 325; *Elkins v. Transportation Co.*, 81 Pa. 315.

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The use of the term "consideration" in the findings would not have added to the effect of the facts therein exhibited. The general rule as to agency is that the principal who adopts the act of one professing to act for him must adopt it in toto, and will not be permitted to claim the benefit arising therefrom, and at the same time to repudiate the burden thereof. *Bish. Cont.* (Enlarged Ed.) § 1110; *Daniels v. Brodie* (Ark.) 15 S. W. 467, 11 L. R. A. 91. "Authority to ship carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability." 1 *Am. & Eng. Enc. Law* (2d Ed.) § 1034. The following authorities cited to the above-stated proposition sustain it: *Railroad Co. v. Jonte*, 13 Ill. App. 424; *Root v. Railroad Co.*, 76 Hun, 23, 27 N. Y. Supp. 611; *Nelson v. Railroad Co.*, 48 N. Y. 498; *Armstrong v. Railway Co.*, 53 Minn. 183, 54 N. W. 1059. To the same effect, see, also, *Zimmer v. Railroad Co.*, 137 N. Y. 460, 33 N. E. 642; *Donovan v. Oil Co.*, 155 N. Y. 112, 49 N. E. 678; *Hill v. Railroad Co.*, 144 Mass. 284, 10 N. E. 836; *Ray, Neg. Imp. Duties* (Freight Carr.) § 37; *Hutch. Carr.* (3d Ed.) §§ 265, 266.

Those who rely upon agents in the transaction of any business always incur some risk, because of the possible failure of the agent to apprehend and carry out instructions. Contingencies frequently arise within the scope of the agency which have not been provided for by the instructions. The existence of such risk does not operate in any case to release the principal from responsibility for the acts of the agent within the scope of his authority. The shipper of goods may always protect himself when entering into a special contract for carriage by placing the true value upon his property. To allow him to undervalue it, thereby securing transportation at a reduced rate, and afterwards to ignore such valuation, in such actions as the one at bar, would be to make it possible for him to be "cheaply negligent and safely dishonest." No facts are presented in this record justifying a discussion of the law applicable when collusion between a negligent and dishonest carrier and a negligent and dishonest agent is shown.

Petition for rehearing overruled.

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GALVESTON, H. & S. A. RY. CO. v. ORTHWEIN-FITZHUGH COTTON CO.

(Court of Civil Appeals of Texas, June 23, 1902.)

[69 S. W. Rep. 490.]

**Carriers—Cotton Shipment—Compressing in Transit.**

One shipping cotton by bill of lading containing notation, "To be compressed in transit," is not entitled to deduction from freight rate fixed by the railroad commission, though it is not compressed; there being no compress at shipping point or intermediate station; the rules of the commission providing that a shipper desiring his cotton delivered

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compressed, when there is no compress at shipping point, shall insert in bill of lading, "To be compressed in transit," and it shall be the carrier's duty to comply with instruction if there is a compress at an intermediate station.

Appeal from Harris county court; E. H. Vasmer, Judge.

Action by the Orthwein-Fitzhugh Cotton Company against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Baker, Botts, Baker & Lovett, for appellant.

PLEASANTS, J. Appellant received from the appellee at Engle, Fayette county, for shipment to Houston, Tex., 15 bales of cotton. The cotton was shipped under two bills of lading; one covering 12, and the other 3, bales. Each of these bills contained the notation, "To be compressed in transit." The cotton was promptly shipped to Houston, but, there being at that time no compress in operation between Engle and Houston, it reached its destination in an uncompressed condition. When the cotton reached Houston, appellee refused to receive it unless appellant would have it compressed at Houston, or would deduct from its freight charges of 42 cents per 100 pounds the cost of such compression, which, at the rate of 10 cents per 100 pounds, amounted to \$7.50. Appellant refused to accede to this demand, and the cotton remained in its possession for several weeks, during which time demurrage and storage charges accrued to the amount of \$20.75, and the market value of the cotton depreciated in the amount of \$84. Appellee finally received the cotton, and, under protest, paid all the charges. It then brought suit in the justice court to recover back the demurrage and storage charges and the costs of compression, and also to recover the amount of the depreciation in the value of the cotton; the aggregate sum claimed being \$112.25. The trial in the justice court resulted in a judgment in favor of appellee for the full amount claimed, but, on appeal and trial de novo in the county court, appellee only recovered the costs of compression, \$7.50. From this judgment the railroad company prosecutes this appeal.

The only question presented for our decision is whether the appellee is entitled, under the facts in the case, to recover the cost of having the cotton compressed. This question must be answered in the negative. At the time this shipment was made, the freight rate on cotton from Engle to Houston, as fixed by the Texas railroad commission, was 42 cents per 100 pounds. This was the rate paid by appellee. While the rules of the railroad commission required the railroad, if there had been a compress at the place of shipment, or at a station directly intermediate between the place of shipment and the place of destination, to have the cotton compressed, if the shipper so directed, it was only under these conditions that it became the duty of the carrier to pay the charges for com-

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pression. The rules of the railroad commission are as follows:

"First. A shipper desiring his cotton to be delivered at destination uncompressed, shall give to the railroad company notice of such desire by inserting in his bills of lading the notation, 'To go through uncompressed,' or other plain words of similar import, and it shall be the duty of the railroad company accepting such shipment to make delivery at destination accordingly.

"Second. A shipper desiring his cotton delivered at destination compressed shall, when no compress is in operation at shipping point, give to the railroad company notice of such desire by inserting in his bills of lading the notation, 'To be compressed in transit,' and it shall be the duty of the railroad company accepting the shipment to comply with such instructions, if there is an accessible compress at a station directly intermediate between shipping point and destination.

"Third. Railroad companies shall assume the cost of compressing cotton, which is to be delivered at destination compressed, only on the following conditions: (1) Cotton shall be compressed at shipping point, when an accessible compress is in operation at such point. (2) When no compress is in operation at shipping point the cotton shall be compressed at a station directly intermediate between shipping point and destination, and distant seventy miles or more from such destination. Compresses being in operation at two or more stations directly intermediate between shipping point and destination, the compress nearest to shipping point shall be selected to compress such cotton. (3) The amount of the cost of compressing, assumed by railroad companies, shall not exceed ten (10) cents per 100 pounds, out of rates that are not less than 35 cents per 100 pounds between stations subject to the rates prescribed in table of rates, section 1, of this tariff, nor less than 35 cents per 100 pounds to Houston from points specified in exceptions, section 2, of this tariff. When the rates between such stations are less than 35 cents per 100 pounds, the railroad companies shall assume only so much of the cost of compressing as will make the aggregate of such cost and the current freight rate not to exceed 35 cents per 100 pounds."

The uncontradicted evidence shows that at the time this shipment was made there was no compress in operation at Engle, or at any station on appellant's road between Engle and Houston; and we think it clear that, under the rules above quoted, appellant was not required to have the cotton compressed. It was further shown that there had been, until a few days prior to this shipment, a compress in operation at Schulenberg, a station on appellant's road between Engle and Houston, and that at the time the cotton was received for shipment, and the bills of lading given therefor, neither the agent of appellee who delivered the cotton, nor the agent of

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appellant who received the same and issued the bills of lading, knew that said compress had ceased operation. It is therefore evident that if the notation in the bills of lading, "To be compressed in transit," could be regarded as evidencing a contract on the part of the railroad company to have the cotton compressed, such contract, having been executed under a mutual mistake of fact, would not be binding. The notation in the bills of lading cannot be considered as evidencing any contractual undertaking on the part of appellant, but was merely a notice of the desire of the shipper to have the cotton compressed in transit, given in the manner prescribed by the rules of the railroad commission, and necessarily subject to all of the conditions imposed by said rules. In fixing the freight rate for the transportation of cotton by railroads within this state, the railroad commission has not seen fit to make any distinction between compressed and uncompressed cotton, but, recognizing the benefit accruing to the carrier by reason of the lessened cost of transporting compressed cotton, it has provided that, if the shipper so requests, the railroad company shall have cotton delivered to it for shipment compressed, and shall pay the charges for same, not to exceed a certain amount, out of the prescribed freight rate, whenever there is at the time of shipment an accessible compress in operation at the place of shipment, or at any station on the railroad directly intermediate between the place of shipment and the place of destination. The freight rate is fixed at what the commission considers a fair and reasonable rate for transportation of uncompressed cotton, and the carrier is only required to expend a portion of this rate in paying compress charges when by doing so it derives the corresponding benefit resulting from the lessened cost of transporting compressed cotton. In this case the appellant was compelled, through no fault on its part, to transport appellee's cotton from Engle to Houston in an uncompressed condition, and we think it clearly entitled to receive the compensation fixed by law for such services. The judgment of the court below will be reversed, and judgment here rendered in favor of appellant, and it is so ordered. Reversed and rendered.

UNITED STATES *ex rel.* KELLOGG *et al.* *v.* LEHIGH VAL.  
R. Co.

(District Court, W. D. New York, April 2, 1902.)

[115 Fed. Rep. 373.]

Carriers—Interstate Commerce Act—Shipments between Points in Same State.\*

A shipment of grain over a single railroad between two points, both

\*Interstate Commerce Com. *v.* Bellaire, etc., R. Co. (U. S.), 7 Am. & Eng. R. Cas., N. S., 768; Cincinnati, N. O. & T. P. R. Co. *v.* Interstate Commerce Co. (U. S.), 4 Am. & Eng. R. Cas., N. S., 223; Southern Ry. Co. *v.* Wilcox (Va.), 22 Am. & Eng. R. Cas., N. S., 260; Kansas City S. Ry. Co. *v.* Board of R. Comr's (Ark.), 21 Am. & Eng. R. Cas., N. S., 178.

United States *ex rel.* Kellogg *v.* Lehigh Val. R. Co

within the same state, is not an interstate shipment, so as to bring it within the terms of the interstate commerce act, and authorize a federal court to compel such shipment, by mandamus, at the same rates charged other shippers of a like commodity, because the line of road between the two terminal points passes through other states; nor is it rendered an interstate shipment by the fact that the grain was received at the initial point from a carrier by which it was transported from a point in another state, and was there stored in an elevator for further shipment, where it was not taken by the first carrier under a through bill of lading.

Petition for writ of mandamus, under the interstate commerce act, on relation of Spencer Kellogg and another. On demurrer to petition.

George L. Lewis, for petitioners.

Bissell, Carey & Cooke (Martin Carey and James McC. Mitchell, of counsel), for respondent.

HAZEL, District Judge. It appears by the pleadings that the relators desired to ship 50,000 bushels of corn from Buffalo, N. Y., to New York City, over the railroad of the respondent, a Pennsylvania corporation operating its railroad through the states of New York, Pennsylvania, and New Jersey. The corn was purchased by the relators in Chicago, Ill., and conveyed from there to Buffalo, N. Y., by lake vessels. It does not clearly appear when the grain was shipped to Buffalo. On its arrival at Buffalo, it was elevated at the Kellogg Elevator, of which the relators are the owners, and remained elevated until the relators desired to reship the same to New York City for foreign delivery. There is no allegation of a through bill of lading from the initial point of shipment. The petition shows that the relators were required and compelled by the respondent railroad company, about August 1, 1900, to pay for the reshipment of such grain from Buffalo, N. Y., to the city of New York, one-half cent per bushel more than was charged to other shippers of like grain, who sent their grain through other elevators located at Buffalo, and with which respondent had an agreement by which all elevated grain would be reshipped by it and delivered to the consignee at a specified price per bushel. Other averments in the petition show shipment at various times during the lake season of 1900, from other points in various states bordering on the lakes, to Buffalo, N. Y. The initial consignment in each instance was to the relators, and the grain, on its arrival at Buffalo, was transferred from the ship to the Kellogg Elevator, where it remained until a sale thereof was perfected. Thereupon a demand for cars and rates of shipment per bushel to New York City was made on the respondent, who exacted a greater rate for conveying the grain to New York City than it exacted or required other shippers to pay.

This proceeding is laid in the district court, and any relief granted must be obtained under the provisions of the interstate commerce act. Those provisions are claimed by the relators to have been violated by respondent in its refusal to



United States *ex rel.* Kellogg *v.* Lehigh Val. R. Co

move interstate traffic at the same rates as are charged, or upon terms and conditions as favorable as those given by respondent for like traffic, under similar conditions, to any other shipper, and therefore this court has jurisdiction to issue a writ of mandamus against the defendant common carrier, commanding it to move and transport the traffic to New York City as required by the relators. It has been held that transportation by railroad from one point within a state to another point within it, but passing during the transportation without the state, and through part of another state, is not an interstate shipment, and does not constitute interstate commerce. *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, 53 Am. & Eng. R. Cas. 679. In the case cited, it was held that a state tax imposed upon the Lehigh Valley Railroad Company by the state of Pennsylvania, under whose laws it was incorporated, on account of the transportation of merchandise by it within the state, but passing during the transportation without the state, and through part of another state, was not a tax upon interstate commerce, and not in infringement of the provisions of the constitution of the United States. It would seem, therefore, to be clear that a shipment between Buffalo and New York, where the merchandise, while in transitu, passes without the state, and through part of another state, is not a violation of the interstate commerce act. Although shipment between two points within a single state has been held to constitute interstate commerce, yet such shipment is required to be part of a continuous carriage between points in different states. The language of the interstate commerce act expressly states that its provisions shall apply to "common carriers or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory \* \* \* to any other state or territory of the United States."

I do not think that the shipment of the grain specified in the petition was a continuous carriage thereof between points in different states. Here the shipment sought to be enforced is one from Buffalo to New York. *U. S. v. Chicago, K. & S. Ry. Co. (C. C.)* 81 Fed. 783; *Ex parte Koehler (C. C.)* 30 Fed. 867, 17 Am. & Eng. Enc. Law, 128, 129, and cases cited; *Pennsylvania Millers' State Ass'n v. Philadelphia & R. Ry. Co.*, 8 Interst. Com. R. 531; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, 53 Am. & Eng. R. Cas. 1. The facts do not justify the court in issuing the extraordinary remedy sought, for the reasons above set out. It is therefore unnecessary to discuss any of the further points raised on the argument.

The demurrer is sustained, and the writ dismissed, with costs.

HOUSTON & T. C. RY. CO. *v.* TRAMMELL.*(Court of Civil Appeals of Texas, Feb. 15, 1902.)*

[68 S. W. Rep. 716.]

**Carriage of Live Stock—Insecure Pens\*—Independent Cause—Issues—Instruction.**

In an action against a railroad for negligence in permitting cattle to escape from its pens, the allegation in the petition that the pens were insecure, and, from want of repair, were insufficient to hold the cattle, would permit the admission of evidence to show their insecurity from any cause; and an instruction that defendant was not liable for an injury to the pens from the derailed car of another road, unless the pens were placed in such position with reference to the other railroad as was in itself negligence, was not objectionable as outside the issues.

**Same—Same—Absence of Obligation to Receive Stock.**

Rev. St. art. 4519, requires a railroad to have at each place of unloading freight suitable buildings and inclosures to protect the same from damages. The evidence showed that plaintiff's cattle reached their destination at midnight, and were then offered him upon payment of the freight. He did not have the money with him, and refused to receive the cattle that night, whereupon they were unloaded, and put in the company's pens. The weather was cold and wet, and the plaintiff, who was a stranger in the city, did not know where to take his cattle: *held*, that the evidence supported the finding that the plaintiff was not obliged to receive the cattle when tendered under such circumstances, and accordingly the company's liability as a carrier did not cease upon the unloading of the cattle.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Action by J. P. Trammell against the Houston & Texas Central Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 21st day of August, 1899, appellee instituted suit in the district court of Navarro county to recover damages of appellant, the Houston & Texas Central Railway Company, by reason of the alleged negligence of appellant in permitting certain cattle to escape from its pens in Corsicana, and become damaged by reason of exposure to weather and from other causes. On the 2d day of May, 1901, his second amended petition was filed, on which the case was tried. The grounds of negligence alleged in the petition are as follows: That the pens of appellant in which the cattle were unloaded were insecure, and from want of repair were insufficient for the purpose of holding appellee's cattle, and that this fact was well known to appellant; that appellant was guilty of negligence in permitting the pens to become in such condition, and in placing the cattle therein, which was unknown to appellant; that, owing to the insecurity of the pens, and because of the negligence of appellant, its servants and employees, in not fastening the gates, the cattle were wrongfully and negligently

\*See *San Antonio & Texas R. Co. v. Pratt* (Tex.), 2 Am. & Eng. R. Cas., N. S., 505; *Missouri, Kansas, etc., R. Co. v. Woods* (Tex.), 2 Am. & Eng. R. Cas., N. S., 519; *Kansas City P. M. & G. R. Co. v. Barnett* (Ark.), 22 Am. & Eng. R. Cas., N. S., 81.

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permitted and allowed to escape during the night. Appellant filed a general demurrer and general denial. The demurrer was overruled, and the case tried on the 3d day of April, 1901, and resulted in a verdict for the sum of \$500, with 6 per cent. interest from the 17th day of February, 1899, and on this verdict judgment was rendered in favor of plaintiff. Defendant appealed.

Frost, Neblett & Blanding, for appellant.  
Simkins & Mays, for appellee.

BOOKHOUT, J. (after stating the facts). 1. It is contended that the court erred in the following paragraph of its charge: "If the cattle were tendered plaintiff the night of their arrival, and he refused to receive them, and that was a reasonable time for their delivery to him, and the cattle were placed in the pens with closed gates and fences up, and the fence or gate was knocked down by a derailed car of the Cotton Belt Railroad, then defendant would not be liable, unless the cattle pens were placed in such position with reference to said railroad as was in itself negligence,—that is, such an act as would not be commonly done by persons of ordinary prudence in a similar case." The petition alleges that the pens of defendant (appellant) were insecure, and, from want of repair, were insufficient for the purpose of holding said bunch of steers, which was well known to appellant, or could have been known by the use of ordinary care, and it was guilty of negligence in permitting said pens to get and be in such condition, and in placing the cattle therein,—all of which was unknown to plaintiff; that said cattle reached Corsicana during the night, and were by defendant (appellant), its servants and employees, unloaded from the cars, and placed in said pens, intending that the cattle should remain there during the night, and until they could be delivered to and received by the plaintiff. Plaintiff shows that during the night, owing to the insecurity of said pens, and because of the negligence of said defendant, its servants and employees, in fastening the gates thereof, and because of the failure to use ordinary care in keeping the cattle therein, said defendant wrongfully, negligently, and carelessly permitted the cattle to escape from the pens during the night, and as a result thereof the cattle were allowed to and did scatter over the country, etc. The defendant demurred generally to the petition. There was no special demurrer presented calling for and demanding a more specific statement of the reasons why the pens were insecure. We are of the opinion that the general allegation that the pens were insecure was sufficient to admit evidence to show their insecurity from any cause. If the pens were so erected with reference to the Cotton Belt track as to make them unsafe and insecure, and if a person of ordinary prudence would not have so erected said pens, then the defendant was liable for the damages occasioned to the plain-

tiff in permitting the cattle to escape therefrom under the facts as shown. The contention that the charge submits an issue of fact not made by the pleadings is therefore without merit. Appellant did not plead that the accident was the result of an independent cause. It introduced evidence tending to show that the accident was caused by a car of the Cotton Belt Railroad, and that the gate had been previously knocked down by a train on that road. Appellant presented special charges, in which it requested the court to instruct the jury, if the gate to the pens was knocked down by a car or train on the Cotton Belt Railroad, to find for defendant. These charges were properly refused, and the court instructed the jury as above set out. It would seem that appellant, having introduced evidence on this phase of the case, and requested charges in reference thereto, ought not now be heard to complain that the court erred in submitting the issue. *Railroad Co. v. Sein* (Tex. Civ. App.) 33 S. W. 559; *Id.* (Tex. Sup.) 33 S. W. 216; *Railroad Co. v. Knight* (Tex. Civ. App.) 49 S. W. 250; *Simpson v. Edens* (Tex. Civ. App.) 38 S. W. 474.

2. The appellant contends, under its seventh and tenth assignments of error, that if the fence forming the inclosure, or the gate to the inclosure, was knocked down by the Cotton Belt train, an independent agency, and this was the cause of the escape of the cattle, and the cattle had, prior to that time, been tendered to appellee after being placed in the pen, appellant would not be liable. The evidence shows that the cattle reached Corsicana about 12 o'clock at night, and that they were then offered to appellee, and the freight demanded. Appellee did not have the money with him to pay the freight, and declined to receive them that night, whereupon appellant unloaded the cattle and put them in its pens. During the night the cattle escaped, and stampeded over the prairie. The statute requires a railway company to erect at each of its depot stations or places established by such company for the reception and delivery of freight suitable buildings and inclosures to protect produce, goods, wares, and merchandise, and freight of every description, from damages. Rev. St. art. 4519. It is held that under the designation of "inclosures" stock pens for the reception of cattle tendered for shipment are included, and that such pens must be sufficiently safe for the purpose indicated. *Railway Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948. The trial court submitted to the jury, under proper instruction, the issue as to whether the stock pens were insecure at the time the appellant company placed the cattle therein. The verdict, in effect, was that the pens were insecure. It was the duty of appellant to transport the cattle to Corsicana, and there deliver them to appellee. Appellant contends that its duty as a carrier ceased when the cattle reached Corsicana and were unloaded into its stock pens, and after that time its liability was that of a warehouseman. If appellee was at fault in not receiving the cattle when they

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were offered to him at 12 o'clock at night on their arrival in Corsicana under the circumstances accompanying said offer, then this contention is sound. When the offer was made, payment of freight was demanded as a condition upon which the cattle would be delivered. The weather was cold and wet, and the ground was sloppy. Appellee was a stranger in the city, and did not know the location of the place where he contemplated feeding the cattle. Appellee did not have the money with him to pay the freight, and he declined to receive the cattle. We do not think it can be said, as a matter of law, that a tender made under these circumstances and conditions was such a tender as in fact amounted to a delivery of the cattle. It can hardly be expected that appellee would have the money on his person with which to pay the freight at such an hour. It seems that the freight amounted to a considerable sum. The appellant was bound to tender the cattle within a reasonable time and within reasonable hours. *Railway Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398; *Morgan v. Dibble*, 29 Tex. 119, 94 Am. Dec. 264; *Railway Co. v. Schneider*, 1 White & W. Civ. Cas. Ct. App. §§ 120, 121; *Hutch. Carr.* § 340; 5 Am. & Eng. Enc. Law (2d Ed.) pp. 217-225; *Hills v. Humphreys*, 39 Am. Dec. 117; *Eagle v. White*, 37 Am. Dec. 434. The court submitted the question to the jury whether the cattle were tendered to plaintiff at a reasonable time and within reasonable hours. It was a question of fact whether the cattle were tendered within reasonable hours, and whether appellee should, under the circumstances, have received them. The jury, by their verdict, found, in effect, that the cattle were not tendered within reasonable hours, and that appellee was not compelled to receive them when tendered under the circumstances above set out. The evidence amply supports their finding. Under this finding appellant's liability as a carrier did not terminate upon unloading the cattle and placing them in its stock pens.

There are various assignments of error in which complaint is made of the court's charge and of the action of the court in refusing several special charges requested by appellant. We have examined and considered these assignments, and are of the opinion that they present no reversible error. The assignment complaining of the verdict as not being supported by the evidence is without merit.

Finding no error in the record, the judgment is affirmed. Affirmed.

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CHICAGO, R. I. & P. RY. CO. v. SATTLER.*(Supreme Court of Nebraska, May 8, 1902.)*

[90 N. W. Rep. 649.]

**Right of Passenger to Leave Train on Account of Business or Curiosity.\***

A passenger on a railroad train does not lose his character as such by

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\**Alabama G. S. Ry. Co. v. Coggins* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 109, and note, 117 et seq.

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leaving his car at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey.

Same.

Where, however, the train in which the passenger is being transported is run upon a switch to allow the passage of another train, or is stopped at a place other than that used by the carrier for receiving and discharging passengers, and the stoppage is not for the purpose of allowing passengers to board the train or alight therefrom, one who leaves the train must usually assume all the ordinary risks incident to his action.

Same.\*

All passengers actually on the train, whether the same is moving or not, are passengers "being transported over the road," within the meaning of section 3, art. 1, c. 72, of the Compiled Statutes; and passengers who have left the train at the express or implied invitation of the carrier, for any necessary purpose incident to their journey, are passengers being transported, within the meaning of said section.

Same.

Where a passenger leaves his car of his own volition, for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he cannot claim the protection of section 3, art. 1, c. 72, of the Compiled Statutes, although the carrier may, under some exceptional circumstances, still owe him the duty imposed on it by the common law.

Same—Contributory Negligence.

A through train between Denver and Chicago ran onto a side track at an intermediate station to allow the passage of another through train, from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about 100 feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about 50 feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed: *held* that, under the circumstances, he was not "a passenger being transported over the road," within the meaning of section 3, art. 1, c. 72, of the Compiled Statutes, and the railroad was not liable for damages on account of his death, because of his own negligence.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Cass county; Jessen, Judge.

Action by John P. Sattler, administrator of Emanuel Leveroni, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low, Wm. F. Evans, and Woolworth & McHugh, for plaintiff in error.

Matthew Gering, for defendant in error.

DUFFIE, C. John P. Sattler, the defendant in error, is administrator of the estate of Emanuel Leveroni. The deceased was killed by a train of the railroad company at the station of Alvo, in Cass county, Neb., on the 11th of April,

\*See foot-note on preceding page.

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1899. The jury returned a verdict against the company for \$4,000, upon which judgment was entered, and the company has brought the case to this court by petition in error.

There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alvo from the west on schedule time, at 2:52 in the afternoon. On its arrival at the station the train went upon a side track to await the arrival and passage of a west-bound train which was then due at that point; its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the side track, Leveroni left his train, and crossed over the main track to the depot platform, and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump, and started on a run for his car, and, in crossing the track upon which the west-bound train was approaching the station, was struck by the approaching train and instantly killed. The east-bound train upon which he was a traveler did not move from the side track until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train.

Two questions are presented by this record for our determination: (1) Was the deceased a passenger, within the legal meaning of that word, after leaving his car while it was standing upon the side track for the purpose of allowing an approaching train to pass? (2) If he was such passenger, can his administrator claim for him or his estate the benefits of the provisions of section 3, art. 1, c. 72, of the Compiled Statutes of 1901?

Relating to the first question, the courts may be said to be fairly divided. In Maine and Minnesota the rule appears to be that a passenger on a railway, who purchases a ticket for a distant station, and gets off the train temporarily, and without objection or notice, while it is stopping at an intermediate station, surrenders for the time being his place and rights as a passenger. *State v. Grand Trunk Ry. Co.*, 58 Me. 176, 4 Am. Rep. 258; *De Kay v. Railway Co.*, 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687, 39 Am. & Eng. R. Cas. 463. See, also, *Railway Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785. In *De Kay v. Railway Co.* the facts were very similar to the facts under consideration in the case at bar. The conclusion of the court upon these facts is well expressed in the syllabus of the case as follows: "Where a passenger enters a railway train, and

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pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and, if he leaves the train at such a station, he, for the time being, surrenders his place as a passenger, and takes upon himself the responsibility of his own movements; but, if he leaves without objection on part of the company, he does no illegal act, and has a right to re-enter and resume his journey. While, if a railway company permits the practice of passengers leaving and re-entering their train while on a side track at an intermediate station for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side track as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers, that no trains will pass while they are crossing or recrossing the main track. Neither does the call of 'All aboard!' by the conductor of the side-tracked train give an assurance to those who have left their train that they may cross the main track in safety without looking for approaching trains. Passengers who have thus left their train, when they attempt to cross the track, under these circumstances, are bound to exercise reasonable care and caution to avoid injury from passing trains, and must use their senses for that purpose. The station platform, and not the side track, is the proper place to enter or leave a train; and those who, for purposes of their own, use the latter, assume all the extra risks necessarily incident to such a practice, and are bound to exercise a degree of care corresponding to the increased risks." Another class of cases establish the rule that a passenger on a railroad train does not lose his character as such by alighting from the cars at a regular station from motives of either business or curiosity, although he has not yet arrived at the terminus of his journey. *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450; *Clussman v. Railroad Co.*, 9 Hun, 618.

Of the two classes of cases which we have been examining, we think that the latter establishes the better rule. In this country of long journeys by railway trains, there can be no impropriety in a passenger claiming the right, which may be said to be established by long custom, to leave his car at any intermediate point on his journey, where a stop of any considerable time is made, to send a message, to obtain exercise and relief by walking up and down the platform, or to gratify his curiosity, provided he does not interfere with the employees of the company, or run counter to any established rule brought to his notice. In the exercise of this privilege he does not lose his character of passenger, and the common-law duties of the carrier are still to be exercised in his behalf, and injuries received on account of a failure on the part of the



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carrier to observe all its duties toward him required by the rules of the common law must be responded to in an action for damages. We think that the supreme court of Massachusetts has announced the true rule in *Dodge v. Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541, 37 Am. & Eng. R. Cas. 67, where the following language is used: "To determine the right of the parties in every case, the question to be answered is, what shall they be deemed to have contemplated by their contract? The passenger, without losing his rights, while he is in those places to which the carrier's care should extend, may do whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So if one who leaves a train to obtain refreshments, where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may be well implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties."

All the cases agree that the carrier must furnish safe ingress and egress to and from the train for its passengers. In many of the larger stations the passenger has to cross two or three or four tracks in going to or from his train. In such cases he may assume that the company will see that his way across such tracks is clear and uninterrupted, and that no injury will be incurred in crossing the same. In *Jewett v. Klein*, 27 N. J. Eq. 550, it is held that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence, in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform to the station, and before his train has come to a full stop. Referring to this case, the supreme court of Colorado, in *Railroad Co. v. Shean*, 33 Pac. 108, 20 L. R. A. 729, says: "By the foregoing and well-considered cases it is settled that a passenger on a railroad, while passing from the cars to the depot, is not required to exercise

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that degree of care in crossing the railroad track that is imposed upon other persons, and that he has the right to assume that the company will discharge its duty in making the way safe, and, relying on this assumption, may neglect precautions that are ordinarily imposed upon a person in holding that relation. And this distinction is to be taken into consideration in determining the propriety of his conduct."

We do not care to extend this rule to passengers who leave the train at an intermediate station at a place other than that used by the carrier for the ingress and egress of its passengers. One who leaves the train at a point not intended for the discharge of passengers, and while the train is standing for some other purpose, must himself assume all the ordinary risks incident to his action. The cases above cited differ from the case at bar in the fact that the passenger left or boarded the train at its regular stopping place, and at the point where passengers were regularly received and discharged.

In the case now under consideration no stop was made to receive or discharge passengers. The train was not run to the depot platform, but was side-tracked to allow the passage of the west-bound train. It is probably true that parties who desired either to board or leave the train at Alvo, and who were aware of the custom of the train to side-track at that point to allow the west-bound train to pass, took advantage of the opportunity thus offered to take passage on the train, or to leave it while standing on the side track; but no inducement to do this was extended by the company, as the evidence discloses that it refused to sell tickets to passengers who desired to take this train at that station. Those on the train must have known that the stop upon the side track was not for the purpose of receiving or discharging passengers, and those who left the train without any express or implied invitation so to do on the part of the company, and without some known reason requiring them to do so, should, in all reason, assume the natural and ordinary risks of their own voluntary action.

A part of the fourth instruction of the court expresses so clearly our views upon this question that we insert it here: "If you find from the evidence that when the said Emanuel Leveroni left his car while standing on the side track at Alvo, Nebraska, he did so without the invitation of the defendant, either express or implied, and not for the purpose of attending to any personal want of his own, usually incident to a through passenger, nor made necessary by the manner in which the defendant's train was operated, then it was his duty, while absent from said train, to exercise ordinary care to avoid any injury to himself; and if you find from the evidence that while so absent from his car he failed to exercise ordinary care, and was injured through his failure so to do, then the defendant would not be liable."

Having now defined what we believe to be the rights of a

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passenger at common law, we will proceed to examine our statute relating to injuries received by passengers while being transported over a railway, and the questions discussed in the briefs of counsel in the light of that statute.

Section 3, art. 1, c. 72, of our Compiled Statutes, is as follows: "Every railroad company as aforesaid, shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." In *Railroad Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434, it was held that this statute made a common carrier an insurer of the safety of its passengers, except as against the gross negligence of the passenger, or his violation of some rule of the carrier brought to his notice; but up to this time this court has not been called on to determine the particular persons or class of persons taking passage with a railroad company who were intended by the legislature to be included in the phrase "passengers being transported over its road." The plaintiff in error insists that the statute was not intended to cover all cases of injuries to passengers, and its position on this question cannot be more clearly or briefly stated than by quoting from its reply brief: "Although no one but passengers can be brought within the section, yet it is not designed to cover injuries to all passengers. By express provision, as clear and positive language will permit, the section carved out of the general body of passengers of a company the particular class thereof to which it applies. 'Every railroad shall be liable for all damages inflicted upon the person of passengers' (so reads the section) 'while being transported over its road.' The liability imposed by this section with respect to injuries to passengers extends only to those injuries which passengers receive while such passengers 'are being transported over its road.' The clause 'while being transported over its road' is a clear limitation modifying the general word 'passenger' in the section. Therefore, to bring a case within this section, it must be shown that when the injury was received by a person he was not only a passenger, but that at the time of the injury he was, as such passenger, 'being transported over the line of the railroad company.' There is, of course, a manifest reason for this qualifying clause. The purpose of the act was to relieve the passenger injured 'while being transported over the line of the company' from the necessity of specifically proving the act of negligence which caused the injury. The passenger who buys a ticket and takes his seat upon the train may know that the court will presume that any injury which he receives on account of the operation or management of the train will be presumed to be attributable to negligence on the part of the railroad company. The train and all agencies connected with

its management belong to the railroad company. All knowledge with respect to the cause of injuries resulting from the operation or management of the train is known to the company, but these causes may be difficult for an injured person to ascertain. The section was designed to relieve the passenger so injured from the necessity of proving the specific act of negligence. The manifest reason for the adoption of this section shows the purpose of the insertion of its provision, 'while being transported over its road.' After a person leaves the train provided for his transportation, then whatever dangers he encounters are dangers not connected with the operation and management of his train; and, if he is injured, he must prove negligence, and recover, if at all, upon the common-law liability. While riding upon the train provided for his transportation, he may not be able to learn the cause of an injury so received, due to the operation and management of the train. Therefore, as was said, this section was provided to relieve him of the necessity of proving such facts. But when the passenger leaves the train provided for his transportation, and is injured by reason of dangers entirely disconnected from the operation and management of his train, then there will be no difficulty in his ascertaining the cause of his injury, and in alleging and proving it in case of suit. Therefore the legislature did not intend that the presumption of negligence provided by the section should apply to such a case; and, to make the meaning clear, the legislature expressly made the section apply not to injuries to all passengers, but to injuries received by passengers 'while being transported over the road of the company.' The legislature having expressly limited the operation of the statute to the cases of injury received by passengers 'while being transported over the road of a company,' this court cannot obliterate the qualifying clause referred to. This court, in construing this statute, must give effect to every provision thereof. When the legislature expressly limited this section to cases of liability for injuries to those passengers only who were injured 'while being transported over the road of a company,' this court has no power or authority, nor will it have any inclination, to nullify the express will of the legislature, and to extend this section to cases which the legislature expressly excluded from its effect."

We are agreed that the words "while being transported over its road" is a qualifying phrase, intended to limit liability on the part of the company, and that we must give it the force intended by the legislature. We cannot, however, agree with the plaintiff in error that it was intended to exclude all passengers who leave the car provided for them by the carrier. It is well known that many—perhaps most—roads provide eating houses and other accommodations for the comfort or convenience of their patrons, and that regular stops are made for meals, requiring the passengers to leave the car in which

they are being transported, and often to cross numerous tracks on their way to and from the car to the dining room or restaurant. In such cases one does not lose his character as a passenger in the course of transportation over the road, or the protection of the statute. The duty of the company to provide him safe egress and ingress for such necessities as are required on his journey, and which the road assumes to furnish, and which it invites him to partake of, is no less stringent than to furnish him safe passage on its cars. While seated in the dining room of the company he is under its control, and must conform to its rules, as fully as while on the train; and, while thus subject to the rules and regulations of the company, he is their passenger, entitled to like protection from damage from the operating of the road as while seated in the car, proceeding on his journey. We believe and hold that it was intended to include in the words "while being transported over its road" all passengers actually on the train, whether the same is in motion or standing on any part of the road; and it further includes those passengers leaving the train for any necessary purpose incident to their journey, such as a change of cars, or to procure refreshments at any point where the same is furnished by the company, and where an express or implied invitation is extended to the passengers to leave the car for that purpose. Where, however, the passenger leaves the car for some purpose of his own, not incident to the journey he is pursuing, and at a place not designed for the discharge of passengers, he cannot claim the benefit of this statute, although the company may in such cases, under certain conditions, owe him the duty imposed on carriers by the common law. *Parsons v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450; *Railroad Co. v. Morgan* (Tex. Civ. App.) 64 S. W. 688. The only evidence offered by the company was that of one witness to show that there was plenty of good drinking water in the car in which the deceased was being carried. All of the testimony relating to the circumstances attending the killing of Leveroni came from the witnesses of the plaintiff below. These witnesses all testify that they distinctly heard the whistle of the train approaching from the east. Most of them testify that they saw Leveroni at the pump. One (a Mrs. Brown, a passenger sitting in the car) says that she saw him ascending the steps of the depot platform with a cup in his hand. All who saw him at the pump say that he filled his cup, but that, before he had time to drink, the whistle of the approaching train was heard; that Leveroni thereupon dropped the cup, and ran in a rapid manner for his train. Mrs. Brown relates what occurred as follows: "He went from the steps to the pump, and pumped water into a tin cup which he had. He dropped it. The whistle blew. That is the first warning he had, I am confident." He left the train of his own volition while standing on the side track, and for a

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wholly unnecessary purpose. In so doing he abandoned the protection of the statute. The witnesses agree that from the pump the railway track can be seen for the distance of 100 feet toward the northeast, from which direction the train was approaching. By taking three steps from the pump toward the main line of the road, the view is unobstructed for a mile or more, and the approaching train could have been seen for that distance. When Leveroni reached the track, running rapidly to reach his car, the train was about 50 feet away, and running at a high rate of speed. The evidence is convincing that Leveroni heard the whistle of the approaching train. It was that which caused him to drop his cup, and to run hurriedly to reach his car. He attempted to cross the track in a diagonal course, running partly in the same direction with the approaching train. This, however, is no reason why he should not turn his head to ascertain the position of the train, and whether it was safe to attempt to cross ahead of it. As we have seen, Leveroni was not, under the circumstances, "a passenger being transported over the road," within the meaning of the above-quoted statute. His case must therefore be determined by the rules of the common law, in accordance with which he must be held to suffer the consequences of his own carelessness and negligence. With full knowledge, or full opportunity for knowing the danger, he left a place of safety on the platform of the depot, and ran to his death.

We know of no rule of law that allows a recovery under such circumstances, and we recommend that the judgment of the district court be reversed, and the case remanded for further proceedings according to law.

ALBERT and AMES, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for further proceedings according to law.

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GULF, C. & S. F. RY. CO. *et al.* v. HOUGHTON *et al.*

(*Court of Civil Appeals of Texas, April 16, 1902.*)

[68 S. W. Rep. 718.]

**Connecting Carriers—Improper Treatment of Cattle—Measure of Damages.**

The measure of damages recoverable against connecting carriers for improper treatment of cattle shipped over their lines is the difference between their market value at their final destination and what it would have been but for the improper treatment, and the fact that each carrier limited its liability to its own line, and that none of them carried the cattle to the place of final destination, is immaterial.

Appeal from district court, Travis county; F. G. Morris, Judge.

Action by Houghton & Webb against the Gulf, Colorado &

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Santa Fe Railway Company and others. Judgment for plaintiffs, and certain defendants appeal. Affirmed.

Fiset & Miller, J. W. Terry, West & Cochran, and A. H. Culwell, for appellants.

Hogg, Robertson & Hogg, for appellees.

KEY, J. Appellees brought this suit against the Gulf, Colorado & Santa Fe Railway Company, the Ft. Worth & Rio Grande Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas for damages on account of delay and improper treatment to a shipment of cattle from San Angelo, Tex., to Caney, Kan. The plaintiffs alleged in their petition that the cattle were shipped over the three roads mentioned to Wagoner, Ind. T., and thence over the Missouri Pacific Railroad to Caney, Kan.; and alleged that the three railroad companies made defendants were partners in the contract of shipment, and, if not partners, then each was liable for injuries occurring on its own line. The defendants denied under oath the allegations of partnership, and pleaded a stipulation in the contract of shipment limiting the liability of each defendant to its own line. The trial court withdrew from the jury the question of partnership, and submitted the case as between the plaintiffs and each of the defendants upon the issues of negligence charged in the plaintiffs' petition against the respective defendants, and limited the liability of each defendant to injuries sustained by the cattle while in possession of such defendant. The trial resulted in a verdict and judgment for the plaintiffs for \$4,450, of which amount \$100 was against the Ft. Worth & Rio Grande Railway Company, \$1,590 against the Missouri, Kansas & Texas Railway Company of Texas, and \$2,760 against the Gulf, Colorado & Santa Fe Railway Company. The first-named defendant has not appealed, but the other two have, and present the case in this court on numerous assignments of errors.

It would extend this opinion beyond reasonable limit to treat in detail all the questions raised by the two appellants, and we shall content ourselves with a brief consideration of some of the most important. In our opinion, the objections urged against the admissibility of the testimony submitted by the plaintiffs, in reference to the market value of the cattle at Caney, Kan., are not tenable. They apply to the weight, rather than to the admissibility, of the testimony. We think the evidence referred to comes within the principles announced in *Railway Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703, *Railway Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834, and *Railway Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10. The destination of the shipment being Caney, Kan., following the rule already settled in this state, we hold that the measure of damages was the difference in the market value of the cattle as delivered at Caney, Kan., and what their market value would have been at that place at the time of delivery if they

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had been delivered with reasonable care and diligence, although each of the complaining carriers limited its liability by contract to its own line, and none of said carriers carried the shipment to Caney, Kan., its final destination. *Railway Co. v. Stanley*, 89 Tex. 44, 33 S. W. 109; *Same v. Hume*, 6 Tex. Civ. App. 653, 24 S. W. 915; *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292.

Numerous objections are urged to the charge of the court, none of which are believed to point out reversible error. When considered as a whole, we think the charge correctly stated the rules of law governing the rights of the parties, and fairly submitted to the jury the issues of fact arising between the plaintiffs and the several defendants. Nor was error committed in refusing special instructions requested by the appellants.

We also hold that the testimony sustains the verdict, which involves findings that each of the complaining defendants was guilty of negligence as charged in the plaintiffs' petition, and that, as a result of such negligence, some of the plaintiffs' cattle died, and others were injured, resulting in total damages to the plaintiffs in the amounts awarded against each defendant.

No reversible error has been pointed out, and the judgment will be affirmed. Affirmed.

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RYAN v. NEW YORK, N. H. & H. R. CO.

(*Circuit Court, S. D. New York, Feb. 10, 1902.*)

[115 Fed. Rep. 197.]

**Carriers—Consignees—Unloading Freight—Duty to Protect.**

Where a railroad company furnished and hauled a car loaded with concrete for a contractor who was building piers in the company's yard for an overhead highway bridge, the car being loaded and unloaded by the contractor's employees, such employees were rightfully about the car while unloading, and as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot.

**Same—Evidence of Defect—Weight—Question for Jury.**

Where, in an action against a railroad company for injury to one employed in unloading a car, caused by a door which was suspended by a hook falling, one witness testified positively that he reached up and examined the hook immediately after the accident, and that it was rounded so that it would not be likely to hold, the question whether the hook was defective was for the jury; and their finding should not be set aside, though other witnesses testified that the hook would be out of his reach, and was not situated where he said it was, and produced a hook, which they testified was taken from that place on the car, which was not rounded.

At Law.

Thomas P. Wickes, for plaintiff.

John W. Boothby, for defendant.



**WHEELER**, District Judge. The defendant furnished and hauled a car loaded with concrete by a contractor building piers in the defendant's yard at Harlem for an overhead highway bridge across the yard, being built by the city; the concrete to be unloaded wet, and put down about the foundation of a pier by the contractor's men, of whom the plaintiff was one. The car had heavy flap doors at the sides, which turned up under beveled hooks to catch and hold them up for unloading. While the car was being unloaded, one of the doors fell, and struck the plaintiff (who was sprinkling the concrete as it was shoved out and put into the hole for the pier) on the head, and hurt him seriously. This suit is brought for the injury. The plaintiff had a verdict because the car was found to be unfit for prudent use, and the defendant has moved to set it aside for want of duty of the defendant towards the plaintiff, and of sufficient proof of unfitness.

The relation of the defendant to the plaintiff seems to have been the same as that of any carrier furnishing and hauling a car to a consignee who is to unload and take away the freight. That the haul was short, and all within the defendant's yard, and that the delivery was there, would not appear to make any difference. The contractor and his men were there under the exercise of the right of eminent domain of the state by the city, and not as trespassers, or as licensees for a separate purpose. The contractor was rightfully there, and lawfully entitled to have his materials delivered there, to be taken and placed by his men; and his arrangement with the defendant to furnish and haul the car would include a vehicle safe for the receipt and taking away of the freight. Those properly about the car for this purpose would be as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot, or a passenger approaching or leaving a train, would be to safety from unusual dangers of engines, cars, or stations. *Beard v. Railroad Co.*, 48 Vt. 101; *Kowalewska v. Railroad Co.*, 72 Hun, 611, 25 N. Y. Supp. 184. This was the view in which the case was submitted to the jury.

The claim of the defendant that the plaintiff must prove the dangerous condition of the car, and that this condition caused the injury to him, was recognized and acted upon at the trial. The plaintiff produced a witness who testified that he reached up and examined the hook at that time, and found it rounded so it would not be likely to hold. The defendant produced witnesses who testified that the hook would be out of his reach, and not situated where he said it was, and produced a hook testified to as taken from that place on the car which was not rounded, and claimed that the testimony was so overwhelmingly against there being a defect that the court should direct a verdict for the defendant. The important thing was the defect in the hook, and not its exact location. The direct testimony of the witness to the existence

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of the defect at that time was more than a mere scintilla. It was positive and substantial. The discrepancies and contradictions were for the jury, and were well laid before them in behalf of the defendant. The whole was to be weighed by the jury, and the question as to this now is not whether they weighed rightly, but whether, in reality, there was anything to weigh, and it appears that there was.

Motion to set aside verdict denied.

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(*Supreme Court of Minnesota, May 16, 1902.*)

[90 N. W. Rep. 360.]

**Injury to Passenger—Duty to Furnish Safe Place to Ride—Part of Person Extending beyond Car Line.\***

While it is the absolute duty of a railway carrier of passengers to provide a safe and secure place for its patrons to ride within its cars, when such duty is performed the passenger has no right to voluntarily extend his person beyond the line of a moving car, or ride upon its platform; and if he does so, and injury follows, no recovery can be had therefor.

**Same—Same—Passenger Forced to Ride on Platform—Part of Person Extending beyond Car Line.**

Where a carrier of passengers by steam permits its cars to be overcrowded, and requires its passengers to ride on the platforms, it cannot excuse itself for injuries from such cause, but if a passenger, while riding on the platform, negligently extends his person beyond the car line from curiosity, his act in that respect must be regarded as negligent.

**Same—Part of Person Extending beyond Car Line—Youth of Passenger.**

A youth of 16 years of age, traveling alone, cannot be held, merely on account of his immature years, to have been incapable in law of exercising sufficient discretion and judgment to avoid incurring the risk of a voluntary exposure of his person beyond the side of a moving train.

**Same—Same—Pleading.**

In the review of a complaint upon general demurrer, *held*, that certain facts and conditions set forth therein do not excuse the conduct of an injured party, or absolve him from contributory negligence, in protruding his head beyond the sides of a moving train on which he was a passenger.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Charles M. Pond, Judge.

Action by Minnie Benedict, administratrix of George Benedict, against the Minneapolis & St. Louis Railroad Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Thomas Canty, for appellant.

Albert E. Clarke, for respondent.

\*As to the effect of contributory negligence of passenger in riding with limb on window sill, or with part of person protruding from car, see Chicago, etc., Ry. Co. v. Hoover (Ind. Ter.), 23 Am. & Eng. R. Cas., N. S., 73, and foot-note.

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LOVELY, J. Plaintiff, as administratrix, seeks to recover for the death of her son, occurring through the alleged negligence of defendant, who demurs to the complaint upon the ground that it does not state a cause of action. The demurrer was sustained, from which order plaintiff appeals.

The essential facts in the complaint are as follows. During the summer season of 1901 defendant operated trains between Minneapolis and points on Lake Minnetonka. Defendant's passenger station is near the center of the city, and its tracks extend four miles westerly therefrom within the corporate limits. Two-fifths of a mile west of the depot its railroad passes under a bridge on Lyndale avenue. It is claimed that the defendant negligently maintains its tracks so close to the iron posts which support this bridge that the sides of its cars pass within 10 inches of the same. At this time defendant was running suburban trains, and transporting passengers thereon between the city and Lake Minnetonka in each direction, not only for ordinary purposes, but upon the occasion of picnics and excursions, when the cars would be greatly "overcrowded, so that their doors and windows had to be open, and passengers were required to ride upon the platforms and steps at the end of the cars." That the yards of defendant for a mile west of the depot had switches and side tracks adjacent to its main tracks, and at various points within this distance such tracks were crossed by street bridges overhead, supported by iron posts erected in the yard at the sides of the tracks. That these bridges resemble each other, and look alike to passengers. That the depot is east of and very close to one of the bridges, so that when the trains arrive they must stop partly under it for passengers to alight. That the conductors and brakemen of the train announce the stations as the trains slow up and stop at various points under the bridges, "when the passengers frequently and usually lean out from the platforms of the cars and look ahead to see if their train has arrived at its destination, which is their usual and customary habit" and known to defendant. On the 30th of June, 1901, plaintiff's intestate, a minor, of the age of 16 years, was a passenger on one of these trains coming to the city from Lake Minnetonka. That this train was overcrowded with passengers returning from a picnic. That it was excessively hot. That the car was greatly overcrowded, and many drunken and disorderly persons were riding thereon, whereby intestate was compelled to stand upon the platform of his car. The train suddenly slowed up near the Lyndale avenue bridge, when he, "with the consent of the defendant, and without any warning of the danger" (or knowledge of the bridge), "leaned out slightly, and looked ahead, to see if it was arriving or had arrived at its destination, when his head immediately came into collision with one of the iron posts referred to, and he received the injuries from which he died." The position of the defendant in sup-

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port of the order of the trial court is that intestate, by extending his head beyond the line of the car while in motion, committed an act of negligence, which was the proximate cause of his injury, and therefore precludes recovery in this action.

The law undoubtedly enjoins upon the railway carrier of passengers extraordinary diligence. This rule is intended, for reasons of public policy, to secure their safe carriage, so far as human skill and foresight can accomplish that result. *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550. However, railways must construct and arrange their tracks and yards to attain practical purposes in the operation of their roads. They have been permitted, without restraint from police regulation, to build tracks with switches, when necessary, in close proximity to each other. This course is unavoidable in city yards, where the right of eminent domain, in view of public as well as private interests, have restricted the appropriation of land for railroad uses. A common incident of city yards are overhead bridges, with posts to sustain them, as well as adjacent tracks upon which trains are continually passing so near to each other that a slight extension of the human body beyond the sides of a car is fraught with danger to life and limb. These conditions have always existed. They are customary, and to a large extent indispensable; hence the high degree of duty to patrons exacted of carriers of passengers has been generally regarded as fulfilled with reference to outside arrangements at such places where a safe and secure place has been provided within its cars for their occupation. Having done this, the carrier is not required, in maintaining adjoining structures, to guard against the anticipated carelessness of those who are in no danger so long as they remain in the place of safety which the carrier has furnished. The customary methods of constructing tracks, building bridges, and running trains in railroad yards renders any exposure of a person beyond the car line imminently hazardous; hence there must arise a presumption in behalf of the carrier, when injury arises from such exposure, that the conduct of its business in this respect is not negligent, and imposes upon the injured party the burden of showing that it was otherwise in any particular case. While, as a general rule, it may be said that railroads can arrange structures adjoining their tracks to accomplish practical ends, even though the maintenance of the same are dangerous to those who are themselves reckless, yet it cannot be said either that an unnecessary or useless act by the railroad in this regard would not be negligent as to an employee required to work in the yards, or even a passenger, whose person, through no fault of his own, as by extraneous force, impending danger, sudden emergency, or other unavoidable cause, would be exposed to danger.

Subject to the qualifications above stated, the courts have not been able to impose upon railway carriers burdens so

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unreasonable that they could not be fulfilled, nor have passengers been relieved from the exercise of restraint from the curiosity which prompts them to expose their persons to the imminent risk of collision with objects outside the cars. Car windows and doors are for the admission of light and air, not to enable passengers to pursue a course which general experience declares to be extremely hazardous. The proper use of platforms is to afford travelers a safe and convenient means of entrance and exit to and from the cars when not in motion. But it follows, in view of the conditions above stated, that the voluntary exposure of the body beyond the sides of a moving train, or the improper use of the platform when safety is assured within the car, must be regarded as reckless, and the almost inevitable disaster that follows remediless. These conclusions are supported by the great weight of authority in this country. *Beach, Contrib. Neg. (2d Ed.)* § 155; *Todd v. Railroad Co.*, 3 Allen, 18, 80 Am. Dec. 49; *Id.*, 7 Allen, 207, 83 Am. Dec. 679; *Railroad Co. v. McClurg*, 56 Pa. 294; *Railroad Co. v. Rutherford*, 29 Ind. 83, 92 Am. Dec. 336; *Faver v. Railroad Co.*, 91 Ky. 541, 16 S. W. 370, 47 Am. & Eng. R. Cas. 594; *Railway Co. v. Underwood*, 90 Ala. 49, 8 South. 116, 24 Am. St. Rep. 756; *Moakler v. Railway Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717, 41 Am. & Eng. R. Cas. 135; *Carrico v. Railway Co.*, 35 W. Va. 389, 14 S. E. 12, 52 Am. & Eng. R. Cas. 393; *Railway Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; *Scheiber v. Railway Co.*, 61 Minn. 499, 63 N. W. 1034. In a large measure the learned counsel for appellant concedes the rule as laid down in the cases cited. We quote from his thorough and exhaustive brief as follows: "I concede that, as a general rule, a passenger who stands on the platform, or protrudes his head out of the window or outside of the outer line of the car, on a rapidly moving train on an ordinary steam railroad, under ordinary conditions and circumstances, and is thereby injured, is guilty of contributory negligence as a matter of law." But it is urged that this complaint discloses exceptional circumstances, which takes this case out of the general rule. These exceptions are: The moderate speed of the train; its frequent stops; the misleading appearance of the overhead bridges, calculated to provoke inquiry; the knowledge by defendant of the habit of passengers to put their heads out of the windows of the cars at such places; the omission to give warnings forbidding this custom; the overcrowded condition of the cars, with the incidental necessity of passengers riding on platforms, invited and permitted by the defendant; as well as the immature age of the deceased,—which it is claimed relieve intestate from the imputation of recklessness. We are unable to give force to the view that the speed of the train is of significance, for it was moving with sufficient rapidity to make the exposure of any part of the body dangerous, as the unfortunate accident in this case demonstrates. The misleading appearance of the overhead bridges may have

excited curiosity, but cannot justify a dangerous exposure, which was not necessary, particularly as defendant was required to announce the stations when reached, and this legal duty was admittedly performed; hence we cannot hold that curiosity alone can furnish an excuse for negligent self-exposure in such cases. The allegation of the custom of passengers to extend their heads beyond the sides of the car with the knowledge and consent of defendant, it is claimed, required warnings of the danger incurred thereby. These facts undoubtedly charged a reckless habit of the passengers thus exposing themselves. The general rule, as conceded by plaintiff's counsel, rests upon the ground that such conduct is so hazardous within the range of common experience that all travelers must and should have knowledge thereof, and that dangers from such causes are so well known and anticipated that specific warning ought not to be required, and would be useless if given. These considerations have all been carefully weighed and answered in the revolution of the rule forbidding unnecessary exposure of their persons by travelers on railways in the cases cited above, and have not been considered sufficient to modify its force, so as to be the subject of innovation in this respect. The fact that the train on which intestate was a passenger was one among other suburban trains, and that such trains were habitually overcrowded by passengers who were permitted and required to ride on the platforms with the knowledge and consent of the defendant, may well have excused intestate in choosing the place he occupied when injured. If railway companies subject their trains to the same uses adopted on urban electric or trolley cars, and receive compensation for carrying passengers upon the platforms of the same, they cannot avoid responsibility for an injury arising merely from the occupation of such place by their patrons to which the injured party does not contribute. *Reem v. Railway Co.*, 77 Minn. 503, 80 N. W. 638. Had intestate fallen from the train by reason of its being overcrowded, or had he been pushed therefrom by causes attributable to the dangerous course of conduct pursued by defendant in allowing passengers to ride on its platforms, we could not hold that intestate's conduct was negligent; but the complaint rests plaintiff's right to recover upon the expressed ground that the accident resulted from the action of intestate himself. It is alleged therein that at the inopportune moment he "then leaned out slightly and looked ahead as said train moved along, to see if it was arriving or had arrived at its destination." This averment repels the inference that the efficient cause of the accident was the overcrowding of the train; and, while his position on the platform may be excused by the course of defendant, it was the voluntary act of the unfortunate youth himself, wherein he exercised his own judgment, and took chances, which resulted in his death. Under the admissions of the plaintiff, her son's conduct can

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no more excuse him from negligence than in the case of a passenger within the car, who protrudes his head from a window and is struck by a passing car.

It remains to consider whether the immature age of intestate would, as a matter of law, demand a submission to a jury of the question of intestate's capacity to appreciate the risks incurred. The allegation in the complaint in this respect is that he "was sixteen years of age." There are no facts alleged to show lack of intelligence, discretion, or ability ordinarily exercised by persons of that age. The rule of care imposed upon persons of immature years has been stated in a former decision of this court in the following language: "The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied as a rule of law to all children, without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity, and the want of that degree of care is negligence." *Twist v. Railroad Co.*, 39 Minn. 164-168, 39 N. W. 402, 12 Am. St. Rep. 626. See, also, *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505; *Powers v. Railway Co.*, 57 Minn. 332, 59 N. W. 307; *Tucker v. Railroad Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. 776. The general rule that it is for the jury to determine the capacity of a minor to exercise discretion and judgment, and whether the failure to do so is contributory negligence, cannot reasonably be applied in cases where such persons are infants only in legal theory. An infant at 14 years, under the policy of our law, has sufficient discretion to select a guardian (Gen. St. 1894, § 4535), and is capable of malice which would subject him to penal consequences for crime when above the age of 12 (Gen. St. 1894, § 301). It would seem to follow that the mere fact alone that the infant is above that age, though under 21, would not presumptively absolve him from the consequence of contributory negligence. While an infant over 12 years might not have sufficient capacity to appreciate the risk of a dangerous situation, owing to peculiar individual characteristics affecting his capacity, yet we are unable to hold that a youth 16 years of age, traveling alone on a railway train, is not, as a matter of law, endowed with sufficient intelligence and discretion to avoid the consequences of acts which the law considers culpably negligent. *Pat. Ry. Acc. Law*, § 7; *Nagle v. Railway Co.*, 88 Pa. 35, 32 Am. Rep. 413; *Deitrich v. Railway Co.*, 58 Md. 347.

The order appealed from is affirmed.

**MCNEILL v. DURHAM & C. R. Co.***(Supreme Court of North Carolina, May 6, 1902.)*

[41 S. E. Rep: 383.]

**Injury to Passenger in Derailment—Admission of Establishment of Prima Facie Case—Immaterial Allegations of Complaint.\***

Where, in an action by a passenger for injuries sustained by reason of the derailment of the train, defendant admitted the derailment and the establishment of a prima facie case of negligence, the allegations of the complaint as to the manner and cause of the accident became immaterial; defendant being liable unless able to show that the derailment was not caused by any act of negligence on its part.

**Same—Negligence—Instruction Not Warranted by Evidence.**

In an action by a passenger for injuries sustained by reason of the derailment of the train, where there was no evidence tending to show that the accident occurred from the want of a sufficient crew, the giving of an instruction that if defendant failed to provide the train with a sufficient number of competent employees, and in consequence thereof it was derailed, defendant would be liable, was harmless error, where defendant admitted the derailment, and attempted to show that it was not at fault.

**Same—Competency of Engineer—Error in Admitting Testimony.**

In an action by a passenger for injuries sustained by reason of the derailment of the train, the admission, over defendant's objection, of testimony, after evidence that the engineer in charge of the train was competent, that three wrecks had occurred on trains in charge of such engineer, and that at one wreck lives were lost,—such wrecks resulting from an unusual freshet,—though admitted only on the question of the competency of the engineer, was prejudicial error, as calculating to divert the jury from the true issue.

Clark and Douglas, JJ., dissenting.

Appeal from superior court, Moore county; McNeill, Judge.

Action by W. H. McNeill against the Durham & Charlotte Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Guthrie & Guthrie, Murchison & Johnson, and Seawell & Burns, for appellant.

Black & Adams, Douglass & Simms, and U. L. Spence, for appellee.

**MONTGOMERY, J.** There were two issues submitted to the jury in this case: (1) Was the plaintiff injured by the

\*Presumption of negligence from injury to passenger, see Illinois Cent. R. Co. v. Kuhn (Tenn.), 22 Am. & Eng. R. Cas., N. S., 324, and foot-note: Bassett v. Los Angeles Traction Co. (Cal.), 22 Am. & Eng. R. Cas., N. S., 5; Harrison v. Sutter St. Ry. Co. (Cal.), 23 Am. & Eng. R. Cas., N. S., 809; Whitney v. New York, etc., R. Co. (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 184; Southern Ry. Co. v. Dawson (Va.), 18 Am. & Eng. R. Cas., N. S., 592; Baltimore & O. S. Ry. Co. v. Hausman (Ky.), 17 Am. & Eng. R. Cas., N. S., 237; Glover v. Charleston & S. Ry. Co. (S. Car.), 17 Am. & Eng. R. Cas., N. S., 102; Sprague et ux. v. Southern Ry. Co. (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 356; Steele v. Southern Ry. Co. (S. Car.), 14 Am. & Eng. R. Cas., N. S., 350; Lake Shore & M. S. Ry. Co. v. Kelsey (Ill.), 16 Am. & Eng. R. Cas., N. S., 82; Fremont, E. & M. V. R. Co. v. French (Neb.), 4 Am. & Eng. R. Cas., N. S., 365; Chicago, etc., Ry. Co. v. Zernecke (Neb.), 17 Am. & Eng. R. Cas., N. S., 76.



McNeill v. Durham & C. R. Co

negligence of the defendant, as described in the complaint? (2) What damages, if any, is the plaintiff entitled to recover? The plaintiff, in the complaint, alleged that his injuries were caused by the derailment of the coach in which he was seated; and the causes of the derailment were specifically set out, in the following language: "That the derailment of said car and the injury of the plaintiff were caused by the careless, negligent, and rapid running of said train, the defendant's negligent construction of said road, and negligent failure to keep the same in proper and safe repair, and the defendant's negligent failure to provide for said train a sufficient crew, and its negligent failure to provide and use such air brakes and other machinery and appliances as were necessary to the safe and proper operation of said road." The defendant, in its answer, admitted the plaintiff's injuries, but not to the extent claimed, and also admitted that they were caused by the derailment of the car. For a defense against the allegation of negligence, the defendant averred in its answer that the occurrence was an accident, and that it was due to other causes than either or all of those set out in the complaint.

On the trial the defendant introduced evidence tending to show that in the train was a box car belonging to the Chesapeake & Ohio Railroad Company, which was just in front of the derailed car, and that the Chesapeake & Ohio car had a defective bolster connected with its rear truck; that the defect consisted in a fracture of long standing, and so situated that it could not be discovered by ordinary inspection, nor without taking the truck from under the car to which it was attached; and that the breaking of said bolster under the Chesapeake & Ohio car was the cause of the derailment of the aforesaid truck under the box car next behind the Chesapeake & Ohio box car. On the trial the defendant's chief purpose was to hold the plaintiff to the specific allegations in his complaint as to the causes of the derailment upon the trial of the issue, and the principal and chief prayers for special instructions were directed to hold the plaintiff to proof of the allegation as described in his complaint. The defendant, through its counsel insist, that that contention involves a very old and familiar question of pleading, as well as evidence; that is, that a plaintiff is held to the proof of the material allegations in his complaint. But is either one of these specifications of the causes of the derailment, as set out in the complaint, material to the proper determination of the first issue in this case? The derailment, as we have seen, was admitted by the defendant, and its counsel further admitted that that constituted a prima facie case of negligence, and put the burden of proof on the defendant to show that the derailment of the car was not caused by defendant's negligence. That admission was the law of the case, and what difference does it make by what means or in what manner the car was derailed, unless the defendant is able to show that the derailment was not caused by a negli-

McNeill v. Durham & C. R. Co

gent act of the defendant,—any negligent act of the defendant? The defendant, as we have seen, undertook to show that the occurrence was an accident, and that it was caused by a hidden defect of a foreign car, which could not be detected by the ordinary and usual inspection. The derailment having been admitted, then, and the prima facie negligence of the defendant established, the specifications in the complaint as to the manner of the derailment became immaterial. The matters set up by the defendant as to how the derailment occurred, and according to the proof introduced, were submitted to the jury in a full and fair aspect.

This case involves a number of important legal questions, and, in the main, his honor's instructions to the jury were correct. One immaterial error probably ought to be noted. The court instructed the jury: "If the jury shall find from the evidence that on the 6th of April, 1900, the defendant received the plaintiff as a passenger on its passenger train, to convey him, as such, from Hallison to Gulf; and if the jury shall further find from the evidence that the defendant failed to provide said train with such number of competent employees as was necessary for the safety of the passengers thereon, and that in consequence thereof said train was derailed and thrown from the track, and that the plaintiff was injured thereby,—the jury should answer the first issue, 'Yes.'" We find no evidence in the record tending to show that the derailment occurred from a want of sufficient train crew to manage and operate the train. That instruction constituted the fifteenth exception of the defendant, and was well taken. It was, however, not material error, for the reasons already stated in this opinion.

There is, however, one error in the ruling of his honor on a question of evidence so substantial and serious that a new trial will have to be granted on account of it. The witness Jones, superintendent of defendant's road, testified for the defendant that the general character of the engineer who had charge of the defendant's engine at the time when the plaintiff was injured was good; and that he was a competent locomotive engineer. On cross-examination the witness was asked (the "case" states, as affecting the competency of the engineer), "How many wrecks have occurred on the defendant's road when Marshburn [the same in charge of engine at time of accident] was acting as engineer? The court admitted it as affecting the competency of Marshburn as an engineer, and the jury was instructed to consider it in no other light. The witness answered that there were three,—one of them, the Tyson Creek wreck. The plaintiff's counsel then asked the witness to state the character of that wreck, and the number of people killed in it, if any, with a view, so the case states, of showing that Marshburn was reckless and incompetent as a locomotive engineer. It was admitted over the

objection and exception of defendant, the court instructing the jury to consider it only as bearing upon the competency of Marshburn as an engineer. The witness answered, "There were three persons killed or drowned in the Tyson Creek wreck, when said Marshburn was engineer on the wrecked train." The answer was objected to, and an exception filed to its being allowed. The witness, on redirect examination, testified that the Tyson Creek wreck was caused by an unusual freshet in the creek, which washed out the foundation of the benches which supported the trestle over said creek, and, on account of the high water, the engineer could not have discovered it until the locomotive got on the trestle and went down. It was not the fault of the engineer, Marshburn, that the Tyson Creek wreck occurred. After all this evidence was in, what light did it shed on the engineer's competency or incompetency? It was admitted for no other purpose, and it had no bearing on the matter of the skill of the engineer, or his fitness, in any respect, for his position. It might have been competent, after the defendant had undertaken to prove the engineer's competency, to show by evidence, if such evidence existed, that the engineer, through his carelessness or incapacity, caused other wrecks, but the evidence should have been confined to those wrecks caused by the engineer's fault. As it was, after the evidence was in, the jury had before them the fact that three wrecks had occurred in which the engineer was in charge of the engine, and in one of which there had been loss of life. The whole of it, and especially that part of it concerning the Tyson Creek wreck and its attendant circumstances, was damaging to the defendant, and prejudicial. It probably had considerable weight upon the question of defendant's alleged negligence, and, if that was clear beyond question from the other undisputed facts in the case, it may have had weight on the question of the amount of damages. And although it is true that the court instructed the jury that they should not award exemplary damages, yet we know how difficult a matter it was for the jury to draw the line between exemplary or punitive damages and damages purely compensatory, when there was evidence allowed, over the objection of defendant, calculated to arouse a feeling of resentment or prejudice against the defendant, and to divert their minds from the true issue.

New trial.

CLARK and DOUGLAS, JJ., dissent.

**PURPLE v. UNION PAC. R. CO.***(Circuit Court of Appeals, Eighth Circuit, March 10, 1902.)*

[114 Fed. Rep. 123.]

**Carriers—One Entering Train with Understanding with Conductor Not to Pay Fare a Trespasser—Duty of Carrier.\***

One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury.

**Same.†**

One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him.

**Same—Alleged Passenger on Freight Train Presumptively a Trespasser.**

In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser.

**Same—Freight Trains—Passenger—Knowledge of Facts Suggesting Inquiry.**

One about to board a train who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers is charged with a knowledge of all the facts which a reasonably diligent inquiry would discover.

**Negligence—No Such Degree as "Gross."**

It is not error to refuse to instruct the jury that a defendant is guilty of gross negligence as distinguished from ordinary negligence on the one hand, and willful or reckless negligence on the other, because there is no such legal degree of negligence as "gross" negligence. The word "gross" in this connection is a mere epithet used to characterize one of the two legal classes of negligence mentioned.

**Bill of Exceptions—Statements in Conclusive, unless Excepted to When Bill Is Settled.**

The statement of facts in a bill of exceptions is conclusive in an appellate court unless it is excepted to and the exceptions are recorded in the bill when it is settled.

(Syllabus by the Court.)

**In Error to the Circuit Court of the United States for the District of Kansas.**

\*As to who are, and who are not, passengers, see *Gradert v. Chicago & N. W. Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 118, and extensive note, 121 et seq.; *Menaugh v. Bedford Belt Ry. Co.* (Ind.), 22 Am. & Eng. R. Cas., N. S., 1; *Chicago & E. I. R. Co. v. Jennings* (Ill.), 22 Am. & Eng. R. Cas., N. S., 127; *Lemery v. Great Northern Ry. Co.* (Minn.), 21 Am. & Eng. R. Cas., N. S., 257; *St. Louis S. W. Ry. Co. v. Harper* (Ark.), 21 Am. & Eng. R. Cas., N. S., 77; *Farley v. Cincinnati H. & D. R. Co.* (C. C. A.) 21 Am. & Eng. R. Cas., N. S., 404; *Girton v. Lehigh Valley R. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 157.

†See *Merrilees v. Wabash R. Co.* (Mo.), 22 Am. & Eng. R. Cas., N. S., 158, and note, 169 et seq.

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Harry G. Purple, who is the  
defendant, brought an action against the  
Union Pacific Railroad Company for negligence causing his  
death on October 16, 1899, between  
Cheyenne, in the state of Wyoming, he was a  
conductor of the railroad company, and was  
negligence of the latter by another train  
in the rear of that upon which Purple was riding.  
The company denied these allegations, and averred  
that he was riding upon an extra freight train, which was  
not authorized to carry passengers, that he knew that this  
train was not authorized to carry passengers, and that he was  
not authorized to pass or other free transportation, with the  
company paying no fare. The issues presented by these  
facts were submitted to a jury, which returned a verdict  
for the defendant, and a writ of error has been sued out to  
reverse the judgment founded upon this verdict. The case  
was presented upon a bill of exceptions which contains but a  
summary of the evidence. It discloses these facts: The train  
upon which Purple was riding was an extra freight train run-  
ning east from Laramie to Cheyenne. It was prohibited from  
carrying passengers by the rules of the company, but those  
rules permitted regular freight trains to take passengers. At  
Sherman, on its way from Laramie to Cheyenne, it became a  
section of passenger train No. 6. The sectionizing of a train  
is the act of the train dispatcher. It is an act of temporary  
application, and may be discontinued at any suitable point.  
Its sole purpose is to give certain track rights that a train  
does not possess before the order is issued. The order at  
Sherman which made this train a section of regular passenger  
No. 6 directed a freight train ahead of this one, this train,  
regular passenger No. 6, another passenger train, and another  
freight train to run as sections 1, 2, 3, 4, and 5 of the regular  
passenger No. 6. These sections were running in this way  
when the accident occurred. The evidence of the defendant  
tended to show that an extra freight train did not lose its  
distinctive character as such by being made a section of a  
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train. One of the rules of the company was that, where  
"freight trains on which passengers are allowed to be carried  
are run in sections, the last section of the train only" will be  
permitted to carry passengers, and another was that "con-  
ductors will collect fare from all persons traveling without a  
ticket or pass, and will be allowed no discretion in the  
matter."

Harry G. Purple was an employee on the Union Pacific  
Railroad from 1884 until 1893, and a part of the time was a  
conductor. The rules for the operation of this road in force  
at the time of his death were the same as those in force when  
he was employed upon the road, and at that time he was  
thoroughly familiar with them. The train upon which

*Purple v. Union Pac. R. Co*

Purple rode left Laramie at 8.15 p. m. on October 15, 1899. Its conductor was an old friend and acquaintance of Purple. The train consisted of 27 or 28 freight cars and a caboose. Purple had been visiting at Laramie for two or three days, and he had in his pocket on this day a time card which disclosed the fact that this train which he boarded was not a regular freight train, and therefore was not entitled to carry passengers. He was in the train dispatcher's office before the departure of the train, and that dispatcher could have informed him that this was not a regular freight train. The evidence of the defendant tended to prove that he had no intention of paying his fare, and that there was a tacit understanding between him and Davis, the conductor of the freight train, that he was to be permitted to ride on this train from Laramie to Cheyenne without the payment of any fare. He did not pay or offer to pay fare, nor did the conductor or any one else ask him to do so.

The bill of exceptions contains a statement that all evidence tending to show the fact or character of the defendant's negligence is found in it, and that there was no evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the deceased. These are the principal facts disclosed by the record which condition the determination of the questions presented by the alleged errors specified in this case, which all relate to the charge of the court and to its refusal to give certain requested instructions.

L. W. Keplinger (C. F. Hutchings, on the brief), for plaintiff in error.

N. H. Loomis (A. L. Williams and R. W. Blair, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The court refused to instruct the jury that the deceased was a passenger on the freight train of the defendant at the time he was injured, and that if he was killed by the negligence of the company the plaintiff was entitled to recover. This ruling is the first and the chief complaint of counsel for the plaintiff in error. There are, however, two reasons why this specification of error cannot be sustained.

In the first place, Purple had no pass, ticket, or permit to ride free upon this train, he paid no fare, and there was evidence tending to prove that he did not intend to pay fare, and that there was a tacit understanding between him and the conductor, Davis, that he should ride free. He was a man of years, intelligence, and experience. He had been employed upon this railroad for about nine years. He knew that he had no right to ride, and that the conductor of this train had

## Purple v. Union Pac. R. Co

On the 9th of January, 1900, Cassandra Purple, who is the widow of Harry G. Purple, brought an action against the Union Pacific Railroad Company for negligence causing his death. She alleged that on October 16, 1899, between Laramie and Cheyenne, in the state of Wyoming, he was a passenger upon a train of the railroad company, and was killed through the negligence of the latter by another train which ran into the rear of that upon which Purple was riding. The railroad company denied these allegations, and averred that Purple was riding upon an extra freight train, which was prohibited from carrying passengers, that he knew that this train was not authorized to carry passengers, and that he was riding without pass or other free transportation, with the intention of paying no fare. The issues presented by these pleadings were submitted to a jury, which returned a verdict for the defendant, and a writ of error has been sued out to reverse the judgment founded upon this verdict. The case is presented upon a bill of exceptions which contains but a portion of the evidence. It discloses these facts: The train upon which Purple was riding was an extra freight train running east from Laramie to Cheyenne. It was prohibited from carrying passengers by the rules of the company, but those rules permitted regular freight trains to take passengers. At Sherman, on its way from Laramie to Cheyenne, it became a section of passenger train No. 6. The sectionizing of a train is the act of the train dispatcher. It is an act of temporary application, and may be discontinued at any suitable point. Its sole purpose is to give certain track rights that a train does not possess before the order is issued. The order at Sherman which made this train a section of regular passenger No. 6 directed a freight train ahead of this one, this train, regular passenger No. 6, another passenger train, and another freight train to run as sections 1, 2, 3, 4, and 5 of the regular passenger No. 6. These sections were running in this way when the accident occurred. The evidence of the defendant tended to show that an extra freight train did not lose its distinctive character as such by being made a section of a passenger train, but that it still remained an extra freight train. One of the rules of the company was that, where "freight trains on which passengers are allowed to be carried are run in sections, the last section of the train only" will be permitted to carry passengers, and another was that "conductors will collect fare from all persons traveling without a ticket or pass, and will be allowed no discretion in the matter."

Harry G. Purple was an employee on the Union Pacific Railroad from 1884 until 1893, and a part of the time was a conductor. The rules for the operation of this road in force at the time of his death were the same as those in force when he was employed upon the road, and at that time he was thoroughly familiar with them. The train upon which

*Purple v. Union Pac. R. Co*

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In the first place, Purple had no pass, ticket, or permit to ride free upon this train, he paid no fare, and there was evidence tending to prove that he did not intend to pay fare, and that there was a tacit understanding between him and the conductor, Davis, that he should ride free. He was a man of years, intelligence, and experience. He had been employed upon this railroad for about nine years. He knew that he had no right to ride, and that the conductor of this train had



no authority to permit him to ride without the payment of his fare. The rules governing the operation of this railroad during the nine years when he was employed upon it prohibited this course of action, and they forbade it when he was killed. He had been familiar with these rules during the nine years of his employment upon this railroad, from 1884 to 1893, and in the seven years which followed, from 1893 to 1899, before he was injured, it is hardly possible that he could have forgotten or could have become ignorant of the specific fact that conductors were not empowered to grant free transportation upon this railroad, or of the general and universally known fact that it is not the custom to permit them to do so upon any railroad. If, knowing this fact, he entered and rode upon this train with the deliberate intention not to pay his fare, under the tacit understanding between himself and the conductor that he should not pay it, the entire transaction was a fraud upon the railroad company, and a deliberate attempt to appropriate transportation without compensation, in violation not only of the rules of the company, but also of the civil and the moral law. If he entered and continued upon this train under this understanding with the settled intention not to pay his fare, the relation of passenger and carrier was never created between him and the company, but he was a mere trespasser upon its property, fraudulently appropriating his ride, and the only duty which the company owed to him was to abstain from willfully or recklessly inflicting injury upon him. One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury. *Condran v. Railroad Co.*, 67 Fed. 522, 523, 14 C. C. A. 506, 507, 508, 32 U. S. App. 182, 185, 28 L. R. A. 749, 2 Am. & Eng. R. Cas., N. S., 16; *Railway Co. v. Brooks*, 81 Ill. 250; *Railroad Co. v. Michie*, 83 Ill. 431; *Railway Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613; *Railroad Co. v. Mehlsack*, 131 Ill. 64, 22 N. E. 812, 19 Am. St. Rep. 17; *McVeety v. Railway Co.*, 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 Am. & Eng. R. Cas. 471; *Robertson v. Railroad Co.*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Prince v. Railway Co.*, 64 Tex. 146; *Railway Co. v. Campbell*, 76 Tex. 175, 13 S. W. 19; *Way v. Railway Co.*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; *Same v. Same*, 73 Iowa, 463, 35 N. W. 525; *Hendryx v. Railroad Co.*, 45 Kan. 377, 25 Pac. 893; *Railway Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Railway Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780. A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agree-

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ment that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination. But it is equally true that if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created, but the existence of such an agreement is conclusively negated by the actual fraudulent contract so that it cannot exist. Therefore, if the deceased entered and rode under the fraudulent understanding with the conductor that he should pay no fare and with the deliberate intention to pay none, there was neither an express nor an implied agreement that he should pay for his transportation, and no relation of carrier and passenger arose, because the minds of Purple and the conductor never met upon any such contract, but came together upon the contrary understanding that Purple should pay no fare and should not be a passenger, but should fraudulently appropriate his transportation. The bill of exceptions instructs us that there was evidence tending to establish this state of facts, and in the presence of it the court properly refused to instruct the jury that Purple was a passenger, and that the plaintiff was entitled to recover if he was killed by the negligence of the defendant, because if this state of facts existed he was not a passenger, and the limit of the duty of the defendant toward him was to refrain from willful and reckless injury to him.

In the second place, Purple was riding on a train which was prohibited from carrying passengers by the rules of the company, and there was evidence tending to prove that he either knew this fact, or had notice of such facts as would have led a person of ordinary prudence and diligence to an inquiry which would have disclosed its existence. The record is clear that at the time Purple boarded the train on which he rode to his death that train was an extra freight train, which was forbidden to take or carry passengers. After he started upon his ride and at Sherman it was made the second section of regular passenger train No. 6 by the orders of the train dispatcher, but the character of the train and the number of the cars remained unchanged. It still contained the 27 or 28 freight cars and caboose with which it started from Laramie, and it contained no passenger cars. The orders of the dispatcher made this the second of five sections running on the

time of regular passenger train No. 6. The first section which preceded it was a freight train, the two sections which followed it were passenger trains, and the fifth or last section was a freight train. Thus, this passenger train No. 6 consisted of five sections, the first, second, and fifth of which were composed exclusively of freight cars and cabooses, and were in fact freight trains.

It will be convenient to notice here the earnest argument of counsel for the plaintiff presented in the discussion of another specification of error to establish the proposition that, if the extra freight train on which Purple was riding was prohibited from carrying passengers before it reached Sherman, it was permitted to do so after it passed that point, so that at the time Purple was killed it was not under this ban. Stated in syllogistic form, this is the contention: The rules permitted regular freight trains to carry passengers and forbade extra freight trains to do so. They declared that regular freight trains were those running on schedule time, while extra freight trains were those which did not run upon such time. Prior to its arrival at Sherman the train on which Purple rode was not running on the schedule time of any train. After it passed Sherman it ran on the schedule time of regular passenger train No. 6. It therefore became from that time a regular train, because it was running on the schedule time of the regular passenger train, and hence it became authorized to carry passengers before the fatal injury was inflicted. This argument is not persuasive or convincing, because the composition, character, and function of the train on which Purple rode remained the same after it became a section of the passenger train that it was before that time, and because after it passed Sherman it was not running on any schedule time prescribed for it upon the time card, but upon the time of a passenger train, under the special and temporary orders of the train dispatcher. It is, however, unnecessary to discuss this question, because the right of the conductor of this train to carry passengers upon it after it passed Sherman is conclusively negated by another admitted rule of the company. That rule is that, where freight trains on which passengers are allowed to be carried are run in sections, the last section of the train only will be permitted to carry the passengers. If, therefore, this became a regular freight train authorized to carry passengers when it passed Sherman, it was only the fifth section of this freight train which was permitted to do so, while the conductor of the second section, on which Purple was riding, was expressly prohibited from exercising this privilege. The train upon which Purple rode, therefore, was when he boarded it, and continued to be until the fatal collision, a train which was forbidden by the rules of the company to accept or carry him as a passenger.

Purple had worked on this railroad for nine years from 1884 to 1893. During a part of this time he had been a conductor

upon the railroad. The rules for the operation of the railroad were the same in 1899, when he was injured, that they were in 1893, when he left his employment. At and before that time he was familiar with them. It is difficult to believe that in 1899 he could have forgotten that these rules permitted some freight trains to carry passengers and prohibited others from doing so. For a day or two before he started on his fatal ride he had been visiting at Laramie, where he boarded the train. On the day upon which he started he had been in the office of the train dispatcher, where he could have readily learned by a simple inquiry whether or not the train upon which he entered was permitted to carry passengers. Beyond all question, these facts charged Purple with notice sufficient to put any man of ordinary prudence and diligence upon inquiry for the answer to the question whether or not this train was authorized to carry passengers, and brought him far within the established rule that notice sufficient to put one on inquiry for a fact is notice of all the facts relative to the matter in question that a reasonably diligent investigation and inquiry will disclose. In this state of the evidence the court below rightly charged the jury: "It was the duty of the deceased to inquire whether this train was such as was authorized to carry passengers. It does not appear that he did so; consequently he was charged with such knowledge and information as reasonable inquiry would have elicited." No exception was taken to this portion of the instructions of the court, and it comes here the established law of this case. If, therefore, Purple knew, or by a reasonably diligent inquiry he could have learned, that the train which he boarded was not permitted to carry passengers, he was not a passenger upon it, but was a mere trespasser on that train, because in the eyes of the law he was there knowingly violating the rules of the company. There was evidence tending to show this state of facts, and in the presence of it the court could not have lawfully instructed the jury that Purple was a passenger, and that the defendant was liable for his death if it was caused by its negligence, because, if this state of facts existed, Purple was a trespasser, and not a passenger, and the only duty of the defendant to him was to abstain from wantonly or recklessly inflicting injury upon him. One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him. *Railway Co. v. Roach* (Va.) 5 S. E. 175; *Robertson v. Railroad Co.*, 22 Barb. 91; *Eaton v. Railroad Co.*, 57 N. Y. 382, 384, 15 Am. Rep. 513; *Pennsylvania R. Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87; *Powers v. Railroad Co.*, 153 Mass. 188, 191, 192, 26 N. E. 446; *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Ecliff v. Railway Co.*, 64 Mich. 196, 31 N. W. 180.

The conclusions which have now been announced have not

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been reached without a careful perusal and consideration of the authorities cited by counsel for the plaintiff in error, such as *Dunn v. Railway Co.*, 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Railway Co.*, 33 Wis. 41, 54, 14 Am. Rep. 735; *Railroad Co. v. Derby*, 14 How. 468, 484, 14 L. Ed. 502; *Gradin v. Railroad Co.*, 30 Minn. 217, 220, 14 N. W. 881; *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; and *Whitehead v. Railway Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, 39 Am. & Eng. R. Cas. 410,—in which boys and men who had never been employed upon the railroad, or who had no notice of facts sufficient to put them upon inquiry as to the power of the conductor or officer in charge of the train to permit them to ride upon it as passengers, were held, under the circumstances of these particular cases, to stand in this relation to the companies. The rules and principles announced in those cases are inapplicable to the facts of the case in hand, because the evidence here conclusively establishes the fact, which did not exist in those cases, that before the alleged passenger boarded the extra freight train he knew facts which would put any man of reasonable prudence upon inquiry to ascertain—First, whether or not that train was permitted to carry passengers; and, second, whether or not the conductor had any authority to allow him to ride upon it, and because there was evidence in this case, which was not presented in any of those cases, tending to show that the alleged passenger entered and rode upon the train with the deliberate intention not to pay his fare, under a tacit understanding with the conductor that he should ride free. Purple did not approach this train in the relation to the company of a boy or of an ordinary individual honestly seeking transportation without knowledge of the rules or practices of the company. The conceded facts that he had been employed upon the railroad for nine years, had been familiar with the rules and practices upon the road and the evidence of his intention not to pay, and tacit understanding with the conductor that he should not pay fare, gave him notice of facts, and suggested inquiry which the ordinary applicant for passage upon the train of a railroad company does not have. This case is not governed by the authorities cited by the plaintiff in error, which declared the liabilities of railroad companies upon very different states of facts, but is controlled by the rules and the decisions to which reference has been made in the earlier portion of this opinion.

It will be convenient to notice here another contention of counsel for plaintiff in error allied to those which have already been considered. It is that although Purple was not a passenger he was not a trespasser, and the court should have instructed the jury that the defendant was liable to him for gross negligence. In support of this proposition cases are cited like *Railroad Co. v. Derby*, 14 How. 483, 14 L. Ed. 502, where a passenger who was riding free upon the railroad by the invitation of the president of the company was carelessly

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injured, and *Farmers' Loan & Trust Co. v. Baltimore & O. S. W. R. Co.* (C. C.) 102 Fed. 17, where one riding in a passenger car upon a pass sustained injury through the negligence of the company, and it was held that the defendant was liable to these persons for the exercise of ordinary care and diligence, and that any failure to exercise such care might well be characterized as gross. These authorities, and the rules of law upon which they rest and which they announce, have no application to the case in hand. Purple was not traveling on a free pass. He was not a licensee. He was either a passenger without knowledge and without notice of facts suggesting an inquiry which would have led a prudent man to knowledge of the fact that the conductor of this train was not authorized to permit him to ride upon it as a passenger, or he was a trespasser with knowledge, or with notice charging him with knowledge, of this fact, engaged in executing a deliberate intention to ride upon the train in violation of the rules of the company. He was not a licensee, and he could occupy no middle position. There was therefore no error in the refusal of the court to charge that if he was not a passenger the railroad company was liable to him for gross negligence. The term "gross" in this connection is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion. *Wilson v. Brett*, 11 Mees. & W. 113; *The New World v. King*, 16 How. 474, 14 L. Ed. 1019; *Milwaukee Railroad Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374; *Beal v. Railway*, 3 Hurl. & C. 337; *Grill v. Collier Co.* [1865-66] L. R. C. P. 600; *Perkins v. Railroad Co.*, 24 N. Y. 196, 207, 82 Am. Dec. 281.

Another complaint of the plaintiff in error is that the court instructed the jury that there was no evidence in the case sufficient to warrant them in finding that there was any wanton, willful, or reckless disregard by the company of the safety of the deceased. But the bill of exceptions contains these two statements: "All evidence tending to show the fact or character of defendant's negligence is contained in this bill of exceptions;" and "there was no evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the deceased." Counsel review the evidence contained in the bill of exceptions, and ask a holding that there was evidence tending to show willful and reckless injury. But this question is not here for our consideration. The only way in which it could have been presented in the present state of the record was by an exception to the statement in the bill of exceptions that there was no such evidence in the case taken and recorded in the bill itself. No such objection or exception was taken, so that the

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question whether or not there was such evidence was not presented to the court below when it certified the record, and as, in an action at law, this is a court for the correction of errors exclusively, there could have been no error in the court below, because that question was not presented to or ruled upon by that court when the bill of exceptions was made. In this court the record presented by that bill, in the absence of objection or exception thereto, is conclusive.

It is assigned as error that the court refused to instruct the jury that, although the conductor did not intend to demand transportation, the fact that he had such intention could not in any way affect the right of the plaintiff to recover, in the absence of evidence to show that Purple in some way induced the conductor to form such intention. But there was evidence tending to show that Purple did induce him to form this intention by presenting himself for transportation, by forming with him the tacit understanding that he should ride free, and by entering and riding upon the train without the payment or the offer to pay fare, in pursuance of his deliberate intention and tacit understanding that he should ride without the payment of any. The instruction requested was therefore inapplicable to the facts of this case, and there was no error in its refusal. It is not the duty of a trial court to instruct the jury what the law would be in the absence of material evidence which has been presented and submitted to the jury upon the crucial issues in the case. It completely discharges its duty when it gives the law applicable to the evidence before the jury.

For the same reason there was no error in the refusal of the court to charge the jury that some of the defendant's freight trains carried passengers, that Purple was riding on one of them with the knowledge and assent of the conductor in charge, and that under these circumstances, in the absence of evidence to the contrary, it would be presumed that he was a passenger. This instruction ignored all the material evidence in the case upon which the jury based its finding that he was not a passenger, the evidence of his deliberate intention not to pay fare, of the tacit understanding that he should ride free, of his employment upon the road for nine years, and his familiarity with the rules, and of his presence and opportunity to learn the facts at Laramie before he started upon his fatal ride.

It is said that it was error for the court to refuse to charge that the payment of fare is not necessary to give rise to the liability to pay it, and that if the carrier permits the passenger to take his seat without requiring payment the obligation to pay will stand for actual payment. But the rule of law embodied in this request was fairly given to the jury in the general charge of the court. Although the evidence was conclusive that Purple never paid any fare, and never was asked to pay any, the court instructed the jury that if he was invited

onto a train authorized to carry passengers, either by express words or by a tacit understanding between him and the conductor, he became a passenger, and it was the duty of the company to exercise the highest degree of practicable care for his safe transportation.

It is contended that the court erred because it failed to submit instructions (1) that if the car on which Purple was riding was of the same general appearance of other trains on which passengers were carried on that division of the railroad, but by reason of other facts, unknown to Purple, the train was not permitted to carry passengers, and if the failure of the conductor to demand fare was not procured by Purple, he was a passenger; and (2) that a person riding by the unauthorized permission of the conductor on a train not intended for the carriage of passengers is not a trespasser, unless it was known to him that the conductor exceeded his authority. It may be conceded for the purpose of this discussion, although the proposition is not considered or decided, that one without any knowledge and without any notice of facts sufficient to put him upon inquiry which would lead to knowledge of the lack of the authority of a conductor upon or of the character of a train which was not permitted to carry passengers might become a passenger upon that train under the circumstances stated in these propositions. The difficulty with the instructions is that Purple was in no such situation. He was an old employee on the road. In its practical operation he had known and had experienced the fact for nine years that regular freight trains might carry passengers and that extra freights might not. It is certainly probable that he knew this fact when he boarded the train, seven years later. Whether he did or not, the record clearly shows that he had ample knowledge of facts to put him upon an inquiry which would have led to an acquaintance with this fact. Under these circumstances, he could not escape this duty of inquiry. He was in this situation: If he had forgotten the rules and the practices, then he did not know that any freight trains on that railroad carried passengers, and the fact that he placed himself upon a freight train was notice to him that he was wrongfully there, because the presumption is that freight trains are for freight and passenger trains for passengers. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there and is a trespasser. *Bryant v. Railroad Co.*, 53 Fed. 997, 998, 4 C. C. A. 146, 147, 12 U. S. App. 115, 123, 58 Am. & Eng. R. Cas. 15; *Powers v. Railroad Co.*, 153 Mass. 188, 190, 26 N. E. 446; *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Files v. Railroad Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; *Hoar v. Railroad Co.*, 70 Me. 65, 72, 73, 35 Am. Rep.



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It is assigned as error that the court refused to instruct the jury that, although the conductor did not intend to demand transportation, the fact that he had such intention could not in any way affect the right of the plaintiff to recover, in the absence of evidence to show that Purple in some way induced the conductor to form such intention. But there was evidence tending to show that Purple did induce him to form this intention by presenting himself for transportation, by forming with him the tacit understanding that he should ride free, and by entering and riding upon the train without the payment or the offer to pay fare, in pursuance of his deliberate intention and tacit understanding that he should ride without the payment of any. The instruction requested was therefore inapplicable to the facts of this case, and there was no error in its refusal. It is not the duty of a trial court to instruct the jury what the law would be in the absence of material evidence which has been presented and submitted to the jury upon the crucial issues in the case. It completely discharges its duty when it gives the law applicable to the evidence before the jury.

For the same reason there was no error in the refusal of the court to charge the jury that some of the defendant's freight trains carried passengers, that Purple was riding on one of them with the knowledge and assent of the conductor in charge, and that under these circumstances, in the absence of evidence to the contrary, it would be presumed that he was a passenger. This instruction ignored all the material evidence in the case upon which the jury based its finding that he was not a passenger, the evidence of his deliberate intention not to pay fare, of the tacit understanding that he should ride free, of his employment upon the road for nine years, and his familiarity with the rules, and of his presence and opportunity to learn the facts at Laramie before he started upon his fatal ride.

It is said that it was error for the court to refuse to charge that the payment of fare is not necessary to give rise to the liability to pay it, and that if the carrier permits the passenger to take his seat without requiring payment the obligation to pay will stand for actual payment. But the rule of law embodied in this request was fairly given to the jury in the general charge of the court. Although the evidence was conclusive that Purple never paid any fare, and never was asked to pay any, the court instructed the jury that if he was invited

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299; *Gardner v. New Haven & N. Co.*, 51 Conn. 143, 50 Am. Rep. 12, 18 Am. & Eng. R. Cas. 170; *Graham v. Railway Co.*, 23 U. C. C. P. 541; *Sherman v. Railway Co.*, 34 U. C. Q. B. 451; *Railroad Co. v. Michie*, 83 Ill. 427.

If, on the other hand, Purple knew the rules and the practice of the railroad company, then he knew that conductors were forbidden to carry passengers, and passengers were prohibited from riding, on extra freight trains. So that, whether he knew the rules or not, the duty was imposed upon him to inquire and to ascertain whether or not the train upon which he entered was a regular or an extra freight train. The instructions under consideration ignore this duty of inquiry which the situation and knowledge of Purple imposed upon him, and for that reason they were properly refused. He was a trespasser, not only if he knew that the train on which he rode was not permitted to carry passengers and that the conductor was not authorized to allow him to ride upon it, but also if he knew such facts relative to this matter as would have put a man of ordinary prudence and diligence upon an inquiry which would have led to a knowledge of these facts.

The specifications of error in this case are numerous. They have not all been specifically set forth, but the rules and principles of the law and the facts, by which they must be judged, have now been carefully considered and declared. Our conclusion is that the material issues in this case were fairly and impartially tried, that the charge of the court tersely and correctly presented to the jury the rules of law applicable to the evidence, and that there was no error in the refusal of the court to submit the requested instructions of counsel for the plaintiff.

The judgment below is accordingly affirmed.

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HOUSTON E. & W. T. RY. CO. v. STELL.

(*Court of Civil Appeals of Texas, Feb. 26, 1902.*)

[67 S. W. Rep. 537.]

**Carriers—Passengers on Freight Train—Permit—Ejection—Representation of Agent.**

A passenger who knew it was essential, under the rules of the railroad, that, in addition to his ticket, he have a permit to ride on a freight train, and that he must get the permit before he got on the train, and that the ticket agent had no authority to say he could get it of the conductor, cannot, because of such representation of the agent, recover for his ejection by the conductor.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Action by Nathan Stell against the Houston East & West Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

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Baker, Botts, Baker & Lovett and J. S. McEachin, for appellant.

A. W. Boyd, Stanley Thompson, and Stevens & Marshall, for appellee.

FLY, J. Appellee sued appellant to recover damages alleged to have accrued by reason of his unlawful expulsion from a freight train on which he was riding from Diboll to Lufkin, stations on appellant's line of railway. The trial resulted in a verdict and judgment for appellee in the sum of \$1,500. Appellee alleged that he procured a ticket on April 30, 1899, from the agent at Diboll station, which entitled him to ride on all trains from that point to Lufkin, and got on a train which carried both freight and passengers, and after the train had gone about two miles he, with other passengers, was ejected by the conductor because he refused to pay cash; that the night was dark, and it was raining, and that he was compelled to walk back to Diboll. His damages are stated as follows: "That at the time of the said occurrence plaintiff alleges the truth to be that he was taking, and had the morning of the occurrence taken, calomel, and so informed said conductor and agent of said fact at the time he was ejected from said car; that by reason of unlawful acts plaintiff became and is now salivated, and has lost eight of his teeth, suffered intensely with sore mouth, sloughing off of flesh caused as aforesaid; and that by reason of said unwarranted acts his whole system has become affected, and that he is suffering, both mentally and physically, by reason of said acts, and is now suffering from said acts, and that he has not since said acts, nor is he now, and he alleges that he will not be, able to either work mentally or physically for a long time; and he alleges that said injuries caused as aforesaid are permanent." Tersely stated, the allegations amount to a charge that by the ejection from the cars, and consequent exposure, salivation was produced, from which the injuries resulted.

On the trial of the cause, Dr. Burroughs, the physician who had been attending appellee, swore that "salivation is produced after a man has taken mercury and then submits himself to the vicissitudes of the weather, as cold or wet, or anything that suddenly stops the secretions of the skin. \* \* \* To the best of my knowledge and belief, it is not the prevailing opinion of physicians who have been educated within the last 10 or 15 years that exposure does not produce salivation." Dr. Mynett, witness for appellant, testified: "I do not think his getting wet after taking the calomel would make any difference. The absorption of the calomel in the system produces salivation. Exposure does not have anything to do with it at all." Dr. Boyd, witness for appellant, swore: "Exposure to damp and cold weather after taking calomel does not have any effect towards producing salivation. I base that conclusion on teaching in the first place, and the next place from observation. I get that from all authorities I have

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read, and I can name you several. The prevailing, accepted opinion of the leading medical fraternity, as to exposure to cold or damp weather producing or not producing salivation, is it has no effect. \* \* \* The medical profession of to-day accepts as the true theory of salivation the amount of mercury absorbed and the length of time it would be retained in the system, and the theory of exposure causing salivation is not entertained in the scientific world at all, so far as I know."

As will readily appear, the testimony of these witnesses raised the issue sharply as to whether the exposure to the rain produced the salivation which caused the injuries to appellee. The issue thus raised was not presented to the jury, except in a very general way, by a requested charge of appellant, which was given, and appellant requested the following charge: "If you find as a fact that the plaintiff was salivated, then, before you can return a verdict for the plaintiff in this case, you must believe from a preponderance of the testimony in this case that the plaintiff was not salivated by reason of having taken an overdose of calomel, or that he was not salivated by permitting a quantity of calomel to remain in his system too long; and you must further find from a preponderance of the evidence that the salivation, if any, was caused as a proximate result by reason of his exposure brought about by his leaving the defendant's train at the time and under the circumstances that he did, and that he was improperly ejected from said train, and that such salivation, if any, was the reasonable or probable result of such exposure, and unless you so find the facts to be your verdict should be for the defendant."

The requested charge would certainly not be adopted as a model or a precedent, and yet, we think, it embodies, when analyzed, the law of the case. The first part of the charge may be treated as surplusage, because if the jury had found that the salivation was not a proximate result of the expulsion from the train, and that appellee was not improperly ejected, no damages could have been allowed, whether it was found that the salivation did or did not result from other causes. The requested charge presented an issue clearly raised and sharply defined by the evidence, and appellant had the right to have it presented to the jury. *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Same v. Rogers*, 91 Tex. 52, 40 S. W. 956; *Railway Co. v. Casseday*, 92 Tex. 525, 50 S. W. 125.

There is no merit in the third, sixth, seventh, and eleventh assignments of error. The agent at Diboll did not violate any rule in not giving a permit to appellee to ride on the freight train. He had not been furnished any permits, and could not give them, of course. The law as to the assignments above named is stated correctly, we think, in cases of *Railway Co. v. White* (Tex. Civ. App.) 61 S. W. 436, and *Same v. Jackson*, Id. 440, which are companion cases to this.

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None of the assignments of error save the one hereinbefore discussed is well taken.

For the error in failing to give the special charge hereinbefore copied the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

(April 9, 1902.)

Appellee's motion is based on the statement that the refusal of the charge for which we held that the judgment should be reversed was given in substance in other requested instructions, and the record may bear out the contention.

Another question, however, is presented by the record which will necessitate an adherence to the judgment reversing the judgment of the lower court and remanding the cause. In the answer filed by appellant one of the issues raised was the knowledge of appellee as to a lack of power on the part of the ticket agent to abolish a rule that passengers in order to ride on freight trains must, at all stations where tickets were sold, obtain a permit as well as a ticket from such agent. It may be stated as settled that a railroad company may make and enforce a rule forbidding passengers to be carried on freight trains, or, if it permits passengers on freight trains, it may, after due notice, require such passengers to provide themselves with a particular kind of ticket. *Elliott, R. R. § 200*, and authorities cited. It may be also stated as the established doctrine that the employees of a railway company cannot abrogate rules governing passengers established by the employer, and that a person who knowingly acts in violation of a reasonable regulation of the railway company, even with the consent of an employee, whom he knows has no authority to abrogate the rule, occupies the attitude of a trespasser towards the company, and cannot claim and maintain the right of a passenger. *Railway Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Prince v. Railway Co.*, 64 Tex. 144; *Railway Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Railway Co. v. Hayden*, 6 Tex. Civ. App. 745, 26 S. W. 331. In the last-named case it was said "if the rules of the company forbade persons being carried on freight trains, and the conductor had no authority to relax the rule, and Black took passage upon the train with knowledge of the facts, the consent of the conductor would not make him a passenger, rendering the company liable for injuries received by him from wrongful acts of a servant done without the scope of his employment." The judgment was reversed because the charge made the railway company liable, regardless of whether the party injured knew of the rule prohibiting persons from riding on freight trains. Afterwards the cause, under the style of *Railway Co. v. Black*, was again tried, and appealed to the same court, which held that he was a passenger, and affirmed a judgment which, on writ of error, was reversed by the supreme court in *Railway Co. v.*

Black, above cited. The supreme court in that case approved the doctrine as held when the case was first before the court of civil appeals, and held that "a railroad company may carry passengers and freight by different trains, and, when such provision is made, the conductor and brakemen have no implied authority to receive passengers upon freight trains." It will be noted that in all the cases cited conductors and brakemen form the class of employees mentioned, and the facts establish cases of violation of instructions on the part of the employees, and they are cited more for the purpose of showing that knowledge of the want of authorities on the part of the employee to abolish a rule will prevent a recovery than as tending to show a lack of authority in the ticket agent. The conductor in this case was acting under instructions and performing his duty to the carrier, yet if the agent had induced appellee by his representations to get on the freight train the railroad company might be held liable. Under the powers granted to the agent, a ticket buyer would undoubtedly be authorized to assume that the ticket agent had the authority to bind the company by his representation that the permit, which appellee knew was essential to his passage on the freight train, could be procured from the conductor. But suppose he knew that the agent had no such authority, and knew that it was absolutely essential for him to get the permit before he got on the train, he then was an intruder and a trespasser on the train, and was entitled to nothing at the hands of the carrier except what is due to such trespasser. According to the testimony of appellee, the jury might have found that he did not know of a lack of authority in the agent to set aside the rule of the company, but the charge must be viewed in the light of the whole testimony. The evidence disclosed that appellee knew that a permit was necessary because he applied for one, and because he had been told by the agent at Lufkin never to get on a freight train without a permit. He does not swear that he was misled by the representation of the agent, or that he had told the conductor that the agent had told him that he could get a permit on the train; and, on the other hand, testimony was introduced by appellant to the effect that appellee and his two companions had been asked if they did not know that they must have permits in order to ride on a freight train, and they replied that they did, but thought it would be all right, and that it would not make much difference.

In view of the testimony, it was error for the trial judge to disregard the issue of appellee's knowledge of want of authority upon the part of the agent to make such representation as he was said to have made. If appellant's testimony was true, appellee knew that the agent had no such authority, and was merely running his chances when he got on the freight train, and under such a state of facts he certainly could not recover. The court instructed the jury, however, that the

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appellant was liable if the agent made the representation, which was equivalent to informing the jury that knowledge of the lack of authority upon the part of the agent was no defense, and whether the inducement for getting on the train was the representation or not appellant was liable.

It is true that the identical charges given by the court were held to be correct in the companion cases to this cited in our former opinion, but the question of knowledge of a lack of authority in the agent to so change the rule was not raised or adverted to, but the affirmance was based on the practical abrogation of the rule by its customary violation. It may be contended in this case that the error in the charge should not avail, as the verdict could be justified on the ground of abrogation of the rule by its violation, and that contention would be well founded if the uncontradicted evidence showed such abrogation. The evidence on that point is sharply contested by appellant, it being shown by it that there was no violation of the rule, but a strict enforcement of it.

The law of agency, as applied to railroads, is the same as it is when applied to individuals, and the agent, acting within the apparent scope of his authority, will bind the principal. The enunciation of that rule was all that was called for in the cases of *Railway Co. v. White* (Tex. Civ. App.) 61 S. W. 436, and *Same v. Jackson*, Id. 441, and was all that was done by the court. The exception that, when the party with whom the agent was contracting knew he had no such authority, the rule does not apply, was not raised, and the court did not discuss it. There is therefore no conflict between the rule laid down in the cases cited and that enunciated in this.

The motion for rehearing is overruled.

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OXSHER v. HOUSTON, E. & W. T. RY. CO.

(*Court of Civil Appeals of Texas, March 12, 1902.*)

[67 S. W. Rep. 550.]

**Railroads—Personal Injuries—Persons Assisting Passengers to Board Train—Negligence.**

Where a boy 18 years old, and carrying baggage, boarded a passenger train to assist certain relatives who were going away, but without indicating to the train employees that he was not himself going on the train, and was injured in getting off after the train had commenced to move, —it having remained at the station from three to five minutes, and long enough to allow passengers to get off and on the car,—the railroad company was not negligent, and a verdict was properly directed in its favor.

On Rehearing.

**Contributory Negligence of Boy Assisting Passengers—Jumping from Moving Train.**

A boy who, after assisting relatives to board a train, walked rapidly out while it was moving, in the dark, and, without taking time to see where he was jumping, jumped out into space, was negligent, and not entitled to recover for his injuries.



Oxsher v. Houston, E. & W. T. Ry. Co

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Action by J. A. Oxsher against the Houston, East & West Texas Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Blount & Garrison, for appellant.

Baker, Botts, Baker & Lovett, and J. S. McEachin, for appellee.

FLY. J. Appellant, an alleged minor, through his next friend, G. E. Oxsher, instituted this suit to recover damages of appellee, resulting from the crushing of his foot by the wheel of a car. The court instructed a verdict for appellee. It was developed by the facts that appellant, who was about 18 years of age, went in company with two ladies (his relatives) and four children to Garrison, a station on appellee's line of railway, to assist them on the train, about 10:30 o'clock at night on June 25, 1900. Two young men named Weatherly were also assisting the ladies and children. When the train arrived the three young men, in company with the women and children, got on the train, which was very crowded. After procuring seats for some of the party, the train began to move, and the three young men ran out on the platform of the car and jumped off. Appellant struck a freight car on a siding, and was knocked under the coach, and had his foot so badly crushed that it had to be amputated. The train was running from seven to ten miles an hour when appellant jumped off. Appellant entered the train with a basket in his hand. One of the other young men carried baggage, and the remaining one carried a child. The conductor passed the people as they were moving towards the train, and he asked one of the young men where the people were going, and he replied that they were going to Houston. Nothing was said or done to indicate to the conductor that the young men were getting on the car merely to assist the women and children, and that they desired to get off. The train remained at the station from three to five minutes,—the usual time. The young men testified that they heard no signal given for the train to start. It was dark where appellant jumped off, and he did not take time to see where he was jumping. The train stopped long enough at the station to give full time for passengers to get off and on the car.

We do not think the evidence established any negligence upon the part of the railway company, and it was therefore not error for the court to instruct a verdict for appellee. It is not alleged or proved that the conductor had any notice of the fact that the young men desired to get off the car after entering it; and the appearance of the men, carrying a child and baggage, tended to lead to the reasonable conclusion that they, like the women and children, were entering the car to remain. In the absence of knowledge, or such facts as would

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charge with knowledge, on the part of the conductor, that appellant did not intend to become a passenger, the railroad company owed him no duty, except to give him a reasonable time to safely board the train. That this was done was uncontroverted. It may be that the conductor should have assisted the women and children on the car, and that a stool should have been provided on which they might the more easily enter the car, but the failure to assist and to furnish the stool had no direct connection with the accident. Appellant went to the station to help them on, independent of a want of assistance from a conductor, or the lack of a stool. It is not intended to convey the impression that, had his assistance to the women and children been the direct result of the lack of assistance on the part of the conductor, it could have any controlling influence on the decision of this case. The basis of the decision must be that the railway company, in the absence of notice that appellant desired to get off, was under no obligation to hold the train long enough to give him time so to do; and this conclusion is fortified by the decisions of this and other states. In the case of *Railway Co. v. Miller*, 27 S. W. 905, the court of civil appeals held, in a case similar to this: "The relations sustained between the railway company and appellee do not arise out of contract, and the obligations are not such as are imposed by contract. Appellee did not go into the train as a passenger, and hence the duties imposed by law upon carriers to passengers did not rest upon the company, and govern its conduct towards him. He went upon the train under an implied permission or license, and the company owed him the duty of ordinary care. \* \* \*

The company was under obligation to passengers to stop the train a sufficient length of time for those desiring to get off and those desiring to take passage to do so with safety. It was the duty of appellee to take notice of the usual length of time, and, if it was not sufficient, and it was necessary for him to go into the train, in order to place upon the company the duty of holding it specially for him to disembark he must have given notice of his intention." In the case of *Railway Co. v. McGilvary*, 29 S. W. 67, it was said by the same court: "Plaintiff did not stand in the same relation to the company as a passenger, and therefore the liability of the company cannot be measured by the standard of duty to passengers. While plaintiff was not a trespasser, and the company was under obligation not to negligently injure him, yet whether or not the company was negligent must depend upon the knowledge the employees had of plaintiff's intention to immediately disembark from the train, or that the train did not stop the usual length of time, and the same was started without giving some signal indicating an intention to start." The same doctrine is announced in *Dillingham v. Pierce* (Tex. Civ. App.) 31 S. W. 203. In the case of *Railway Co. v. Leslie*, 57 Tex. 83, where the plaintiff, who boarded the train to assist

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some ladies and children who intended to leave on it, had jumped off and was injured, it was said: "There is no evidence showing any other connection of the defendant's agents with the accident, except such culpability as may be implied from the short period of time the train of cars remained at the station; and if the defendant is not liable on account of its failure to stop at said station five minutes, as required by law, or to allow passengers to board the train, there would exist no basis whatever for complaint in this case against the defendant." In the case of *Railway Co. v. Miller*, 39 S. W. 583, decided by this court, the liability of the railway company was made to depend on the knowledge of the conductor that the plaintiff was on the train, following the opinion in the same case by the court of civil appeals of the Fifth district, above cited. In the case of *Berry v. Railway Co. (Ky.)* 60 S. W. 699, the plaintiff got on the train to assist his wife and children and mother-in-law, and was injured in getting off the train, which was leaving the station. The supreme court of Kentucky reviewed, among others, the *McGilvary* and *Miller* Cases, above cited, and in conclusion said: "From these and numerous decisions bearing upon this question we think it is clear that, if appellee had actual or constructive notice that appellant had gone into the car for the purpose of seating his wife and children, and that he intended to get off before the train started, it was their duty to have given him notice before starting the train, and to have held it long enough for him to get off with safety; but, in the absence of such notice, no obligation existed on their part." A peremptory instruction was given for the railway company by the trial court, and the judgment was affirmed by the court of appeals,—the court of last resort in Kentucky. In the case of *Railway Co. v. Lawton*, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, the supreme court of Arkansas, through Judge Hemingway, reviews numerous decisions on the subject, and says: "But one who goes upon the train to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, in its interest and upon its implied invitation, as before stated, has a right to render the needed assistance, and leave the car; and the railroad, in permitting him to enter it with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. *Griswold v. Railroad Co.*, 64 Wis. 652, 26 N. W. 101. But the duty is dependent upon the knowledge of his purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after giving him a reasonable time to get aboard. The law could not, in reason or justice, impose as a duty the doing of that which, in the light of everything known to trainmen, would not appear necessary or proper, or hold that the cars should be stopped when there was no reason to stop them, except a fact unknown to them.

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If the attendant intended to become a passenger, he had no reason to ask a continued stop; and if he desired to get off, and that alone made a longer stop necessary, he could not expect or ask that it be made where no occasion for it was known to those in charge." The evidence clearly established that ample time was given for the passengers to get on the train, and for several of them to manage to get seats on a crowded car, before the train started; and there was not a fact adduced in evidence that tended in the slightest degree to show anything was done to apprise appellee's servants that appellant wished to get off immediately, but his acts and those of his companions tended to create the impression that all of them were passengers.

We have not adverted to the conduct of appellant in rushing out in the dark and jumping from the platform of the moving car against a freight car standing on a siding, and thus bringing about the injury to his foot. The courts in several of the cases cited have held that such conduct was contributory negligence, and the party guilty of such conduct could not recover. In the case of *Railway Co. v. Leslie*, above cited, it was held that plaintiff, when he "found himself safely on the defendant's cars, although being rapidly carried away unwillingly from home, was required, under the circumstances, to act with prudence, the same as would be required of any other passenger; and, whilst the defendant was not without fault, that fault of too speedily leaving the station did not endanger the personal safety of the plaintiff, and, in its very nature, could not be the proximate cause of the injury which the plaintiff received through his own direct act, and which was the proximate cause of said injury." In none of the cases cited by appellant has it been held that a railway company will be liable for injuries inflicted on a person by jumping off the train, who has gotten on with passengers, to assist them, when the servants have no notice of his desire to leave the train. As said by the supreme court of Wisconsin in the case (above cited) of *Griswold v. Railway*: "The law would work in such a case the greatest injustice if it could create a liability of the company. It would seem to be the first duty of the person entering a train for such a purpose to notify some one in its management of his presence, business, and purpose, so as to create some relation to the company, and make it its duty to care for him. The principle is elementary in all such cases that the liability of the company to a person injured by being in such a place of danger depends upon the company's failure to use ordinary care to avoid injuring him after becoming aware of his danger."

The evidence would have admitted of no other verdict than the one instructed by the court, and the judgment is affirmed.

On Motion for Rehearing.

(April 16, 1902.)

The motion for rehearing presents no meritorious grounds

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for consideration. As stated in the original opinion, the evidence failed to establish negligence on the part of the railway company; and, in addition, we find that appellant was guilty of contributory negligence in jumping as he did from the moving car. The uncontroverted evidence showed that it was at night, and dark,—so dark that appellant said he could not see anything,—and he walked rapidly out of the coach, and down to the second or third step, and, without taking hold of the hand rail, jumped out into space. He swore in his depositions that he did not take time to see where he was jumping. He knew that a side track was there, and that it was usual to leave box cars on it, and had seen them down where he jumped off. He saw box cars on the side track before he got on the train. He swore he struck something when he jumped which turned him under the wheels of the train. The act of jumping as appellant did was utterly devoid of care, and so opposed to the dictates of ordinary prudence that it was negligence in itself, and was properly so declared by the court. *Bullock v. Railway Co.* (Tex. Civ. App.) 55 S. W. 184.

The motion is overruled.

## LOUISVILLE &amp; N. R. CO. v. CHAMPION.

(Court of Appeals of Kentucky, May 1, 1902.)

[68 S. W. Rep. 143.]

**Passenger Leaving Train Because of Conductor's Refusal to Accept Ticket—Punitive Damages.\***

Where plaintiff, a passenger on defendant's train, voluntarily left the train because the conductor refused to accept his ticket, it was error to give an instruction authorizing the jury to award punitive damages, as the conductor was honestly mistaken in supposing that the ticket had expired, and was led into the mistake by the indistinctness of the date stamped on the ticket, and by a warning he had received to look out for an unused ticket of the date that appeared to bear.

**Same—Negligence—Burden of Proof.**

As defendant, by its answer, admitted that plaintiff was entitled to actual damages,—stating the amount,—judgment would have gone against it if no evidence had been offered; and therefore the burden of proof was upon it, under Civ. Code Prac. § 526, providing that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by Charles D. Champion against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

\*As to when punitive damages may be recovered for ejection of passengers, see *Gillman v. Florida Cent. & P. R. Co.* (S. Car.), 12 Am. & Eng. R. Cas., N. S., 125, and note, 130 et seq.; *Lexington Ry. Co. v. Cozine* (Ky.), 23 Am. & Eng. R. Cas., N. S., 624; *Lexington & E. Ry. Co. v. Lyons* (Ky.), 11 Am. & Eng. R. Cas., N. S., 212; *Southern Ry. Co. v. Hardin* (Ga.), 10 Am. & Eng. R. Cas., N. S., 250.

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W. C. McChord, for appellant.

John W. Lewis, for appellee.

PAYNTER, J. On the 28th of June, 1900, the appellee purchased from the appellant's agent at Springfield, Ky., a ticket entitling him to passage from Springfield to Louisville. He boarded the train for the trip. After leaving Springfield, in due time the conductor approached the appellee with the view of taking up his ticket. Upon examination of it, the conductor concluded, from the figures stamped on the back of it by the agent, that it had been issued on the 26th of June; the terms of the ticket requiring that the party holding it should use it upon the day of its issuance. So the conductor, after reaching the conclusion that he could not receive the ticket from the appellee for passage from Springfield to Louisville, declined to accept it, but told the appellee that, if he would pay his fare to Bardstown, he could there ascertain whether the ticket had been regularly issued on the 28th, instead of the 26th, of June, and, if it had been so issued, he would refund the fare thus paid. The appellee, not having the money to pay his fare to Bardstown, paid it to an intermediate station, where he obtained a horse and buggy, and drove back to Springfield. He was not ejected from the train, but was given to understand that he could not ride on the ticket, but would have to pay his fare. Therefore he paid his fare to the intermediate station, and voluntarily left the train. The figure "6" on the back of the ticket looks quite as much like an "8" as, if not more so than, a "6." This fact, together with the information which had been given the conductor to look out for an unused ticket which had been issued on the 26th, led him to make the mistake.

Under the instructions of the court, the jury was authorized to award punitive damages. Without going into details of the evidence as to the conversation which took place between the conductor and appellee, it is sufficient to say that the facts do not warrant the giving of instructions authorizing the jury to award punitive damages.

The court below ruled that, under the pleadings, the burden of proof was on the appellee. The appellant admitted in its answer that the ticket in question entitled the appellee to ride from Springfield to Louisville, that the conductor made a mistake in not accepting it, and that the appellee was entitled to recover actual damages, and stated what it claimed to be the amount of them. If no evidence had been offered, judgment would have gone against the appellant on account of the admissions which it made. Section 526, Civ. Code Prac., provides that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." This provision of the Code is clear, and defines the rule for the government of courts in determining where the burden of proof lies. The judgment is reversed for proceedings consistent with this opinion.

NORTHERN PAC. RY. CO. *v.* ADAMS *et al.**(Circuit Court of Appeals, Ninth Circuit, May 19, 1902.)*

[116 Fed. Rep. 324.]

**Carriers—Free Ticket—Exemption from Liability.**

A contract exempting a railroad company from liability "for any injury to the person, or for any loss or damage to the property," of the passenger using a free ticket, arising from the negligence of its agents or otherwise, does not extend to the death of the passenger so contracting.

**Death by Wrongful Act—Heirs and Personal Representatives—Statutory Right of Action.**

The right of action given by Rev. St. Idaho, § 4100, and 2 Ballinger's Ann. Codes & St. Wash. § 4828, to the heirs or personal representatives of a person whose death is caused by the wrongful act or neglect of another, to recover such damages as may be just, is an entirely new cause of action for damages for the loss sustained by such beneficiaries, and is not dependent on the right of the deceased to maintain an action for the act which caused his death had he survived.

**Carriers—Vestibuled Train—Unprotected Platform\*—Unusual Speed†—Injury to Passenger—Questions for Jury.**

A passenger boarded a railroad train which was vestibuled with the exception of a tourist sleeper placed between the day coach and the dining car. This sleeper had no device for inclosing its platforms or guarding persons who might be thereon. The passenger entered the day coach, and went back to the dining car to purchase cigars, and started to return to the day coach. He was not seen, after passing out of the dining car, until his body was found near the track opposite a sharp curve. The train was three hours late. The track contained many sharp curves between the station where deceased boarded the train and the next station. The schedule running time between these stations was 35 minutes, and on this occasion the run was made in 24 minutes. There was testimony that there was unusual lurching of the cars, to such an extent the mail clerk could do no work, and the news agent could not make his usual trip through the cars: *held*, that the question of the company's negligence in so running the train with such unprotected platforms thereon was for the jury.

**Same—Contributory Negligence.**

The fact that deceased was in the habit of traveling on such trains, and knew that they contained an unvestibuled sleeper, did not deprive him of the right to visit the dining car, or make it negligence on his part to do so, and the question whether he was exercising ordinary care was for the jury.

**In Error to the Circuit Court of the United States for the District of Washington.**

This was an action to recover damages from the plaintiff in error for the loss sustained though the alleged negligent killing of Jay H. Adams, the husband and father of the defendants in error. A verdict was obtained in the lower court in favor of the defendants in error in the sum of \$14,000, and judgment entered for that amount. The case is now before this

\*As to whether the placing of a car without vestibules in a vestibuled train amounts to negligence, see subdivision R. of note to *Herbert v. St. Paul, etc., R. Co.*, ante, p. 152.

†As to when the running of trains and cars at an unusual rate of speed amounts to negligence, see notes at end of case.

court upon writ of error to reverse that judgment. See 95 Fed. 938.

It appears that the deceased, Jay H. Adams, was an attorney at law residing at Spokane, Wash., frequently having occasion to travel over the lines of railroad in that section of the country. On November 13, 1898, the deceased, in company with a friend, took the east-bound overland train of the Northern Pacific Railway Company at Spokane about 8 a. m., and continued to ride thereon until the town of Hope, Idaho, was reached, at which point they left the train. They remained in Hope several hours, taking the regular west-bound overland train of the same company for Spokane at 4:15 p. m. of the same day, this train being some three hours and ten minutes late in arriving at Hope. The train consisted of an engine and eight cars, placed in the following order: Engine, mail, baggage, express, smoking car, day coach, tourist sleeper, dining car, and standard Pullman sleeper. These cars were vestibuled, with the exception of the tourist sleeper, which was not only not vestibuled, but had no device whatever for inclosing its platforms or guarding persons who might be upon the same. The deceased, with his friend, boarded the train at either the rear end of the smoking car or the front platform of the adjoining first-class day coach, and proceeded immediately forward into the smoking car, where they took seats. Very shortly after the train left Hope the deceased left the smoking car to go to the dining car for the purpose of getting some cigars. He did go to the dining car, purchased the cigars, and left the dining car again, going in the direction of the smoking car. He did not return to the smoking car, and was not again seen alive. His body, in a somewhat mutilated condition, was found the next day opposite a six degree curve in the railroad track, and between the track and the waters of Pend d'Orielle Lake, at a point about six and a half miles west from the town of Hope.

The complaint charges the railway company with negligence in leaving an opening at the side of the platform of one of the cars of its train unguarded while the train was in motion, and in running its train at a high and dangerous rate of speed around a sharp curve of the track; that by reason of this negligence the deceased was thrown from said train and killed; and that the plaintiffs are damaged because of said death in the sum of \$100,424.

These charges are denied in the answer, and as matter of affirmative defense it is alleged that the negligence and carelessness of the deceased contributed to and caused his death; that he was perfectly familiar with the trains running on said line, and knew of the unvestibuled car upon said train; that he well knew the nature of the country through which the said train was about to run, and that the track had many sharp curves, and well knew the rate of speed at which the train would run; also that he well knew there would be great



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risk and danger of being thrown from the train if attempting to pass from one car to another while the train was passing through said country. For a further affirmative defense it was alleged that the deceased was not a passenger for hire, but was a purely gratuitous passenger upon the terms and conditions and subject to the provisions of a free ticket, which terms and conditions were printed on the back of said ticket, and were accepted and agreed to and signed by the deceased before boarding said train. These conditions were as follows: "This free ticket is not transferable, and, if presented by another person than the individual named thereon, or if the alteration, addition, or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare." "The person accepting this free ticket agrees that the Northern Pacific Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same." "I accept the above conditions." It was alleged that under this contract and agreement the railway company owed the decedent no duty whatever as a common carrier toward a passenger for hire, and was therefore not liable for any loss or damage that might have occurred to the plaintiffs by reason of the death of the said Jay H. Adams under the circumstances related. The court sustained a demurrer to this last affirmative defense, holding that as the plaintiffs did not base their demands upon any contract, but complained of a wrong resulting in an injury to them by deprivation of the support, protection, society, and comfort of their husband and father, the question as to the validity of the contract under which the defendant claimed exemption from liability was immaterial. The case proceeded to a trial upon the question of negligence, resulting in a verdict against the railway company.

Will H. Thompson and Stephens & Bunn (C. W. Bunn, of counsel), for plaintiff in error.

C. S. Voorhees and Reese H. Voorhees, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The errors assigned are the sustaining of the demurrer to the affirmative defense contained in the answer, the admission of certain testimony at the trial, and the giving of certain instructions to the jury, and refusing to give certain other instructions. The first question, then, for consideration is, what effect, if any, did the contract between the deceased and the railway company have upon the plaintiffs' right of action?

It will be observed that the terms of the contract provided for the exemption of the railroad company from liability "for any injury to the person, or for any loss or damage to the

property," of the passenger using the free ticket, caused by the negligence of agents or otherwise. Can this language be construed to relieve the railroad company from liability for the death of the person using such ticket, if such death is caused by the negligence of the carrier or its servants? In the first place, if such meaning could be given to the language of the contract, the contract would be void as against public policy. A man's life is not his own, to be disposed of by contract. "A man may not barter away his life or his freedom or his substantial rights." *Insurance Co. v. Morse*, 20 Wall. 445, 451, 22 L. Ed. 365. The state has an interest in securing the safety and preserving the lives of its citizens. By both the common and statute law, the state has provided the greatest safeguards for the protection of the lives of its citizens. Negligent killing was manslaughter at the common law and indictable. In many of our states it is similarly regarded, and severe penalties imposed therefor. The expressed permission by the deceased, therefore, that the railroad company might negligently take his life without consequent liability, would have been in violation of both the common and statute law, and a void contract. But the contract in question, in our opinion, does not extend to the death of the party contracting; it is limited to injury to the person and loss to the property of that person. "Injury to the person" and "death of the person" are not synonymous terms. The one presumes a continuation of life, though in an impaired state; the other, the destruction or ending of life. The law will permit a person to contract with reference to the liability of a carrier which affects the person contracting solely, but will not permit him to contract with reference to the statutory liability of the carrier to others, in case of his death through the negligence of the carrier. *Clark v. Geer*, 86 Fed. 447, 32 C. C. A. 295.

What, then, is the statutory liability of the defendant herein to the representatives of the deceased, if liable at all? By the statute of Idaho, in which state the deceased met with the fatal accident, action for death by wrongful act or neglect is permitted, as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then, also, against such person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." Rev. St. Idaho, § 4100.

And by the statute of Washington, in which state this action was brought, it is provided that:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives

may maintain an action for damages against the person causing the death. \* \* \* In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just." 2 Ballinger's Ann. Codes & St. Wash. § 4828.

The action for damages against a party causing the death of another by wrongful act or neglect had its origin in Lord Campbell's Act, 9 & 10 Vict., and that act has served as a model for much of the statutory enactment in this country upon the subject. The principal object of the act and the legislation following it was to meet a supposed defect in the common-law rule that any right of action which an injured person might have against the person causing the injury abated with his death, and did not survive in favor of his heirs or representatives. An entirely new cause of action was created in favor of certain beneficiaries for damages caused to them by the loss of the deceased in consequence of the wrongful death. It was at first considered that Lord Campbell's act merely provided for a survival to the representatives of the right the deceased would have had to an action for personal injuries had he lived; and, following this construction, many of our state statutes provide that the action will only lie when the death occurred under such circumstances that the deceased, had he lived, would have been entitled to sue. The plaintiff in error contends for this strict construction, even though the statute does not contain any express provision so limiting the right of action; claiming that such a provision is necessarily implied for the purpose of ascertaining the status or relation of the deceased to the person alleged to have committed the wrongful act, and thereby determining what duty such person owed, if any, to the deceased.

The statutes have been variously held to be penal and remedial, and accordingly given strict and liberal constructions. But under the most liberal interpretation implied provisions cannot be introduced into a statute where no ambiguity appears. The intention of the lawmakers is to be determined from the words they employ; and, where statutes have been enacted by certain states omitting provisions which occur in similar statutes in other states, courts have no right to presume that such omission was negligent or unintentional, especially where the language is clear and conclusive without such clauses. In such cases there is nothing to construe. Language bearing a plain import needs no extended construction. In the statutes of both Idaho and Washington the clause limiting the right of action to circumstances which would have permitted the deceased to sue is entirely omitted, and nothing appears elsewhere in the statutes to warrant its insertion by implication. The omission must therefore be considered as unintentional, and the legislative will to be completely expressed without such limiting provision. The right of action given by such statutes is to the heirs or personal rep-

representatives of a person killed by the wrongful act of another, not for the injuries or damages caused to the deceased, but for the injuries and damages caused to his heirs or representatives by reason of the loss of the deceased. It cannot be dependent upon the right of the deceased to such an action if living, for it does not come into existence until his death by the wrongful act of another. It then springs into existence, by virtue of the statute, in the heirs or personal representatives, purely and simply because they have been damaged by the wrongful or negligent act of another, the relationship existing between the deceased and the party causing the death having no bearing upon the right of action other than as a circumstance to be considered in determining the degree of negligence. In the case of *Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, the supreme court of California, in construing a similar statute to those in controversy herein, held the action given for a death caused by negligence to be a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. The supreme court of the United States in the case of *Railroad Co. v. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, 45 L. Ed. 121, 14 Am. & Eng. R. Cas., N. S., 827, takes the same view. A statute of the state of Kentucky was there under consideration which contained no words of limitation of the right of action given for the death of a person by negligence or wrongful act. The court said: "The cause of action thus created is independent of any right of action the deceased may have had or would have had if he had survived the injury."

Under the statutes of both Idaho and Washington, then, the plaintiffs had a right of action against the defendant railroad company for the just damages to them resulting from the death of the said Jay H. Adams, if his death was caused by the negligence of the railroad company; and this right of action was in no way dependent upon any right existing in the deceased before his death, or which might have accrued to him had he survived.

The plaintiffs claim that the defendant was negligent (1) in running a nonvestibuled car as a part of the train, and (2) in running the train with too great rapidity around a curve in the track. Evidence was introduced in support of these contentions showing that the train which the deceased boarded at the station of Hope was some 3 hours late; that the distance between Hope and the station of Sand Point is 16 miles; that the ordinary schedule time for running between these stations was 35 minutes; that on the afternoon in question this run was made in 24 minutes. For the first half of this distance the track is practically on a level, but contains many curves; in fact, between the 3-mile post out of Hope and the 8-mile post the outline of the track forms a figure similar to three sides of a parallelogram, with the sharp corners cut off by rounding

curves, and the general lines being sinuous instead of straight. The engineer in charge of the engine drawing the train on that day testified that in pulling out of Hope a speed of only 20 miles an hour was attained while passing through the yards, but at about one half mile west of Hope the speed was increased to about 35 miles an hour; that this speed was increased to 40 miles an hour, but was decreased at the Pack river trestle, a little beyond the 3-mile post, to perhaps 25 miles an hour. The trestle was about 7,100 feet long. The engineer testified that about 200 or 300 feet before leaving the trestle he started working steam again, and increased the speed again to 35 miles an hour, maintaining this speed until reaching the third mile from the trestle, or about 7½ miles from Hope, when the speed was again increased to about 45 miles an hour at the 10-mile post, in order to carry the train up a light grade there. From the top of the grade a speed of 60 miles an hour was gradually attained, and maintained until necessary to stop at the station of Sand Point. The body of Mr. Adams was found at a point about 1½ miles beyond the Pack river trestle, or about 6½ miles west of Hope, where the sharpest curve of the track between Hope and Sand Point occurs. The air brakes were not used on approaching the curves before the accident occurred. This testimony of the engineer is not, of course, from any actual record made of the running of the train at that time, but is based upon his experience in running over that line for three years and a half.

The railway mail clerk on the train at the time of the accident, and who had been running over that line for about eight months, testified that when the train had nearly passed over the Pack river trestle he noticed an unusual motion of the car,—such a lurching and swinging that he could not continue with his work, but, to use his own words, “did not do a thing only hold on to keep from being knocked around the car until I got to Sand Point.” He stated that the mail sacks piled against the side of the car fell down; that he observed the engine “talking for all she was worth”; and in his judgment the train attained a speed of about 50 miles an hour immediately after leaving the trestle, and that this speed was increased to 60 miles an hour within a mile and a half from the trestle, where the accident occurred.

The news agent, who had been running on that line for over two years, also testified to the unusually high speed of the train between Pack river trestle and Sand Point; that the shaking motion of the train over the crooked road there was so violent as to make him car sick, and he did not make his usual trip through the cars until after leaving Sand Point, finding it too difficult to stand in the aisles. He further stated that the brakeman told him they had orders to make up a certain amount of time between Hope and Sand Point, and that the best thing he could do would be to sit down and hold onto the seat.

A merchant of Hope, accustomed to making the trip over this road to Spokane about twice a month, and Mr. Gabbert, the gentleman who boarded the train with the deceased on that day, both testified to the unusual lurching of the car shortly after leaving the Pack river trestle, and the high rate of speed maintained by the train until reaching Sand Point.

The evidence of running a train at too great speed, and its permission by the railway company's rules, is an element of consideration in determining the question of negligence in a particular case (*Railway Co. v. Dixon*, 179 U. S. 131, 139, 21 Sup. Ct. 67, 45 L. Ed. 121, 14 Am. & Eng. R. Cas., N. S., 827); and it is of especial importance in this case in considering the advisability or necessity of providing vestibuled platforms over which passengers are permitted to pass while the cars are in motion, and whether, under the circumstances, the omission to make such provision is negligence on the part of the railroad company. It has long been established that common carriers of passengers are bound to exercise the utmost degree of care, diligence, and skill that is practically consistent with the mode of transportation adopted; and, while they are not required to employ every possible preventive which the highest scientific skill might suggest, the law requires such carriers to use the best precautions in known practical use to secure the safety of their passengers. Whether the carrier has done so or not is a question of fact, depending upon the peculiar circumstances of each case, which circumstances are to be compared and weighed by the jury, and the existence of negligence as a fact decided by them by the application of the principles of reason to such circumstances.

So, in the case at bar, the question whether the defendant railroad company, having announced to the public that it was running a completely vestibuled train, and by advertisement invited the public to patronize the dining car run by it as a part of its train, thereby permitting and in fact inviting the passengers to pass over the various platforms of intervening cars while the train was in motion, was negligent in not providing such platforms with such safeguards as to make passage thereover reasonably safe at all times, taking into consideration the fact that portions of the track to be passed over at a rapid speed contained sharp curves,—this question was necessarily one of fact, and therefore within the province of the jury, under proper instructions from the court. The instructions given by the trial court in this regard were in accord with the established doctrine upon the duty of common carriers to passengers, and with the decision of the jury upon this question we have therefore nothing to do.

In *Bronson v. Oakes*, 76 Fed. 734, 22 C. C. A. 520, 9 Am. & Eng. R. Cas., N. S., 166, a passenger riding in the rear coach of a vestibuled train left the coach at night to go to the forward end of the train, and, to facilitate his return, left open the door of the sleeping coach in which he was riding. The

night was dark, the vestibule was not lighted, and the train was running rapidly. On his return, in passing through the vestibule which led into the coach in which he was riding, he supposed a dim, reflected light from the windows of the sleeper was a light shining through the door of the coach which he had left open, and, proceeding as he supposed to enter the doorway of the coach, he walked through an outside vestibule door, which had been left open, fell from the train, and was seriously injured. The court held that the question of whether the railroad company was negligent or not rested with the jury, and in commenting upon this question said:

"The defendants were under no legal obligation to provide vestibuled trains for their passengers, but, having done so, it was their duty to maintain them in a reasonably safe condition. *Railway Co. v. Glover (Ga.)* 18 S. E. 406, 414, 13 Am. & Eng. R. Cas., N. S., 566. The purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another. The presence of such an appliance on a train is a proclamation by the company to the passenger that it has provided him a safe means of passing from one car to another, and an invitation for him to use it as his convenience or necessity may require. Whether, having provided vestibuled cars for their passenger trains, it was negligence in the defendants to leave the vestibule connection between two cars without light, and the outside door of the vestibule open without a guardrail or other protection while the train was running rapidly on a dark night, is a question of fact for the jury to determine; and if, upon the facts set out in the complaint, they should find that it was negligence, no court could disturb their finding."

It is claimed by the defendant that the deceased was in the habit of traveling upon these trains, and, having knowledge of the unvestibuled tourist sleeping car which invariably formed a part of the train, was guilty of contributory negligence in passing to and from the dining car through the unvestibuled car while the train was in motion. The deceased had the right to visit the dining car, and it was not negligence on his part to do so. He was only required to exercise ordinary and reasonable care to avoid injury. In the absence of evidence to the contrary, the law presumes that the deceased did exercise this care, and the burden of proof is then upon the defendant to show by preponderance of evidence that the deceased was guilty of contributory negligence. This was not done by direct proof, and is not inferable from any of the facts established in the case. The testimony indicates that up to the time the deceased was last seen alive he was exercising due care in returning from the dining car to the car in which he was located for the journey. The charge of contributory negligence was therefore a question of fact, to be determined by the jury, in view of all the facts and circumstances of the case.

## Notes

In *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, 56 Am. & Eng. R. Cas. 296, Mr. Justice Brewer, speaking for the court upon the question of contributory negligence, said:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will draw different conclusions from them."

The testimony admitted by the trial court over the objections of the defendant related to the circumstances showing the probable cause of death of Adams, and to the pecuniary loss sustained by the plaintiffs in his death. These objections do not, in our opinion, present any questions involving reversible error, and are not of a character to call for discussion.

The judgment is affirmed.

## NOTES.

#### CARRIERS OF PASSENGERS—SPEED OF TRAINS OR CARS AS AN ELEMENT OF NEGLIGENCE.

In the absence of statutory regulation the speed at which a train or street car is run is a matter which must necessarily be left to the regulation and control of the carrier, subject to liability for running the conveyance at such a rate of speed as amounts to negligent management. In other words, railway and street railway companies are permitted to run their trains and cars at such high rate of speed as under all the surrounding circumstances and the conditions of the conveyance, track, etc., shall comport with the obligation to exercise a high degree of care for the safety of passengers. *Indianapolis, etc., R. Co. v. Hall*, 106 Ill. 371, 12 Am. & Eng. R. Cas. 146. It follows that the fact that a train or car is run at a high rate of speed is not alone sufficient to show negligence; for even a high rate of speed, if the condition of the tracks and machinery will permit it without increasing the peril to passengers, will not be negligence. *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241; *Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126, wherein it was said that to submit to the jury the simple question of whether the speed at which a train was run was so high and dangerous as to amount to negligent management of the train, without proof of the condition of the roadway and machinery, or other attending circumstances affecting the safety of the train, was to give unbridled and unguided license to find any speed they might regard dangerous to be negligent management. Thus the mere fact that a train or street car was being run at an unusual rate of speed is not of itself sufficient to show negligence. *Perry v. Malarin*, 107 Cal. 363, 40 Pac. 489; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Chesapeake, etc., R. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833. But no doubt the speed of a train or car may be so great when taken in connection with the character of the road, the condition of the means of conveyance, and the various other conditions necessarily affecting the question of safety, that the ordinary risks and dangers incident to the particular mode of transportation are materially increased and the carrier will be chargeable with negligence. Thus a high rate of speed may amount to negligence in running a train over a track which is not in good condition (*Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126; *Texas, etc., R. Co. v. Hamilton*, 66



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Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182; Texas, etc., R. Co. v. Johnson, 75 Tex. 158, 12 S. W. 482, 41 Am. & Eng. R. Cas. 122), in running a train upon a switch (Central, etc., R. Co. v. Johnston, 106 Ga. 130, 32 S. E. 78, 12 Am. & Eng. R. Cas., N. S., 286; Seelig v. Metropolitan, etc., R. Co., 18 Misc. [N. Y.] 383, 41 N. Y. Supp. 656), in running a street car upon a swing-bridge when there is danger that the rails may be out of line (White v. Milwaukee, etc., R. Co., 61 Wis. 536, 21 N. W. 524, 18 Am. & Eng. R. Cas. 213, 50 Am. Rep. 154), in running a train over a bridge which is not able to support a rapidly moving train (Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310), in approaching a down grade on a street railway track which is slippery from snow, rendering it difficult to control the car (Danville Street Car Co. v. Payne, 2 Va. Dec. 379, 24 S. E. 904), and in running a train of passenger street cars down a steep grade at a very great and dangerous speed. Bishop v. St. Paul, etc., R. Co., 48 Minn. 26, 50 N. W. 927. See also, Wilkerson v. Corrigan, etc., R. Co., 26 Mo. App. 144. Compare Feary v. Metropolitan, etc., R. Co. (Mo. 1901), 62 S. W. 452. It has been held that it was a question for the jury whether it was negligence on the part of a street railway company to run a crowded electric car, carrying passengers on the rear platform, at the rate of fifteen or twenty miles an hour down a grade and around a sharp curve. Reber v. Pittsburg, etc., Traction Co., 179 Pa. St. 339, 36 Atl. 245. It may amount to negligence to run a train or street car at a high rate of speed around a curve.

*California.*—Johnson v. Oakland, etc., R. Co. (Cal. 1900), 60 Pac. 170; Samuels v. California, etc., R. Co. (Cal. 1899), 56 Pac. 1115; Lynn v. Southern, etc., R. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Mitchell v. Southern, etc., R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

*Georgia.*—Macon, etc., R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756.

*Illinois.*—Elgin City R. Co. v. Wilson, 56 Ill. App. 364.

*Indiana.*—Louisville, etc., R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343, 58 Am. & Eng. R. Cas. 304.

*Nebraska.*—East Omaha, etc., R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491.

*New York.*—Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Lucas v. Metropolitan, etc., R. Co., 67 N. Y. Supp. 333; Francisco v. Troy, etc., R. Co., 88 Hun (N. Y.) 464, 34 N. Y. Supp. 859.

*Virginia.*—Chesapeake, etc., R. Co. v. Clowes, 93 Va. 189, 24 S. E. 833.

But in an action to recover for injuries received by plaintiff, while a passenger on defendant's cable car, by being thrown from the car by a jerk when rounding a curve, the evidence showing that the jerk was caused by a speed which was no more than necessary to carry the car around the curve, it was held that defendant was not liable. Hite v. Metropolitan, etc., R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555. It may amount to negligence to run a train at a high rate of speed over a portion of the road which is especially liable to be rendered dangerous by the intrusion of cattle on the track. St. Louis, etc., R. Co. v. Stewart (Ark. 1901), 61 S. W. 169, 20 Am. & Eng. R. Cas., N. S., 571; Brown v. New York, etc., R. Co., 34 N. Y. 404; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234, 72 Am. Dec. 698. And in approaching a point where the road may have been rendered unsafe by a recent storm, the engineer knowing of the storm, and apprehending injury to the road, the speed of the train should be regulated accordingly. Andrews v. Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252. Approaching a crowded station at a high rate of speed may amount to negligence (Peyton v. Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 41 Am. & Eng. R. Cas. 550, 17 Am. St. Rep. 430), especially when the train is running on a track intervening between the station house and a train which is taking on or letting off passengers. Terry v. Jewett, 78 N. Y. 338, affirming 17 Hun (N. Y.) 395. See section II, D., 6, b, of note to Muhlhause v.

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*Monongahela St. R. Co.*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131. It may be negligence to run a train which contains improperly loaded cars at a high rate of speed. *Keating v. Detroit, etc.*, R. Co., 104 Mich. 418, 62 N. W. 575, 2 Am. & Eng. R. Cas., N. S., 222.

The question as to whether a particular rate of speed amounts to negligence is usually a question for the jury under all the circumstances of the case. *Andrews v. Chicago, etc.*, R. Co., 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252. Thus it has been held that the trial court properly refused defendant's request for an instruction to the effect that a railway company has the right to propel its train over its road at such rate of speed as it sees fit; that no rate of speed is negligence per se or of itself; and that if the jury should find that, at the place where the accident occurred, the railroad track was in good repair, the ties sound, the rails of suitable character and in safe condition, properly spiked and fastened to the ties with proper elevation, the running of the train at a high rate of speed would not be an act of negligence. *Louisville, etc.*, R. Co. *v. Jones*, 108 Ind. 551, 9 N. E. 476. In action by a passenger on a freight train to recover for injuries received by the derailment of the train, the defendant requested the following instruction: "A railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which, by the highest degree of skill and care, could not be discovered, it would not be negligence per se to run the train at a rate of speed of forty miles an hour." The court refused to give the instruction as asked, but modified it by adding "provided that, under all the circumstances of a given case, such rate of speed was reasonable and a safe one," and gave the instruction as modified. On appeal, in sustaining this action of the trial court, the reviewing court said: "Whether it would be correct as applied to a passenger train we need not stop to inquire, for we are here dealing with an injury received upon a freight train. \* \* \* We think many circumstances might exist, even where the track was in good and safe condition and the cars properly equipped, which would render such a rate of speed negligence. The train might be of unusual size, the cars improperly loaded, or loaded beyond their capacity, or there might be at the particular place dangers of collisions with stock because the track was not fenced, or dangers of collisions with teams at crossings on account of the absence of warnings, or many other circumstances which would render it imprudent and unsafe to run a freight train at such a rate of speed." *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas. 454.

It has been said that street railway company, operating cars by cable, in running its trains at a rate of speed prohibited by ordinance, is guilty of negligence per se. *Weber v. Kansas City, etc.*, R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 41 Am. & Eng. R. Cas. 117, 18 Am. St. Rep. 541, 7 L. R. A. 819. Certainly the running of a train or street car at a speed prohibited by law is at least evidence of negligence. It has even been held proper to refuse an instruction that a provision in the ordinances by which the franchise of an electric railway is granted limiting the speed of cars, can have no effect upon the question as to whether the speed at which cars are run outside of the municipal lines amounts to negligence. *Cogswell v. West Street, etc.*, R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500. It being provided by statute that every steam vessel shall, when in a fog, go at moderate speed, the theory that full speed is the safest speed cannot justify a violation of the statutory rule. *Clare v. Providence, etc.*, Steamship Co., 20 Fed. 535.

Obviously the speed at which a train is run at the time of an accident cannot be considered upon the question of negligence unless it can be connected with the accident. Thus where an accident resulted from the breaking of the side-rods of an engine, and it was not shown that the rate of speed at which the train was running would have tended to contribute to the breaking, it was held that negligence could not be pred-

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icated upon the speed of the train. *Beery v. Chicago, etc., R. Co.*, 73 Wis. 197, 40 N. W. 687.

It has been held that an instruction which defined a safe rate of speed by its comparison with the velocity "practised before, with the tacit consent of the community, and without accident," assumed a false criterion, and was erroneous. *Cleveland, etc., R. Co. v. Newell*, 75 Ind. 542, 8 Am. & Eng. R. Cas. 377. Compare *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471.

THEODOR MEGAARDEN.

## INTERNATIONAL &amp; G. N. R. Co. v. ING.

(*Court of Civil Appeals of Texas, May 7, 1902.*)

[68 S. W. Rep. 722.]

## Excursion Ticket—Terms of Contract.

A railroad ticket read: "I. G. Ry. Special Excursion Ticket. Going Coupon. One First-Class Passage from Austin, Tex., to San Antonio, Tex. Rate sold, \$1.50." It stated passengers would not be allowed to stop off, and had the stamp of the Austin ticket office, with date: *held*, that it embodied a contract entitling the holder to transportation from Austin to San Antonio.

## Same.

The ticket was prima facie evidence of a right to carriage from Austin to San Antonio.

## Same—Evidence.

Where, in an action against a railroad for wrongful ejection from a train, the complaint alleged that plaintiff's ticket was issued by defendant, and the proof showed the ticket was purchased from a person who was not shown to be an agent of the defendant, defendant not having pleaded non est factum, it was not necessary for plaintiff to prove that defendant executed and issued the ticket.

## Same—Transfer.

In the absence of constitutional or statutory prohibition, or a stipulation to the contrary on the face thereof, a railroad passenger ticket is transferable, and entitles the holder thereof to the rights of the original purchaser.

## Same—Same.

Batts' Ann. Civ. St. tit. 94, c. 12a, attempts to regulate the sale of railroad tickets, and under certain circumstances prohibits any one save a duly appointed agent from making such sales; but provides that it "shall not apply to any person holding a ticket on which it is not printed that it is a penal offense for him or her to sell, barter, or transfer the ticket for consideration": *held*, that a ticket not having the printed notice is assignable.

Appeal from district court, Travis county; F. G. Morris, Judge.

Action by John Homer Ing against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. R. Fisher and N. A. Stedman, for appellant.  
Hart & Townes, for appellee.

KEY, J. Appellee brought this suit against appellant for the breach of a contract and for damages resulting from his unlawful and forcible expulsion from a railway train on appellant's road. He pleaded a contract embodied in a special

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excursion ticket, reading thus: "International & Gt. Northern Railroad. Special Excursion Ticket. Going Coupon. Good Only on Day of Issue. One First-Class Passage from Austin (C) Tex., to San Antonio, Tex. Passengers will not be allowed to stop off on this ticket. Issued —, 190—. Rate sold, \$1.50. One way rate, \$——. 3367. Form Local 6." Stamped on back in a circle: "I. & G. N. R. R. Co. City Ticket Office, Austin, Texas, Jul. 14, 1901." He alleged that the ticket and contract referred to were executed and issued by the defendant railroad company. The proof shows that he bought the ticket from a third person, and fails to show that such person was an agent of the railroad company. However, as there was no plea of non est factum, it was not necessary for the plaintiff to prove that the defendant executed and issued the ticket. *Railway Co. v. Tisdale*, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; *Same v. Campbell*, 1 Tex. Civ. App. 509, 20 S. W. 845. We overrule the contention that the ticket referred to did not embody a contract entitling the plaintiff to transportation on appellant's railroad from Austin to San Antonio. While some authorities go to that extent, it is not necessary and we do not hold that the ticket was conclusive of the terms of the contract between the railroad company and the person to whom the company sold the ticket. It was prima facie evidence of a right to transportation from Austin to San Antonio, and the company did not offer to prove any further agreement between it and the purchaser modifying or limiting the right thus indicated. 4 Elliott, R. R. §§ 1596, 1601; *Howard v. Railroad Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313; *Maroney v. Railway Co.*, 106 Mass. 160, 8 Am. Rep. 305; *Railway Co. v. Chisholm*, 79 Ill. 584; *Knight v. Railroad Co.*, 56 Me. 234, 96 Am. Dec. 449; *Nichols v. Southern Pac. Co.*, 23 Or. 123, 31 Pac. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664, 52 Am. & Eng. R. Cas. 205; *Carsten v. Railroad Co. (Minn.)* 47 N. W. 49; *Hoffman v. Same*, Id. 312; *Railway Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039.

As to the point in reference to the assignability of the ticket, we hold that, in the absence of constitutional or statutory prohibition, or a stipulation to the contrary on the face thereof, a railroad passenger ticket is transferable, and entitles the holder thereof to the rights of the original purchaser. 4 Elliott, R. R. § 1599, and the cases there cited. See, also, some of the cases already cited. Chapter 12a, tit. 94, Batts' Annotated Civil Statutes of this state attempts to regulate the sale of railroad tickets, and, under certain circumstances, prohibits any one except a duly appointed agent from making such sales. However, the statute referred to expressly declares "that the provisions of this chapter shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter or transfer said ticket for a consideration." The ticket in

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this case contained no such printed matter, and therefore the statute has no application, and the ticket was assignable.

On the other points presented in the briefs we rule against the appellant. Taking the plaintiff's evidence as to the manner of his expulsion from the train, and the rule which prevails in this state allowing compensation for feelings of humiliation, we are not prepared to hold that the verdict for \$502.90 is excessive.

Judgment affirmed.

LINDSAY v. SOUTHERN RY. CO.

(*Supreme Court of Georgia, March 11, 1902.*)

[41 S. E. Rep. 46.]

**Carriers—Injuries to Passenger—Contributory Negligence.\***

Though it may not, under all circumstances, be an act of negligence to alight from a moving train, yet where a passenger, when the train upon which he was riding was moving away from the station of his destination, "went out on the platform, and got on the steps of the car, \* \* \* moved down the steps, put one foot off, and swung himself in a position to get off," but was not "able, in the position in which he was then placed, to step on the ground," and, while in this position, discovered a telegraph post near the track, "and, perceiving that if he undertook to recover himself and get back on the train he would strike said post, and perhaps fall under the train, turned loose, and was thrown to the ground," and, in consequence, received physical injuries, he was not entitled to hold the railway company liable therefor. (a) There was no error in sustaining a demurrer to the plaintiff's petition.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by B. G. Lindsay against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hoke Smith and H. C. Peeples, for plaintiff in error.

Dorsey, Brewster & Howell and Sanders McDaniel, for defendant in error.

FISH, J. The plaintiff brought suit, based upon an attachment, against the Southern Railway Company, to recover damages for personal injuries alleged to have been sustained by him in consequence of the negligence of the defendant. The petition made the following case: The plaintiff boarded the train of the defendant at Montevallo, Ala., a station of the defendant, for the purpose of going to Birmingham Junction, another station on the defendant's line, and paid the fare between those points to the conductor. When the train had about reached the station of his destination, "and was slowing up, petitioner got up out of his seat, and started toward the door for the purpose of leaving the train, the train at that

\*See *Payne v. Nashville, C. & St. L. Ry. Co.* (Tenn.), 22 Am. & Eng. R. Cas., N. S., 677, and foot-note; *Chicago & E. I. Co. v. Stormont* (Ill.), 21 Am. & Eng. R. Cas., N. S., 116; *Sanders v. Southern R. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 281.

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time being backing slowly from Montevallo to Birmingham Junction." "As petitioner was going through the door of the car, the engine was reversed and started forward." He "went out on the platform, and got on the steps of the car, \* \* \* going quickly." He "moved down the steps, put one foot off, and swung himself in a position to get off. At that time the train was going slowly, but petitioner found it was not stopping, and realized that it was not going to stop, and saw a telegraph post near the track just ahead of him, and, perceiving that if he undertook to recover himself and get back on the train he would strike the post, and perhaps fall under the train, he turned loose, and was thrown to the ground, not being able, in the position in which he was then placed, to step on the ground," and thus sustained certain described injuries. "Petitioner would not have left the train at the time he did if he could have recovered himself after starting to step off, and was in the exercise of ordinary care." The petition alleged "that the defendant was negligent and guilty of neglect of the duty it owed to petitioner, as its passenger, in not stopping the train at Birmingham Junction, and giving him an opportunity to leave the same after it was stopped; and negligent in that its agents and servants did not observe that petitioner was in the act of getting off the train, and did not stop the train a sufficient length of time to enable [him] to get off." The defendant demurred to the petition on the ground that no cause of action was set out therein. The court sustained the demurrer, and the plaintiff excepted.

In our opinion, the court did not err in sustaining the demurrer. It was apparent from the allegations of the petition that the plaintiff was guilty of gross negligence. As he was going through the door of the car for the purpose of alighting from the train, the engine was reversed, and started away from the station of his destination. He had no good reason, therefore, to believe that the train was going to stop for the purpose of allowing him to alight in safety, and apparently he apprehended that it would not, for he went to the steps quickly. Notwithstanding this, he went out on the platform, and got on the steps of the car, "moved down the steps, put one foot off, and swung himself in a position to get off," but was not "able, in the position in which he was then placed, to step on the ground." It seems clear from the allegations of the petition that the plaintiff undertook to alight from a train which was moving away from the station to which he had paid his fare, at a place where he could not step off on the ground, but, in order to land upon his feet, was compelled to swing himself down from the moving car, in an obviously perilous position. While in this dangerous position, swinging down from the platform or steps of a moving car, he "saw a telegraph post near the track, just ahead of him, and, perceiving that if he undertook to recover himself and get back on the train he would strike said post, and per-

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haps fall under the train, he turned loose, and was thrown to the ground, not being able, in the position in which he was then placed, to step on the ground." Alighting from a moving train may or may not be a gross negligence, according to the attendant circumstances. The mere act of alighting from a train which is in motion is not per se negligence, but it is negligence to attempt to alight at a time or under circumstances when the danger of being injured is obviously great. This obvious danger may arise from various circumstances,—such as the speed at which the train is moving, the nature of the ground where the person seeks to alight, the distance from the lower step of the platform to the ground, the position in which the person leaving the train places himself in his efforts to alight safely, and other circumstances. In the present case we think it is apparent, from the allegations of the plaintiff's petition, that his injuries were caused by his own voluntary act in taking an obviously dangerous risk, and, this being so, no cause of action was set forth. *Barnett v. Railway Co.*, 87 Ga. 766, 13 S. E. 904; *Jones v. Railway Co.*, 103 Ga. 570, 29 S. E. 927.

Judgment affirmed. All the justices concurring, except LITTLE, J., absent on account of sickness.

## LOUISVILLE &amp; N. R. CO. v. CAROTHERS.

*(Court of Appeals of Kentucky, Jan. 30, 1902.)*

[66 S. W. Rep. 385.]

**Carriers—Injury to Passengers by Collision\*—Res Gestæ—Outcries of Other Injured Passengers as Evidence.**

In an action to recover damages for injury to a passenger in a collision of trains, the fact that there were outcries by other passengers may be shown as a part of the *res gestæ*, but the particulars of what they said are not admissible.

"Not to be officially reported."

Petition for modification of opinion. Granted in part.

For former report, see 65 S. W. 833.

GUFFY, C. J. The fact that there were exclamations, outcries, or screams by the other passengers may be shown as part of the *res gestæ*, but the particulars of what they said do not seem to have been material to any issue in the case. The opinion in the Simpson Case (Ky.) 64 S. W. 733, was intended to go no further than this, and the opinion in this case is modified to this extent.

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\*See note, 12 Am. & Eng. R. Cas., N. S., 13.

NICHOLSON *et ux.* v. NORTHERN PAC. RY. CO.

(*Circuit Court of Appeals, Ninth Circuit, February 3, 1902.*)

[114 Fed. Rep. 89.]

**Passengers—Injury While Alighting—Evidence.\***

There is evidence to go to the jury on the question whether injury to the internal organs of a passenger was not caused by her fall, when thrown to the ground from the lower step of a car, by the negligent starting of the train, while she was alighting, though the distance to the ground was only two feet, she having been a woman 40 years old and of delicate health, the ground having been covered with stones, and she having struck in a sitting posture, and, in addition to the testimony of physicians that her condition might have been caused by a severe jar, she having testified that she received a severe jar, and that this was the cause of her injury.

In Error to the Circuit Court of the United States for the Northern Division of the District of Idaho.

W. W. Woods and J. H. Forney, for plaintiffs in error.  
Stephens & Bunn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error, Charles Nicholson and Mary E. Nicholson, his wife, brought an action against the Northern Pacific Railway Company, the defendant in error, to recover damages for injuries alleged to have been sustained by Mary E. Nicholson on January 28, 1899, through the negligence of the defendant in error in operating its railway train at the station of Manchester, in the state of Idaho. Mrs. Nicholson, at the time of the accident, was returning from Wallace to Manchester as a passenger on the train of the defendant in error. As the train approached Manchester, the conductor called out the name of the station, and the train then came to a standstill. Mrs. Nicholson proceeded to get out of the car and go down the car steps. While she was in the act of swinging herself to the ground, the train, without any warning or signal, started forward, causing her to fall upon the ground, whereby she received, as she alleges, internal injuries which have caused her great pain and suffering. It was shown that there was no platform at the station of Manchester, and no means of getting off the train other than by stepping or jumping from the car steps to the ground. Testimony was introduced by the plaintiffs in error which tended to show that Mrs. Nicholson, while she had been a woman of delicate health and had been the subject of surgical operations, was, during the two years prior to the accident, in reasonably good health. She testified that when she fell she was "jarred dreadfully," and thought she had bones broken. She testified, further, and her evidence is corroborated, so far as such evidence can be corroborated, by that of her husband and others, that immediately after the accident

\*See note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.



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she suffered very severe pains in the back and groins, and through the abdomen, and was so weak that she had to lie down, and was thereafter for two months under the treatment of a physician on account of the injury, and that she went to a hospital, where she remained 11 days, undergoing treatment, and that subsequently she was under the care of another physician, who performed an operation upon her, and that thereafter she submitted to another operation, all of which trouble, pain, and suffering she testifies was the result of the fall. Upon the close of the testimony, the court instructed the jury to find a verdict for the defendant in error. In so ruling, the court, according to the report of his oral instructions contained in the record, seems to have been moved by two considerations: First, that the evidence showed that Mrs. Nicholson had been in very delicate health for some years prior to the accident, and several years before had suffered miscarriages, and had submitted to surgical operations, concerning which and the nature of her ills the court remarked: "So it is to my mind utterly impossible that this distress that she may be in could have resulted from that accident." The second consideration was that the shock or injury which the plaintiff suffered could not, in the nature of things, have been severe, owing to the short distance which she fell. The court said: "She could not have had, when the car moved, more than one and a half to two feet at the outside to jump. Now, I cannot for a moment believe from my own observation and experience and from the testimony of physicians in cases like this that that kind of a fall could have injured her seriously. If so, four-fifths of the women in the United States would have the same trouble. \* \* \* It could not have been possible that a little jump of that kind could have created the serious state of her health to which witnesses have testified." The court then referred to the testimony of physicians, and said: "They have said that a certain state of her organs testified to might have occurred from an accident, but they acknowledge that it would require a very severe accident."

We are unable to agree with the trial court that the case should have been taken from the jury. The negligence of the railway company was fully proven. It was shown that, after the train had come to a stop at Manchester, one of the passengers, a young lady who was acquainted with the conductor, called his attention to the fact that there was snow at the point where the train had stopped, and requested him to have the train moved further up, so that she might get out at a better place. The conductor, without looking to see whether other passengers were descending from the train, gave the signal to move the train forward, and it started, according to some of the testimony, with quite a jerk, and proceeded a distance of 50 or 100 feet. Mrs. Nicholson, at the moment when the train started, was standing on the lowest step of

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the car. It is not disputed that she was thrown to the ground. The distance which she fell is not definitely shown. According to the evidence of the only witness who testified on the subject, the height of the lowest step from the ground was 25 or 30 inches; but, conceding that it was not more than 2 feet, as stated by the court, it is, in our judgment, quite conceivable that a woman over 40 years of age, falling that or even a less distance, and striking the earth in a sitting posture, as it has been testified Mrs. Nicholson fell, might receive a very severe shock. We do not think it would follow, as a conclusion to be deduced by a court, that a fall such as that might not have produced all the injuries of which Mrs. Nicholson complained. The testimony of the physicians was that the condition in which they found her internal organs might have been caused by a severe jar. The test of a carrier's liability in a case of this kind is not whether the accident, if it had occurred to one in robust health, would have resulted in a permanent or serious injury. The carrier is bound to carry, with due care, the weak, the blind, and the lame, and is responsible for the injuries which they sustain by reason of its negligence. It cannot wholly absolve itself from liability by proving that the injured passenger was in delicate health or diseased before the accident. It is true the plaintiff in such an accident must make out his case. He must show with reasonable certainty that the injury which he suffered resulted from the negligence complained of. Mrs. Nicholson testified that she received a severe jar, and that that was the cause of her injury. The physicians testified that the condition in which she was might have resulted from a severe jar. The photographs of the place where she fell show that the ground was considerably lower than the track, and that it was covered with stones and boulders. According to some of the witnesses there were from two to seven feet of snow on the ground, and according to others there were but a few inches. Wholly aside from the testimony of the physicians and the question whether the serious condition in which they found Mrs. Nicholson's organs was attributable to her fall, there was her own direct and positive testimony as to her acute and long-continued pain and suffering, which she declared was the result of the accident, and for which, if the jury found her evidence true, damages were recoverable under the pleadings. We think the court erred in ruling that there was no evidence to go to the jury.

The judgment will be reversed, and the cause remanded for a new trial.

HOUSTON, E. & W. T. RY. CO. v. GRUBBS.

(*Court of Civil Appeals of Texas, March 27, 1902.*)

[67 S. W. Rep. 519.]

**Carriers—Injury to Passenger—Defective Freight Platform.\***

A carrier is under no duty to a passenger to keep in a safe condition the part of its depot platform used, to his knowledge, exclusively for handling freight; so that it is not liable for injury received by him in stepping through a hole in it; he having gone there on a dark night to relieve himself; there being no closet, except across the track, the way to which was lighted.

Appeal from district court, Nacogdoches county; T. C. Davis, Judge.

Action by J. F. Grubbs against the Houston, East & West Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and J. S. McEachin, for appellant.

E. B. Lewis, for appellee.

PLEASANTS, J. This suit was brought by appellee to recover damages for personal injuries alleged to have been caused by the negligence of appellant. Plaintiff's cause of action is thus stated in his petition: "The defendant had a depot at Lufkin, Texas, which, with its platform and waiting room, abutted on its line of railway. It was used by defendant as a place for passengers to get on and off its trains; and all persons who were lawfully at said depot were accustomed and authorized by defendant to pass over and along the platform, which was at a height of several feet from the ground at all points. That the depot was used as a place for passengers to await the arrival of trains, and the defendant was bound to keep the same in a safe condition, and to provide lights for the platform and approaches thereto at night, which it failed to do. That defendant cut a large hole in its platform prior to May 23, 1901, and on said date plaintiff was in the said town of Lufkin, and went to said depot about twelve o'clock on the night of said date, where he purchased a ticket for the purpose of becoming a passenger on defendant's train from Lufkin to Nacogdoches; it being then only a short time before said train was due to arrive. That when he reached the station it was dark and raining, and the depot was only dimly lighted at one side and on one end, but on the other side and other end it was very dark, and was not lighted at all. That the train was late, and it became necessary for plaintiff to go to a remote part of defendant's platform, for the purpose of urinating, no place being prepared by defendant for the use of its passengers, and, being unaware of danger, and free from fault or negligence, started to walk

\*See note to *Muhlhaue v. Monongahela, etc., R. Co.*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

across the platform; and by reason of defendant's willful, careless, and negligent disregard of its duty in cutting a hole in its platform, and willfully, carelessly, and negligently leaving said hole in its platform, and willfully, carelessly, and negligently failing and refusing to light its depot at the point where the hole was cut, and at both sides and ends, plaintiff stepped into said hole, and skinned his leg from the knee down, bruised and sprained his ankle, broke two of his ribs, sustained serious and permanent internal injuries. \* \* \*

Defendant answered by general and special exception, general denial, and by special plea, the substance of which is as follows: "That, if plaintiff was injured, it was not through defendant's negligence, but on account of his own want of care, and as a result of negligence upon his part, in this: Notwithstanding the fact that defendant had used due care in providing safe approaches and lights for all that portion of its premises, depot, platform, and waiting room where passengers were reasonably expected to go, or where it was necessary for them to go, and had used due care to keep the same in safe condition, yet plaintiff, without due care, went upon parts of defendant's premises which were not erected for the use of passengers, which plaintiff knew, or could have known, by the exercise of ordinary care; but plaintiff, without light or guide, or precaution of any character, walked along the platform where passengers were not expected to go, and stepped or fell off of the same." The exceptions were overruled, and a trial by a jury in the court below resulted in a verdict and judgment in favor of plaintiff for \$191.

The evidence adduced by plaintiff on the trial of the case is as follows: E. J. Mantooth testified for the plaintiff: "I reside at Lufkin, and am familiar with the depot. On the morning after plaintiff claims to have been injured, one of his attorneys called me up over the phone, and requested me to go to the depot at Lufkin and make an examination of the platform. I did so. I found a hole in the freight platform just north of the north end of the depot. It was cut out of some planks in the platform. The platform there was about ten feet long, north by south. The hole was made by cutting one of the planks in a slanting manner, so that the piece would fit back without falling through. The hole was about 12x18 inches, and about six inches from the end of the plank on the north end of the platform. A water pipe extended up from the ground to the hole, and the hole had evidently been left there in order to use the pipe and water in case of fire. The platform is about four feet from the ground, and is situated on the north end of the depot, between a side track and a spur track. The passenger departments and waiting rooms are on the south end of the depot. The ticket office and general office of the agent are between the freight department and the passenger departments of the depot. Tickets are sold on the south side of the agent's office, through windows opening

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into the waiting rooms. There are no urinals about the depot. The hole in the platform was open the next morning after Grubbs was injured. I have resided in Lufkin since the town was built, and have often taken passage at defendant's depot. I have never known passengers to use the portion of the depot platform on the north side of the depot where I found the hole. It could be used by passengers if they went up the steps at the northeast corner of the wareroom, and then around the building along the platform to the waiting room. This would be out of the way, and not the usual and customary way that passengers go. They either go up the steps at the southeast corner of the platform, or else step from the ground upon the platform at the ticket office, where the platform is low. I have never known the platform where plaintiff says he was hurt to be used for any other purpose than the handling of freight. The depot building is about ninety feet long. The place where plaintiff claims to have been hurt is about eighty feet from that part of the building between the white waiting room and the southeast corner of the platform. The roof of the depot extends out over the platform. The electric light lights up the entire eastern and southern side of the building. It gives ample light for the purpose of lighting the depot and platform, and the approaches necessary for passengers in going to and from the depot. The ground around the south end and eastern side of the depot is level. There is a light on the corner of the square southeast of the depot, across the street from it, and another southwest of the depot on the street. These lights, with the light at the depot, light up that portion of the street and the building sufficiently for any ordinary purpose." The plaintiff testified: "On the 23d of last May I went from this place [Nacogdoches] to Lufkin, reaching there about 2:30 in the evening. I got through with my business that evening, and that night, near twelve o'clock, I went over to defendant's depot for the purpose of securing a ticket and taking passage back to Nacogdoches. Soon after reaching the depot I procured a ticket. There were some women and children in the waiting room, lying about on the floor. I suppose it was about midnight. The train was due at one o'clock a. m. As the depot was somewhat crowded, I went out on the platform, laid down on some trunks, and went partially to sleep. I was awakened by the porter moving the trunks, and lit my pipe and walked from the platform at the south end of the depot up on the platform on the east side; and, feeling a call of nature, I turned to my left, or the west, around the north end of the depot. I noticed some kegs and boxes sitting next to the northeast corner of the depot, on the platform, found my way between these kegs and boxes, and went in a westerly direction several steps, when suddenly and very unexpectedly I stepped into a hole in the platform, which caused me to fall, and I struck some hard substance on the ground. I wrenched my left

ankle, skinned and bruised my left leg, broke two or three of my ribs, and received other injuries. I thought at the time it would prove fatal and that I would die. I wanted to get word to my wife, and as soon as I could I got up and went around the depot on the west side, coming up to the platform on the south end, where I originally started. It was very dark, and I was very cautious in going around the north end where I fell. I was looking up at the time to see that I kept under the roof, and out of the rain. It was misting rain at the time. I was also feeling along cautiously with my right foot to keep from stepping off the platform. It was my left foot that went into the hole. When I got back to the south end of the depot Mr. Watts suggested that we go and see where I fell. I went with him and Mr. Elder, and showed them where I fell. I showed either Mr. Watts or Mr. Elder the hole I stepped into. I am positive that I did. I have suffered not only directly from the breaking of my ribs, but also from other internal injuries. My respiration has not been good. My left hip has hurt me more or less. My side still hurts me, and my general health has not been good since I was hurt. I have not been able to work over half the time, and only a few days ago I had fever. I had Dr. Campbell, of Nacogdoches, treat me. I am not sure as to the amount of my doctor's bill, but think it was sixteen or seventeen dollars. I have been at Lufkin a number of times during the past two or three years. The waiting room for white passengers is on the southeast corner, and that for colored, on the southwest corner of defendant's depot. The ticket office is north of and next to the waiting room. The freight room is on the north end of the building, the ticket office being between the waiting room and the freight room. That portion of the platform on the south and east of the depot, and next to the waiting room, is, I suppose, about two feet from the ground; but in going north on the east side of the depot the platform makes a gradual rise until it reaches a height of about four feet. The place where I fell from is some sixty or seventy feet north from the door to the white waiting room. I knew that the south end of the depot was constructed for passengers, and that the higher or elevated part of the platform on the north was constructed for the handling of freight. I am positive I showed either Rev. Mr. Watts or Mr. Elder—the one that held the lantern—that I stepped into a hole. I never told any one that I fell against the bumper posts. I had been on the north end of the platform several times before I was injured. I do not know that I had ever been on that particular part from which I fell, but while waiting there for trains I had, on several occasions, walked up and down the east edge of the platform that was used in handling freight. This was in the daytime, and each time they usually had freight boxes and things of that kind piled up along there. It was very dark, and I could not see the hole, the edge of the platform, or

anything of the kind. I went there to urinate. I am not sure how well the lantern next to the waiting room was lighted. I think it was dimly lighted, with an ordinary glass case. It gave no light on the north side, where I fell."

Defendant established by uncontradicted evidence that the portion of its platform on which plaintiff received his injuries was about 80 feet distant from the waiting room of its depot, and was constructed and used solely for the purpose of handling freight, and was never used by passengers in alighting from or in getting on trains, nor in going to and from the passenger depot, and was not a place to which passengers or the public would naturally or ordinarily resort. The defendant had a closet for the use of passengers situate across its track from the passenger depot, and about 30 or 40 feet distant. There was no light at this closet, but none was necessary, as the electric light on the corner of the waiting room and another at the shop, about 150 feet west of the depot, kept the way to the closet sufficiently lighted, so that any person, by ordinary observation, would see it. Defendant's passenger trains stopped at the southwest corner of the platform to receive and discharge passengers. We think these facts wholly fail to show any negligence on the part of the defendant that would entitle plaintiff to recover for the injuries received by him. No duty devolved upon the defendant to keep that portion of its depot platform or grounds not intended for the use of passengers, and to which they would not ordinarily resort, lighted. *Railroad Co. v. Barnett* (Tex. Civ. App.) 47 S. W. 1039; *Rozwadosfskie v. Railway Co.* (Tex. Civ. App.) 20 S. W. 872. As to that portion of its platform which was used only for the purpose of handling freight, and not intended for the use of passengers, the defendant was under no obligation to any person who had knowledge of the purpose for which the platform was used to exercise ordinary care to keep the same in safe condition. This obligation rested upon defendant only as to its servants, and to persons who might use said platform by its express or implied invitation. *Dobbins v. Railroad Co.* (Tex. Sup.) 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Shear. & R. Neg.* § 410, 8 Am. & Eng. R. Cas. 179. The plaintiff testifies that he knew the platform on which he was hurt was constructed and used for the handling of freight. He had been at defendant's depot a number of times before he was injured, and freight was usually piled on that portion of the platform. He had on several occasions, while waiting for the train, walked along the east edge of the platform, but does not remember that he was ever on that particular part from which he fell. There is nothing in the evidence from which consent or invitation by the defendant to use this platform by passengers can be implied, but, on the contrary, the evidence negatives any such consent or invitation. The defendant having violated no duty which it owed to the plaintiff, it is not liable for the

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injuries received by him, and the court below erred in refusing to instruct the jury to return a verdict for the defendant. Having reached the conclusion that there is no evidence in the record to sustain a verdict for the plaintiff, it becomes unnecessary for us to consider the remaining assignments of error. The evidence in the case which is admitted by plaintiff to be true shows that the defendant was not guilty of any negligence which caused or contributed to plaintiff's injury.

The judgment of the court below is reversed, and judgment is here rendered for the appellant. Reversed and rendered.

## TEXAS &amp; P. RY. CO. v. GARDNER.

(Circuit Court of Appeals, Fifth Circuit, February 25, 1902.)

[114 Fed. Rep. 186.]

**Carriers of Passengers—Injury of Passenger—Presumption of Negligence.\***

Evidence of a contract of carriage between plaintiff and defendant, and that plaintiff was injured while a passenger under such contract, casts the burden on defendant to show that it and its agents were without fault, or that plaintiff was guilty of contributory negligence.

**Same—Negligent Starting of Train.†**

It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop.

**Same—Contributory Negligence.**

In an action against a railroad company to recover for an injury to plaintiff, alleged to have resulted from her being thrown down by the sudden starting of the train while she was going on board, evidence that plaintiff made a misstep is not necessarily even prima facie evidence of negligence, requiring a special instruction to the jury on the subject of contributory negligence.

**Appeal—Review—Refusal to Direct Verdict.**

The refusal of a trial judge to direct a verdict for defendant on the ground that a part of the plaintiff's testimony was improbable is not a ground for reversal of the judgment by an appellate court, the matter being one going to the credibility of the witness, primarily for the jury, and subject to review only by the trial court on a motion for new trial.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman, for plaintiff in error.

M. L. Crawford, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This suit was instituted by the defendant in error, Jabe Gardner, to recover damages for injuries suffered by his wife, Amy Gardner, while a passenger on the defend-

\*See *Harrison v. Sutter St. Ry. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 809, and foot-note.

†See note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.



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ant railway company's cars from Wills Point, Tex., to Dallas, Tex. On the trial Mrs. Gardner testified as follows:

"Am the wife of plaintiff. Live in Van Zandt county, about two miles from Wills Point. About the 3d of October last I purchased a ticket from Wills Point to Dallas. I was to come on the Cannon Ball train. The train was an hour and twenty minutes late. My husband was with me. I started to get on the train. I had four children with me. I got on the platform, and the train started suddenly, and threw me down against the iron railing. There was a gentleman present who helped me up. I had my ribs broken; my teeth broken; two or three teeth broken. Have not had my teeth fixed. They are broken off. Don't know how long train remained at Wills Point. Several parties got on before I did, —from three to five persons,—and they did not wait long enough for me to get on. I got on the west end of the coach, and went across the platform to a coach in front. When I reached Dallas I went to my sister's, Mrs. W. T. Strange. Mr. Strange met me at the depot, and took me home in a hack. I sent for Dr. Moseley. I was at Mr. Strange's house from October 3d to October 13th. I think two ribs were broken. I suffered with these broken ribs and my other injuries. My head and arm was hurt. The car I was on was crowded, but I did not know any one."

On cross-examination:

"I was on platform at depot when train came up. I saw the train porter. He was standing by the steps. My husband helped me put the children on. Several passengers got on ahead of me. Do not know whether any behind me or not. The porter helped me up the steps. I was just getting up on platform when I fell. My ribs and my head struck the iron railing. My ribs, jaw, and teeth struck the railing. I had my baby in my arms. Have not had my teeth examined. Have had no dentist. My teeth bled. I never said a word to the conductor. I did not tell any one till I got to Dallas. Rode all way to Dallas, and did not say anything to any one about it. My teeth were bleeding and my ribs hurting me. I did not tell the conductor nor the porter of my injury. I told no one on the car. When I got to Dallas, I went to my sister's. Had a doctor that night, Dr. Moseley. I had Dr. Eagan for my child that was sick. I never said anything to Eagan about my injury. Never had a dentist to look at my teeth. They were broken off pretty close. Can't tell who the gentleman was that helped me. Have never seen him since. I don't know who sat next me. I did not discuss my injury with any one. The conductor took up my ticket, but I did not say anything to him. I did not tell him I fell. I was suffering, and my teeth bleeding. I stayed in Dallas till October 13th. When I went home my husband met me at Wills Point, and I went to the wagon and got in it, and went home."

The main contention of the plaintiff in error in this court is that this evidence shows such a very peculiar character of humanity, and a state of facts so contrary to nature and humanity, that the court below should have given the general charge requested in favor of the defendant. There are other assignments of error in regard to special instructions asked and refused, but only one (the second) seems to be insisted upon in this court, and it is as follows:

“‘You are instructed that it is the duty of a passenger to exercise reasonable and ordinary care for his own safety in boarding or alighting from a train, and if you find and believe from the evidence that this plaintiff’s wife did not use reasonable and ordinary care for her own safety in boarding the train, and if you further find that defendant was in no way negligent, you will find for the defendant,’—for the reason that the plaintiff’s testimony disclosed the fact that the train stopped at the station for at least one and half minutes, and the testimony of the defendant showed that it stopped from two to five minutes, and the plaintiff failed to show by any evidence that the time in which it was at the station was not ample for her to board the train, and it is a fact that common experience teaches that the time was ample for her to have boarded the train had she used care and diligence. Again, the testimony of the plaintiff’s witnesses disclosed the fact that after she went upon the platform she made a false step, and if any injury occurred it occurred from her own negligence in her moving across the platform in making the false step.”

The reasons here assigned to show why these instructions ought to have been given are not conclusive. Mrs. Gardner was a passenger and entitled to safe carriage, and, when the contract of carriage was proved and the injuries shown, the burden was on the carrier to show that it and its agents were without fault, or, if in fault, to show that the passenger negligently contributed to her own injury. Now, whether the train stopped at the station two or five or ten minutes, it was negligence to start the same while the passenger was actually getting aboard.

It is not, necessarily, even *prima facie* negligence to make a false or misstep while boarding a train. If a passenger under such circumstances does make a false step, he, and not the carrier, ought to bear the consequent injuries, unless the false step is caused by or through the negligence of the carrier in starting or moving the train. If the false step is not caused by or through starting or moving the train, but the injuries were enhanced through and because the train was improperly started, then the liability of the carrier is a question for the jury.

The propositions of law contained in the requested instruction seem to be correct, and so plain that it is not a violent presumption that in substance they were given to the jury in

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the general charge, and this presumption is fortified by the fact that the reasons here urged why the instructions should have been given are special, and bear on particular phases of the evidence, and we can safely infer that the same reasons were given to the trial judge. The extraordinary statement made by Mrs. Gardner in regard to her injuries and its probability in the light of human character were questions for the jury, and subject to no other review than that of the trial judge, who had power to grant a new trial if the extravagance of the case as made by the evidence overtaxed his credulity.

On the face of the record we find no reversible error of law, and the judgment of the circuit court is therefore affirmed.

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ST. LOUIS, I. M. & S. RY. CO. v. FARR.

(*Supreme Court of Arkansas, March 15, 1902.*)

[68 S. W. Rep. 243.]

**Injury to Passengers—Alighting at Place Other Than Station.**

Where the porter calls out the name of a station, and soon after the train stops, and the appearances there are the same as opposite the depot building, except that the small building is not just opposite, though there is a building opposite which might indicate the train had stopped for the depot, it is not negligence for a passenger to alight there.

**Same—Same—Negligence.\***

It is negligence not to warn passengers that the stop is not for the station, where, soon after a station is called, but before it is reached, the train stops.

Bunn, C. J., and Battle, J., dissenting.

Appeal from circuit court, Johnson county; Wm. L. Morse, Judge.

Action by Kate Farr against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint is to the effect that on the 6th day of January, 1899, plaintiff took passage on defendant's passenger train at Ft. Smith for Knoxville, a station on defendant's railroad, extending from Ft. Smith, Ark., to Little Rock, Ark.; that the defendant's employees on the train carelessly announced the station of Knoxville before reaching it, stopped the train about 200 yards from the station, and negligently permitted plaintiff, induced by the announcement of the station and the conduct of the employees to believe that the stop was for the purpose of unloading passengers for that station, to attempt to alight from the train; that while she was attempting to alight from the train, as she was in the act of stepping from the bottom step of the platform of the coach, the employees caused it to start with a sudden jerk, threw her to the ground, broke her left leg just above the

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\*See note to Phillips v. St. Charles, etc., R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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ankle, dislocated her ankle, and otherwise severely bruised and hurt her; that as a result of these injuries she was confined to her bed for more than three months, unable to walk for more than six months, during all of which time she suffered great pain, and was unable to perform labor; that her leg is crooked at the point of fracture, and unable to support the weight of her body; that the injuries, from which she still suffers much pain, have made her a cripple for life, and caused her to expend money for medical assistance and attention; and that in consequence of the injuries she has sustained damages in the sum of \$10,000. The answer denies everything stated in the complaint, including the allegation of injury, and then proceeds to aver that any injury she may prove was caused by her negligence.

Kate Farr, plaintiff, testified: "I live at Bonanza, 10 miles south of Ft. Smith. On the 6th day of January, 1899, I bought a ticket from Ft. Smith to Knoxville over defendant's road, and took the morning train for that place. I was going to Mr. Garrior's place, which is about three miles from Knoxville. The conductor of the train took up my ticket, which was for Knoxville, and I told him I was going to Knoxville. Just before the train reached Knoxville, the porter came through and called out the station, saying, 'Knoxville.' About a minute after this announcement the train stopped, and I thought we were at the station. No one notified me that we had not reached the station. I got my packages, left my seat, went out on the platform, the regular place for passengers to get off, and started to step off, thinking the train had arrived at my destination, and that I was required to get off. Just as I started to step off the train started, pitched me off, and broke my leg, both bones, and sprained my ankle. I don't know how long I suffered from that injury. I am still suffering from it. I was confined to my room for three months. I can hardly walk on that leg now. It pains me to walk. When I do walk, I have to walk very slowly. I can walk without a support, but I need one. Every step pains me. The injury was more painful than anything I ever experienced. It was very painful all the time, but at some times more painful than others. Sometimes I could not sleep. I do not object to showing the condition of my ankle, where the sprain and break were, to the jury. It is very badly out of shape. (Here the injured ankle was shown to the jury.) I do not remember what the ticket from Ft. Smith to Knoxville cost me. The train ran about a quarter of a mile after the porter announced, 'Knoxville,' and then stopped. I saw nothing in the surroundings there to indicate that we had not reached the station. There was nothing to lead me to suppose that the train was not at the depot. I had been at Knoxville but once before, at which time I remained 15 or 20 minutes. There was no platform at the depot,—only some coal slack, as there was where I got off. I saw this coal slack

there at the time, and it was the same way for some distance south of there. I had been to Mr. Garrior's place before, in September, 1898. I went through the country, by private conveyance. I left there the 16th of December. Where I got hurt was about 200 yards west of the depot. I saw nothing to indicate that I was not at the depot when I got off. I did not see the depot house. When the porter announced the station, I began to get ready to get off. Mr. Garrior's little girl was with me. When the porter called the station, I called her to me. The train did not entirely stop when I got up. I saw no one about the door when I went out. I got off on the side the station was on. The train, after it had stopped, started up with a sudden movement,—a jerk. The little girl had got off then. I acted in this way: I got my packages, valise, and baggage, went out on the platform, and went down the steps. I did not gather up the packages, and, with the little girl, run out of the train. I did not push the little girl off, and jump after her. I could see there was no platform there. I did not see the depot. I did not stop to investigate about that. I knew the train was still, and I supposed it was at the station. It was just a little time after the train stopped until it started up again. The train had not entirely stopped when I got up and started out, but it stopped before I got out. I went on down the steps to get off, and it started again. It was standing still when I started to get off. I did not tell Miss Annie Lee Crowder 'that before the train slowed up the porter came through and called, "Knoxville," and when the train slowed up I took the little girl and went out, and she jumped off, and I thought she was hurt, and jumped off after her'; nor did I make that statement in substance to Ella Kelton. I did not tell Benjamin Stewart that the porter came through and called out the station, and that just about that time the train slowed up, and I thought it was the station; that the train started up again, upon which I thought I would be carried by the station; that the little girl and I ran out; that she jumped off, and then I jumped off, I did not tell him that if the little girl had not jumped off I would not. I did not make that statement to George Atkins."

Argus Jett testified: "I am 23 years old. On the 6th day of January, 1899, I got on the train from Ft. Smith to Little Rock at Clarksville, and went from there to Knoxville. Miss Kate Karr was a passenger in the same coach that I was in. The train stopped near the end of the switch before arriving at Knoxville. A short time before it stopped there, the porter announced the station of Knoxville. Immediately after this announcement, the train slowed up, and stopped about 150 yards from the station. Soon after it began to slow up the plaintiff left her seat, approached the front door, and passed out. The train stopped, I would say, from half a minute to a minute. It stopped still. No directions were given to the passengers after the porter announced the station of Knoxville.

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The elevation of the ground where the train stopped is about the same as at the depot. They have no plank platform at the depot." Cross-examination: "The plaintiff was seated near the middle of the car. A little girl was with her, and went out ahead of her. The lady had some small packages. After stopping and starting up, the train stopped at the depot, and I and a young lady who was with me got off. I do not remember that any other passenger got off there. There was a train on the side track at Knoxville, but I do not know why the passenger train stopped. The train reached Knoxville between 9 and 10 o'clock. The depot was in plain view from where the train stopped." Redirect examination: "The track of the railroad at Knoxville is on a straight line, and a person standing on the platform of the car could not see the depot without leaning over."

John Crowder testified: "I was at Knoxville at the time of the accident to the plaintiff. The train came to a stop, and about the time it started up a little girl, who was ahead of the plaintiff, stepped off, and the lady jumped off and fell. They were both getting off at the same steps. The train started up with a kind of jerk. This jerk occurred just near the time the lady got off. The stop was about 100 yards from the depot. I was standing in Mr. Hammond's store, about 100 yards off, opposite to where the injury occurred."

There was testimony corroborating that of plaintiff and that of the witnesses above set out, and to show that, where the train is said to have been when plaintiff got off, the ground where she alighted was of the same height as at the depot house, that there was no platform at the depot house, and that the ground there and at the place where plaintiff got off was covered with coal slack, and that it was the same in appearance. The evidence for the defendant tended to show that the train had not stopped, but had only slowed down or slackened its speed, when the red flag was seen, and at the time plaintiff got off; that officers of the road nor employees did not see plaintiff when she got off the train.

At the conclusion of the testimony the defendant asked the court to instruct the jury that, taken in the light most favorable to the plaintiff, the testimony failed to show a state of facts that would entitle her to recover. This the court refused, and the defendant excepted. Thereupon the court gave, at the request of plaintiff and over the objections of defendant, the following instructions, to which proper exceptions were saved: "(1) If the jury believe from the evidence that the plaintiff was a passenger on one of the trains of the defendant at the time and in the manner alleged, and that before arriving at her destination, the station of Knoxville, said station was announced in the usual way by the porter of the train, and said train was stopped a short distance before arriving at said station, and plaintiff was not warned to keep her seat, or otherwise advised the stop was only a temporary one, and the

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landing place." *Smith v. Railway Co. (Ala.)* 7 South. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63; *Railway Co. v. Stringfellow*, 44 Ark. 330, 51 Am. Rep. 598. The accident in the first of these cases cited occurred in the nighttime, but the principle applies here.

No contention is made that the damages were excessive. Though the motion for new trial alleges that they were, yet in the brief this seems to be abandoned. The injury was a severe, painful, and permanent one.

The judgment is affirmed.

BUNN, C. J., and BATTLE, J., dissent.

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SWEET v. LOUISVILLE RY. CO.

(*Court of Appeals of Kentucky, March 12, 1902.*)

[67 S. W. Rep. 4.]

**Discharging Passengers at Dangerous Place.\***

While a street railway company is not bound to furnish safe places for depositing its passengers, yet where the dangerous condition of a street at the place of discharging a passenger is known, or is such as must be known, to the carrier, and is unknown to the passengers,—as where, because of the darkness, he cannot see it,—the carrier is bound to warn him of the danger, or to assist him in safely alighting.

**Same.†**

Whether a hole in the street at the place of discharging a passenger was the cause of the passenger's injury, and was such a defective place for discharging passengers as to render it obviously unsafe, were questions of fact for the jury.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Annie Sweet against the Louisville Railway Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

Augustus E. Willson and Morris B. Gifford, for appellant.  
Fairleigh, Straus & Eagles, Kohn, Baird & Spindle, and J. H. Hazelrigg, for appellee.

O'REAR, J. Appellant was a passenger on appellee's street railway on the evening of July 4, 1899. It was dark when the car reached its destination. The cars were stopped at or near the usual street crossing. In attempting to alight, appellant fell, severely injuring her ankle. She complains of appellee, charging it with negligence in stopping the car at a point where the steps she was to use in alighting were just over a hole or unusual depression in the street, and in not

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\*See note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

†See note to *Muhlhaue v. Monongahela, etc., R. Co. (Pa.)*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

warning her of the danger before she stepped from the car. The evidence disclosed that the street in question was a macadam road. It had become so worn at this particular point that a depression was formed of two or three feet in length, and six inches deep. It was at the edge of the appellee's track, and so near it that one stepping from the car would be apt to step into it. It was easily to be seen in the light. At the close of the evidence for appellant a peremptory instruction to find for the defendant was given. For appellee it is argued that the street at the point in question was under the exclusive control of the city, which alone had either the duty or the right to make repairs, and that appellee merely undertook to safely carry appellant to any desired point on its line, and to allow her to leave the car at any customary stopping place, such as at street crossings. It is stated, and it seems to be true, that a different duty attaches to street railway and to steam railway operators in respect to furnishing safe places for discharging their passengers. The latter must furnish such, while the former is under no such obligation, but discharges its passengers at convenient points along the streets it traverses. Booth, St. Ry. Law, § 326. If the street at the place of discharging the passenger presents a dangerous condition to one alighting there, and such danger is obvious to the passenger, the carrier is not liable to him for injuries received from such defects. But where the danger is known, or is such as must have been known, to the carrier, and is unknown to the passenger,—as where, because of the darkness, he cannot see it,—the carrier is bound to warn the passenger of the danger, or to assist him in safely alighting, or stop the car at a point beyond or short of the dangerous point. Its failure to take one of these precautions renders it liable to the passenger sustaining injury because of such neglect. *Railway Co. v. Scott*, 86 Va. 902, 11 S. E. 404; *Stewart v. Railway Co.* (Minn.) 80 N. W. 854; *Sowash v. Traction Co.*, 188 Pa. 618, 41 Atl. 743, 12 Am. & Eng. R. Cas. 124. While the street railway company is not bound to furnish safe places for depositing its passengers, it is bound to either select them or to warn the passenger of the conditions. Whether the hole in this instance was the cause of appellant's injury, or was such a defective place for discharging passengers as to render it obviously unsafe, are questions of fact that should have been submitted to the jury.

The judgment is reversed, with directions to award appellant a new trial under proceedings not inconsistent herewith.



JOHNSON *v.* ATLANTIC & N. C. R. Co.

(Supreme Court of North Carolina, June 13, 1902.)

[41 S. E. Rep. 794.]

**Railroads—Passenger Alighting from Moving Train—Invitation by Conductor—Contributory Negligence.\***

In an action against a railroad for personal injuries the evidence showed that the time allowed at the station was too brief to permit plaintiff to alight before the train started. Plaintiff testified that when the train stopped he left the car as quickly as he could; that when he reached the platform he found the conductor on the steps, and asked him to let him pass; that the conductor stepped aside, and allowed him to get off; that the train did not stop as long as usual that morning, and that when he stepped off the train was moving slowly, and he thought he could do so safely: *held* to justify a finding that plaintiff was not guilty of contributory negligence.

Montgomery, J., dissenting.

Appeal from superior court, Wayne county; Allen, Judge.

Action by Richard Johnson against the Atlantic & North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Munroe and Isaac F. Dortch, for appellant.

F. A. Daniels and Allen & Dortch, for appellee.

CLARK, J. The defendant in his brief says "the defendant does not deny that there was evidence of negligence, but insists that the plaintiff, on his own showing, was guilty of contributory negligence, and the action should have been dismissed"; and that is the only point relied on therein. The statute (Laws 1887, c. 33) provides that the defense of contributory negligence "shall be set up in the answer and proved on the trial." Clark's Code (3d Ed.) p. 237. The contention, therefore, that the action should be dismissed, cannot be sustained. *Neal v. Railroad Co.*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684, is put upon the ground that, taking all the plaintiff's evidence to be true, he had proved his own contributory negligence. But such is not the case here. As the court told the jury: "The general rule is that a person who gets off a train while it is in motion is guilty of contributory negligence. It is the duty of the passenger, when he sees the train in motion, to ask for it to be stopped, and if it is not done he ought not to get off. To this general rule there are some exceptions, one of which is that, if a passenger is commanded or invited by the conductor to get off while the train is in motion, and the train is going so slow that the danger of stepping or jumping off is not apparent to a reasonable man, and he does so, and is injured, it would not be contributory negligence." "If the jury find from the evidence that the plaintiff alighted from the train while it was in motion, and that in doing so he passed by the conductor on the steps, after asking him to let him pass by, and the conductor stood aside for the purpose of letting him pass by, knowing at the time

\*As to the duties of carriers in taking on and setting down passengers, see note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

*Johnson v. Atlantic & N. C. R. Co*

that he was a passenger, and that his destination was La Grange, and that he was alighting from the train as a passenger, then the jury may consider these facts for the purpose of determining if the conduct of the conductor was such as to reasonably lead the plaintiff to believe that it was safe for him to alight from the train, and for the purpose of determining if the conduct of the conductor was equivalent to an assurance that it was safe to so alight, and an invitation to do so; and if the jury find from the evidence that the conductor, by his conduct, meant to assure the plaintiff that it was safe to alight from the train, and they further find that the train was moving at such a speed that to a reasonable man it was not apparently dangerous, they will answer the second issue 'No'; otherwise 'Yes.' " "If the conductor did not mean by his conduct to assure him that it was safe to alight, or if he did so, and it was apparently unsafe to alight, to a reasonable man, it would be a case of contributory negligence." The court further told the jury that the burden that the plaintiff stepped from the train on invitation of the conductor was upon the plaintiff. *Brown v. Railroad Co.*, 108 N. C. 45, 12 S. E. 958. Was there evidence to justify thus leaving the issue of contributory negligence to the jury? There was evidence that the time allowed at the station was too brief to permit of plaintiff alighting before the train started, and defendant frankly admits there was evidence of its negligence sufficient to be submitted to the jury. The plaintiff's testimony is that he had bought a ticket to that station (La Grange), and the conductor had taken it up; that before reaching there the station was called, and that when the train stopped he left the car as quickly as he could; that the train did not stop at the station as long as usual, and as he was proceeding to alight he found the conductor standing on the steps; that he asked him to let him pass, and the conductor stepped aside in order that he might get off the train. The plaintiff further testified that "the train was moving slowly when I stepped off, and I thought I could step off safely." When the plaintiff asked the conductor to let him pass, and the conductor stepped aside in order that he might get off, and did not make any movement to stop the train, this was evidence tending to show an invitation to alight, a tacit assurance that the plaintiff could do so safely; and if upon such invitation the plaintiff did alight, the speed of the train not being such as to put him on guard not to act on such invitation,—if the jury believed that state of facts,—contributory negligence was not so clearly proved that it could be adjudged that the plaintiff was guilty thereof. On the contrary, there was sufficient evidence to justify the jury in finding that it was disproved. Certainly the court could but leave the issue to the jury. The other exceptions are not pressed in defendant's brief, and are, besides, without merit.

No error.

MONTGOMERY, J., dissents.

SMITH *et ux.* v. WILMINGTON & W. R. Co.

(Supreme Court of North Carolina, May 13, 1902.)

[41 S. E. Rep. 481.]

**Carrying Passenger beyond Destination—Nonsuit.\***

A woman, with her children, purchased tickets, and boarded a train to go to a certain "crossing" where there was no station. The train was a long freight train with a passenger coach in the rear. The conductor was unable to communicate the signal to the engineer in time to stop at their destination, and stopped at another crossing three-fourths of a mile beyond, where he assisted them to alight. A shower had come up, and it was raining when they got off the train, and they were wet when they reached a farm residence near by. There was no unnecessary force used or rudeness shown by the conductor. The woman was not put to any extra expense, and would have been wet if let off at her destination. She was sick afterwards, but her physician testified that she would have been sick anyway: *held*, that a judgment of nonsuit was properly ordered.

**Same—Damages—Mental Suffering.**

In an action against a railroad company for damages for carrying a passenger beyond her destination, where no personal injury was shown, evidence of mental suffering was properly excluded.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Robeson county; McNeill, Judge.

Action by D. H. Smith and wife against the Wilmington & Weldon Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Patterson & McCormick, for appellants.

McLean & McLean, for appellee.

MONTGOMERY, J. At the close of the plaintiff's evidence the defendant's motion for judgment as of nonsuit was allowed, and the plaintiff appealed. The gravamen of the action—indeed, the only cause of action set out in the plaintiff's complaint—was the alleged reckless, careless, and negligent conduct on the part of the defendant's conductor in carrying her past and beyond the point to which she had bought her ticket, and putting her off in the rain, and in an unsuitable place. The exact language of the complaint in respect to the alleged negligence is as follows: "That the conductor on said train recklessly, carelessly, negligently, and unlawfully, and in absolute disregard of his duties to her, carried said plaintiff past and beyond her destination about three-fourths of mile, and despite remonstrance on her part stopped the train, and put off said plaintiff and her children in a low, wet, and swampy place, and in the midst of a steady rain, and at a considerable distance from any shelter or other protection from said rain, and when it was neither likely nor probable that any one would meet said plaintiff and children; all of which was done to the serious inconvenience, annoyance, damage, and injury to said plaintiff and children to the amount

\*See note to Phillips v. St. Charles, etc., R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

of ten thousand dollars." There was no evidence that she suffered any bodily harm, or that she was put to any expense in reaching her home from the point at which the conductor helped her to alight. It is true that she said she got wet, and was laid up for several days, and was exhausted, and very much fatigued; but her physician, who prescribed for her that very morning, testified that for some time she had been suffering from nervous prostration and functional disorder of the heart, and that her condition was such that she would have been sick anyway. Just immediately before the occurrence, a summer thunderstorm was approaching, and all of her evidence showed that she would have become wet from the rain if she had stopped at the point where the conductor had agreed to stop the cars for her to get off; and, besides, there was no house or building at the agreed point of her destination, and no one awaiting her upon her arrival. In fact, the plaintiff not only did not claim in her complaint, as we have seen, any damages other than such as were alleged to have arisen by reason of the conductor having put her off at the place and in the manner he did, but in her testimony also, in answer to a question on her cross-examination, she said, "I sued for damages for being put off out there where there was no one to meet me, and away from any house or protection of any kind, and in the rain." It is significant, too, in this connection, that, although she testified that she consulted counsel with reference to bringing suit in this matter, the summons was not issued until the March following the time of the occurrence, 4th of July, 1899. She testified herself, also, "I was not put to any additional financial expense by reason of being put off at Cameron instead of at Stewart's." In the course of the trial the plaintiff undertook to show that she suffered mental suffering, and she was asked this question by her counsel: "State whether or not there was any mental suffering by reason of the treatment of the defendant?" And his honor—very properly, in our opinion—refused to allow the question. We do not intend to extend to that extent the doctrine of mental anguish. So far as we now recall, that doctrine has only been allowed in this court in cases where there has been personal injury, except in cases where telegraph companies have been negligent in their failure to send and deliver messages concerning personal or domestic affairs, such as the illness or death, or something equally as serious, between persons who are near of kin. Neither do we think that there was any evidence tending to prove that the defendant's conductor, in his conduct, did or said anything which could justify the plaintiff's attempt to recover as for punitive or exemplary damages. Dr. McKenzie, a witness for the plaintiff, testified that the conductor was considered "a very gentlemanly conductor." On the present occasion he told the plaintiff that he was unable to stop the train—a long freight train with one passenger coach in the rear—at the point

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he had agreed to stop for her benefit; that he was unable to communicate with the engineer the signal to stop. He gathered together her parcels or bundles, and, in her own language, "helped me and the children off the train by lending his hand to us; and when we got to the end of the car Capt. Lockamay went out ahead of us." She also said that the conductor stood at the end of the car on the ground, and remained there during the entire time the train was at Cameron, and that he was talking with her some of the time. It was also in evidence that very near the point where the cars were stopped were residences and homes, and in one of them (Mr. Cameron's) the plaintiff and her children found shelter and protection. So it appears from the evidence that while the conductor may not have measured up to the standard recognized by the plaintiff in point of politeness, he yet, in law, fulfilled every duty imposed upon him as conductor of the defendant's train in the acts of helping her to alight from the car and in attending upon her after she alighted and before the train moved off. If it were admitted that the plaintiff was wrongfully put off the train, she would be entitled to recover only the actual damages that she would have sustained therefrom, and if the act was accompanied with unnecessary force or other circumstances calculated to humiliate her or to wound her pride, or with a reckless indifference to consequences, insult, or rudeness, showing malice, such damages might have been allowed by the jury as they should think were warranted by the facts in the way of punitive damages. *Rose v. Railroad Co.*, 106 N. C. 168, 11 S. E. 526; *Hansley v. Railroad Co.*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600. The evidence discloses no such conduct on the part of the conductor. It is true that the plaintiff said that "the conductor treated me in a rough, indifferent manner, was mad, and spoke in a harsh tone"; but that evidence, when taken together with what the conductor actually did under all the surroundings, makes it perfectly clear to us that what she complained of was a matter of taste, and not of substance. In the confusion of the storm, the downpour of rain, the fright of the children probably, and her own weak and nervous condition, combined to cause her to take an extreme view of the situation, and to do the conductor an injustice in her censure of him.

No error.

DOUGLAS, J. (dissenting). I must again dissent from the opinion of the court. That this court can say as a matter of law that a common carrier is not guilty of negligence when it sells tickets to a woman contracting to carry her to Stewart's Siding, and then carries her beyond her destination, and, over her protest, puts her and her four little children out in the rain, can never receive my assent. Let us examine a part of the evidence: Dr. J. C. McKenzie, witness for plaintiff: "I live in South Carolina. I saw the plaintiff on the

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4th of July, 1899, at Tatum, S. C., on the railroad to Stewart. I purchased one and one half ticket for them. I saw them take passage on the train. There were four children. I do not know their ages, but think the youngest one is about nine months old." Cross-examination: "I bought the tickets on the Yadkin Valley Railroad. I did not see the conductor on that day. It was a freight train." Redirect: "The train had a passenger car attached, and carried passengers." Mr. M. J. Smith, plaintiff: "I was at Tatum station on the 4th day of July, 1899. I left there on the north-bound freight train. I do not know who was the conductor. I had one ticket and one one-half ticket. I had my four children with me,—one nine months old, one two years old, one four years old, and the other ten years old. I gave the tickets to the conductor. Dr. McKenzie saw me get on the train. He also helped me on the train. I was to get off at Stewart's Siding, and when the conductor passed through the car I called it to his attention, and asked him if he was going to stop at Stewart's Siding; and I told him I was to get off there, and not at Cameron's sawmill; and he said, 'All right,' he would have the train stopped. I did not see him any more until I got out in the bay where he put me off near Cameron. He came to me, and began to pick up my bundles, and said, 'Here is the place where you will have to get off.' I told him at John station that I would have to have help. He came and picked up my bundles, and I followed after him. There was a fearful looking cloud, and it was raining, thundering, and lightning. The place he put me off at was down in a pond in a low, wet place, with railroad ditches on each side. I stayed there for five or ten minutes. There was no shelter, and it was raining. The conductor stood out on the ground until the train left. This was between one-half and three-quarters of a mile from the station to which I bought my ticket. The conductor treated me in a rough, indifferent manner, and was mad, and spoke in a harsh tone. It was after I passed Stewart's that I was put off. It was in a low, wet, rough place, and I could not go on until the train left. When he put me off, I crossed on the other side, where there were no bushes, and stood there until the train left. The train was in the way, and, as I had my children, I could not go along until the train left. When the train left, I started up the road towards the post office. I went to Phil Cameron's house after it slackd raining. Miss Pearlee Jernigan was at Mr. Cameron's, and she brought an umbrella, and came to meet me. She took my baby, and carried it to the house. When it slackd raining, I sent one of my children over home to tell them I was there without any way to get home, and to come after me. I was wet, and remained in that condition for about two hours." "State what was the condition of those children at the time you reached Mr. Cameron's house." "They were as wet as I was, and had to stay wet as long as I

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he had agreed to stop for her benefit; that you experienced communicate with the engineer the of the conduct of the gathered together her parcels or bring me up for several days, language, "helped me and the child a fatigued. I was sick ing his hand to us; and when we a under the treatment of Capt. Lockamay went out ahead. She again says, on cross-the conductor stood at the end gotten wet very little had I remained there during the because there was a shelter, and Cameron, and that he was been there to meet me. There It was also in evidence that when I passed Stewart's, but one cars were stopped were re a few minutes." There is much them (Mr. Cameron's) of which is conflicting, but that does shelter and protection. case from the jury. We must remember while the conductor r sory nonsuit, which is equivalent to a ard recognized by th evidence. The evidence of the plaintiff is in law, fulfilled ev to be true, and must be construed in the the defendant's t able to her. This has been held in a long and the car and in e line of decisions. Cox v. Railroad Co., 123 N. fore the train E. 848; Cogdell v. Railroad Co., 124 N. C. 302, tiff was wror Moore v. Railway Co., 128 N. C. 455, 39 S. E. recover onl Railroad Co., 129 N. C. 407, 40 S. E. 195, and therefrom ain cited. In Springs v. Schenck, 99 N. C. 551, 555, force or 406, 6 Am. St. Rep. 552, Merrimon, J., speaking wound court, says: "As the court, in effect, intimated upon quence that in no reasonable view of the evidence could the migh ant recover, it must, for the present purpose, be warr ed as true, and taken in the most favorable light for v. because the jury might have taken that view of it if it had Re submitted to them." In Purnell v. Railroad Co., 122 A C. 832, 29 S. E. 953, Furches, J., speaking for the court, c: "This motion is substantially a demurrer to the plain- evidence, and, this being so, and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or tended to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant." If this remains the law, I see no principle of law upon which this case can be taken from the jury. Giving to the plaintiff's testimony its proper weight, it is evident that the defendant broke its contract of carriage, and further injured the plaintiff by putting her off in the rain at an unsuitable place. Merely carrying the plain- tiff beyond her destination was actionable negligence, for which she was entitled to at least nominal damages, giving her costs both in this court and the court below. In Cable v. Railroad Co., 122 N. C. 892, 899, 29 S. E. 377, 379, it is said by a unanimous court: "There is another point in the case at bar on which the plaintiff was clearly entitled to go to the jury. He testified without contradiction that he was on the train as a passenger, had paid his fare to Benaja, a regular station of the defendant company, and was carried beyond his destination by the failure of the conductor to stop his train.

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on the railroad to Stewart  
for them. I saw them  
four children. I do  
not know one is about  
the tickets  
the train  
Mr.*

ence on the part of the defendant, and at least nominal damages. This is a rule in the absence of a local statute. And cases therein cited; Schouler, *Carr. Pass.* p. 581; Hutch. *Carr.* 88 *Eng. Enc. Law*, pp. 565, 566, 572, and in this state the liability is directly imposed by the Code (section 1963) provides that: "The corporation shall start and run their cars for the transportation of passengers and property at regular intervals, to be fixed by public notice, and shall furnish sufficient facilities for the transportation of all such passengers and property as shall within a reasonable time previous to the departure be offered for transportation at the place of starting, at the junction of other railroads, and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places on due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises." As to the quantum of damages, the rule may be found in *Purcell v. Railroad Co.*, 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113, 47 Am. & Eng. R. Cas. 457, and in *Hansley v. Railroad Co.*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600." I am not aware of any change in the statute, and it would seem that, if it was the law then, as was said by a unanimous court, it would be the law now. So she was entitled to at least nominal damages in the court below, and to a new trial for refusing to allow them. I think she was entitled to substantial damages.

Returning to the evidence, there are some things in the opinion of the court that I cannot understand. It says, "There was no evidence that she suffered any bodily harm." She says she did, and the truth of her evidence is admitted by the demurrer. Being asked the distinct question whether she experienced any suffering on this occasion by reason of the conduct of the defendant, she answers as follows: "It laid me up for several days, and I was exhausted, and very much fatigued." The opinion also says, after referring to this testimony: "But her physician, who prescribed for her that very morning, testified that for some time she had been suffering from nervous prostration and functional disorder of the heart, and that her condition was such that she would have been sick anyway." Even if we were permitted to compare and weigh the evidence, and draw our own deduction from conflicting inferences, it seems to me quite a natural inference that a woman already suffering from such dangerous diseases would be made worse by being rudely put out in the rain with a nine-months child in her arms. To my mind, her sick and helpless condition should have been an additional



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protection to her, instead of a mere shield to protect the defendant from the consequences of its own wrong.

There are in the opinion other inferences of fact which seem equally unsustained by the testimony and unwarranted by law. In my opinion, there should be a new trial.

CLARK, J., concurs.

WILLIAMS *et al.* v. INTERNATIONAL & G. N. R. Co.

(*Court of Civil Appeals of Texas, March 19, 1902.*)

[67 S. W. Rep. 1085.]

**Injury to Passenger Compelled to Ride on Platform—Swaying of Car.**

Under Rev. St. 1895, arts. 4509, 4516, requiring railroad companies to furnish separate coaches for negroes and whites, and making it their duty to remove passengers from the coaches in which they were not entitled to ride, it was error to refuse to instruct that if plaintiff, a negro, entered the negro coach, but, on account of white men occupying the seats and room, was crowded onto the platform, from which he was pushed or thrown by the swaying of the car, without negligence on his part, he was entitled to recover, there being evidence to support the instruction.

**Same—Contributory Negligence—Riding on Platform of Crowded Car.**

Where plaintiff, a negro, boarded an excursion train, and there was evidence that the seats and room in the coach for negroes were occupied by whites, so that plaintiff was crowded onto the platform, and the conductor refused a transfer to a train following, though he had authority to make such transfer, it was not error to refuse an instruction stating that plaintiff was not guilty of contributory negligence in standing on the platform, as the question of negligence was for the jury.

**Same—Overcrowding Excursion Train—Negligence—Question for Jury.**

A petition in an action for injuries sustained by falling from the platform of a train averred that defendant carelessly arranged and operated its different trains, and that some of them were overcrowded and negligently placed where the greatest number of people were waiting to board them. The evidence was that it was an advertised excursion, and the first train was so crowded that word was sent to the station where plaintiff was awaiting a train not to allow passengers to board it, and this was announced; but it was denied that plaintiff heard. There was evidence tending to show that defendant could have placed some of the following trains in front with but little inconvenience: *held*, that plaintiff was entitled to have submitted the question as to whether or not defendant was negligent in the arrangement of its trains.

**Same—Same—Evidence.**

Evidence that defendant had advertised the excursion and expected large crowds was admissible.

**Carriers of Passengers—Degree of Care.\***

A railroad's duty to its passengers is to exercise that high degree of care and prudence that would be used by very cautious, prudent, and competent persons under like circumstances; but it was not error to refuse to use the expression "highest degree of care," in instructions.

On Rehearing.

**Carriers of Passengers—Crowded Excursion Train—Negligence—Question for Jury.**

Where, in an action for personal injuries sustained by falling from an

\*See note to West Chicago, etc., R. Co. v. Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

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overcrowded car, it appeared that defendant had advertised an excursion, and on the day thereof its regular passenger and mail train, which was followed by two excursion trains, took on passengers who had purchased excursion tickets, the question whether defendant rested under a duty not to allow the mail train to be delayed in order to place a less crowded train in front, or whether defendant was negligent in not making such delay, was for the jury.

Appeal from district court, Comal county; L. W. Moore, Judge.

Action by Alex Williams against the International & Great Northern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

F. J. Maier, for appellant.

S. R. Fisher and N. A. Stedman, for appellee.

FISHER, C. J. This is an action for damages by the appellant against the railroad company on account of injuries sustained by Alex Williams when a passenger on board of one of appellant's trains by falling therefrom while the same was in motion. Verdict and judgment were in favor of the railroad company. The case made by the plaintiff's petition is to the effect that Alex Williams is a negro, and on the 21st of April, 1900, at New Braunfels, Tex., purchased a first-class ticket over defendant's road from that point to San Antonio and return. He boarded the train at New Braunfels to take passage to San Antonio, and at once sought the negro coach. There were no vacant seats in that coach. Most of the same were occupied by white men. The other coaches were crowded, and it is averred that plaintiff was not permitted, by virtue of the law, to enter therein, as he was a negro. He entered the negro coach, and found standing room only; and while in the coach, and after the train had left New Braunfels, more white men entered that coach, until there was no standing room; all of which, it is alleged, the defendant and its servants knew. By reason of the crowded condition of the car, the plaintiff was crowded therefrom onto the platform. At that time there were passengers on the platform, and others thereafter went upon the platform. When the train was running at full speed, and at the time that Alex Williams was standing upon the platform holding fast to the car, and in as safe and comfortable position as he could get, without negligence upon his part, it is alleged that when the train was going around a curve, owing to the movement thereof and the swaying of the car, some of the passengers on the platform were thrown against the plaintiff, and he was overbalanced and thrown from the train. The petition then proceeds to minutely allege the result of the accident, and the manner in which the plaintiff was injured, and the damages and loss sustained. Then follow averments to the effect that the defendant carelessly and negligently failed and refused to provide sufficient cars and accommodation to haul in safety all of the passengers to whom the defendant had sold tickets, and

who were rightfully upon that train; that all the seats were full, and the aisles were crowded; and that, by reason of this condition, many were compelled to stand upon the platforms, which platforms were open, and without protection on the sides; and that the defendant wrongfully, negligently, and carelessly took passengers on the train after all the seats were occupied, and after standing room in the aisles was exhausted, and carelessly and negligently arranged and operated its different trains so as to overcrowd the train; and negligently and carelessly placed its fullest and most crowded trains in those places and positions where the largest number of people were waiting to board the train, and then carelessly and negligently still more crowded the same; that it wrongfully and negligently, and in disregard of the law, violated its duty in permitting white passengers to go into and occupy the negro coach, and thereby to crowd the plaintiff out onto the platform; and that the facts alleged were known to the defendant and its servants, and they took no steps to prevent the same. The defendant pleaded the general denial, and also alleged that plaintiff was on the platform contrary to the rules of the company, and was guilty of contributory negligence; that the defendant furnished two other special trains, which were amply sufficient to accommodate all; that one was only six minutes behind the train the plaintiff took, and the other six minutes behind the second; that the defendant and its agents informed the plaintiff of this, and requested him to go onto one of the other trains, but the plaintiff still recklessly and negligently crowded onto the first train, after the same was full. Appellant's fifth assignment of error complains of the refusal of the court to give the following instructions: "It was the duty of the railroad company to provide separate coaches for the accommodation of white and negro passengers. Conductors on passenger trains provided with separate coaches have authority to refuse white passengers seats in negro coaches, and to refuse negro passengers seats in coaches for white people, and it is the duty of the railroad company to remove all white passengers from negro coaches, and to remove all negro passengers from the coaches for the whites. Therefore, if you believe from the evidence that the plaintiff, Alex Williams, is a negro; that he entered the negro coach; that said negro coach would have had room for him if white people had not been in it; that white men went into said coach, occupied the seats and room, and thereby the said negro coach became so crowded that there was not room in it for the plaintiff; and that on this occasion the plaintiff, Alex Williams, was crowded out on the platform of said negro coach; and that he fell from said platform, or was pushed or thrown from said platform by other passengers being thrown against him from the swaying of the cars, and was injured without contributory negligence on his part,—you will find a verdict in favor of the plaintiff and assess the damages as

explained in other portions of this charge." Special instruction No. 5, asked by plaintiff and refused by the court, is as follows: "If the plaintiff, Alex Williams, is a negro, he had no right to go into any coach for the purpose of riding therein which was intended for whites, whether there were seats or other room therein or not; but he only had a right to ride in coaches which were intended for negroes; and, therefore, you are instructed that it was not negligence on the part of said plaintiff to stand on the platform, if there was no room for him in the negro coaches, even if there was plenty of room for him in the coaches for white people." The only charge given by the court upon this subject is in the following language: "It is the duty of said company to have separate coaches or compartments thereof for whites and negroes." There is evidence in the record to the effect that the plaintiff purchased at New Braunfels, on the day in question, an excursion ticket from that point to San Antonio and return, and that he was a negro, and, immediately upon boarding the train, went into the coach used for the purpose of transporting negro passengers in order to procure a seat; that the coach was crowded, and all the seats were occupied, and that many were standing in the aisles; and after he entered the car, others came in and he was crowded out of the car onto the platform, and when there, holding on as best he could, by the movement of the train and the jostling of the crowd, he was thrown to the ground while the train was rapidly moving, and sustained some of the injuries complained of. There is evidence tending to show that he was exercising proper care at the time of the accident. While the evidence of the conductor is to the effect that he does not recollect whether the negro coach contained white people or not, there is positive testimony, upon the part of the plaintiff and others, that there were white people in the negro coach, some of whom were occupying some of the seats. The plaintiff, and one of his companions who boarded the train with him, testifies that when the conductor took up their tickets, they asked permission to change to one of the trains following, all of which was refused by the conductor; and the witness Horace Richardson testifies that they stated to the conductor, as a reason for this request, that the car was badly crowded, and that they could not get seats, and that there was hardly standing room; whereupon the conductor informed the plaintiff and Richardson to remain on that train. The conductor testified that he had the authority, when occasion required, to give a passenger a transfer, authorizing him to ride on a train following the one in his control. There is also evidence to the effect that the conductor made no effort to get the white people out of the negro coach, and that the whites were occupying the same when the conductor passed through the coach taking up tickets.

In view of the averments upon this subject, and the facts as

stated, it was clearly the duty of the court to give the first of the instructions above set out. It substantially embraced the law upon this subject. Rev. St. arts. 4509, 4516; *Wood v. Railroad Co. (Ky.)* 42 S. W. 349, 8 Am. & Eng. R. Cas., N. S., 711; *Railroad Co. v. Williams (Tex. Civ. App.)* 50 S. W. 732. It is an imperative duty, required by law, resting upon the railway companies, to furnish separate coaches or compartments in its cars for whites and blacks, and it is a violation of the law to permit the whites to occupy the coaches set apart for negroes; and the law makes it the duty of the conductor to prevent such occupancy, and to remove whites when found in the negro coaches. The inference from the facts is clear that, if the conductor in this instance had discharged his duty and removed from the negro coach the whites that were occupying it, room could have been found therein for the appellant and others of his race, and crowding and forcing him upon the platform, a place of danger, would have been obviated. The fact that he remained upon the platform under the circumstances as stated would not necessarily charge him with contributory negligence. Under the law he had no right to occupy the other coaches upon the train, which were assigned to whites; and when the circumstances were such that he found no room in the negro coach, he had the right to do the best, in view of his comfort and safety, that the circumstances allowed. In the *Williams Case*, supra, it is held that a negro passenger, under such circumstances as those detailed, was not guilty of contributory negligence in riding upon the platform. In fact, the case cited, upon many of the main features, is very similar to the one before us; but in view of the facts of this case, we cannot say absolutely that the appellant was or was not guilty of contributory negligence in riding on the platform. Therefore the second special instruction as above set out was properly refused, because it contained a statement to the effect that the plaintiff was not guilty of contributory negligence in standing on the platform. Whether, under the facts and circumstances, he was guilty of contributory negligence or not, was a question of fact for the jury; and, doubtless, upon another trial, a charge upon this branch of the case will be so framed as to meet this view of the question. The first instruction, as above set out, substantially embraced the law, and the court should have given it in charge to the jury. The petition averred that the defendant carelessly arranged and operated its different trains so as to overcrowd some of its trains, and negligently and carelessly placed its fullest and most crowded trains in those places and positions where the largest number of people were awaiting to board the train, and then carelessly and negligently still more crowded the same. In view of these averments, and evidence to the effect that the railroad company had advertised excursions upon that date to San Antonio, and that there was, following the train upon which plaintiff took passage, two

other trains which were not so crowded, and upon which there was room for many of the passengers who crowded upon the first train, and that these trains were following close behind the one that was boarded by the plaintiff, the plaintiff offered to prove that the overcrowded train was kept ahead all the way to San Antonio, and stopped along the route, where large crowds were waiting at stations to take passage; and that by keeping the empty trains behind passengers boarded the overcrowded train in front, when, if the empty trains had been placed to the front, there would have been room sufficient to have accommodated the crowd. And there are some facts in connection with this which tend to show that this could have been done with little inconvenience to the railway company. The court declined to permit this issue to be submitted to and considered by the jury; but, upon the contrary, by a request from the defendant, instructed the jury as follows: "If you believe from the evidence that when train No. 1 reached New Braunfels it was crowded, and that the defendant desired and gave notice of its desire to take no more passengers thereon, and if you further believe that said train was being followed by two trains a few minutes behind, in which there was ample room to accommodate persons at New Braunfels intending to take passage from that point to San Antonio or intermediate points, then you are instructed that the defendant rested under no duty or obligation to Alex Williams, or other persons at New Braunfels intending to go from there to San Antonio or intermediate points, to sidetrack or lay out train No. 1, to enable the trains following to take on and carry to San Antonio or intermediate points said Alex Williams or other intending passengers; and you are instructed to disregard and not consider any evidence to that effect, and that such a course could have been pursued by the defendant or its agents." In this connection it is well, also, to state that the crowded condition of the train upon which the appellant took passage at New Braunfels was apparent when that train arrived at San Marcos, before it reached New Braunfels going south. A dispatch was sent from that point to the agent at New Braunfels to the effect to keep the crowd off of the train known as No. 1, and on which the plaintiff and other passengers at New Braunfels took passage. There was a large crowd gathered at the station at New Braunfels when the train arrived, many of whom immediately boarded that train, among whom was the plaintiff. The facts authorize the inference that the plaintiff did not hear the notice given of the crowded condition of the train, and that the trains following were not crowded, and had room sufficient to accommodate the plaintiff and other passengers; and there is also evidence to the effect that no effort was made to prevent him from boarding the train. There is evidence to the effect that the station agent and the city marshal of New Braunfels, and the conductor, in a general way, notified the crowd there

present at the depot who were intending to go as passengers to San Antonio that that train was crowded, and to board one of the trains following. There is evidence of the plaintiff and others to the effect that they did not hear any such statement.

It is contended by appellant that, in view of the crowded condition of the first train, the railway company should have put either one or both of its empty trains to the front, in order to accommodate the crowd that was awaiting transportation at New Braunfels and other points along the route to San Antonio, and that if this had been done plaintiff could and doubtless would have boarded one of these trains, and thereby have procured a seat in one of the coaches assigned to his race, or that the crowded condition of the car in which he first entered would not have likely resulted, if the passengers awaiting transportation could have been afforded the opportunity first of entering the trains that were comparatively empty. The pleadings and the evidence upon this subject justified the submission of this issue. It was the duty of the railway company to use a high degree of care to furnish its passengers seats and safe transportation, and if this result could have been accomplished by placing trains to the front that were then convenient, in order to relieve the crowded condition of one of its trains, or to prevent such train from becoming overcrowded, it was a question of fact, to be submitted to the jury, whether or not their failure to resort to these means for the safety of the passengers; under the circumstances, was negligence. Therefore we are of the opinion that the court should have submitted this issue to the jury, and erred in giving the charge complained of in appellant's third assignment of error.

The evidence which was sought to be admitted, as shown in the bill of exceptions, under the fifth assignment of error, was admissible. The purpose of this testimony was to show that upon this special occasion the railroad has advertised two excursions,—one to San Antonio, and another excursion over its line of road. The object of this testimony was to establish the fact that the railway company, in the nature of things, should have expected, and did expect, that a large crowd would be assembled at the depot; and, such being the case, the defendant was called upon to exercise such diligence and care in handling its trains as was calculated to accommodate the crowd that was to be expected its advertisement of the excursions would call to its depots. *Railroad Co. v. Foster* (Tex. Civ. App.) 63 S. W. 952.

The court, in subdivision 6 of its charge, instructed the jury as follows: "If you believe the defendant did furnish the necessary passenger coaches, by running in sections different trains in close and convenient proximity, and the public was duly advertised of this fact, then the railway company in this particular performed its duty. If, under such circumstances, the first train in such section was overcrowded, and if said

company had performed its duty in trying to prevent such overcrowding, and should the plaintiff, knowing of this overcrowded train, take passage thereon, with knowledge of the other incoming trains to convey passengers to his destination, then the plaintiff could not complain of this condition." The only notice given to the crowd assembled at the depot that trains were following, and of the crowded condition of the train upon which the plaintiff took passage, was the public statement by the conductor, the agent, and the city marshal. As above said, there is testimony to the effect that this statement was not heard by all, and that the plaintiff did not know of this condition before he left New Braunfels. The plaintiff would not necessarily be charged with notice given at this time; nor can it be said that it would follow that he was guilty of contributory negligence or want of proper caution if he boarded the train under the circumstances shown by the testimony. Whether the notice given at that time would affect him, and what effect might be attributable to his conduct in getting upon the crowded train under the circumstances, were questions of fact, to be passed upon by the jury, and it was error for the court to assume that the combination of facts presented in the charge quoted would affect the right of the plaintiff to recover. Whether the plaintiff had notice of the crowded condition of the train, and that other trains were following upon which there was room for people of his color, were all questions of fact, to be passed upon by the jury. He may have known, or he may have had reason to believe, that there were other trains following a short time behind the one that he boarded, but he may not have known of the empty condition of those trains, and that there was room thereon in the car assigned to people of his color.

This view also disposes of appellant's ninth and tenth assignments of error. The charge as complained of in these assignments should have been so framed as to have left the jury free to pass upon these issues, and should not have assumed, as a matter of law, that the facts as stated constituted contributory negligence or assumed risk.

The eleventh assignment of error complains of the general charge of the court and special charge No. 3, requested by defendant on the definition of negligence. In that branch of the case that relates to contributory negligence, the plaintiff was only required to do what a person of ordinary prudence would have done under like circumstances; but when it comes to the duty and care to be exercised by the railway company, a different rule prevails. In the case of *Parvin v. Railroad Co.* (Tex. Civ. App.) 54 S. W. 638, a high degree of care is required; and in *Railroad Co. v. Williams* (Tex. Civ. App.) 50 S. W. 734, this degree of care is required in furnishing seats to passengers, and in protecting them from an overcrowded condition of its cars, in order that they may not be forced to ride in positions more exposed to danger.



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The complaint made to the charge by the twelfth assignment of error will doubtless be corrected on another trial. It will be made plain upon the subject pointed out in the assignment.

What we have said in effect disposes of the thirteenth assignment of error. But, however, to be explicit, we think it best for us to say that the objections urged to the charge are well taken, and the court, in submitting this question again, should so frame its charge as to leave all the issues of fact embraced therein to the determination of the jury.

The fourteenth assignment of error complains of the ruling of the court in refusing to give plaintiff's special instructions Nos. 2 and 4. These instructions both use the expression "highest degree of care," and, in effect, request the court to instruct the jury that the railway company must exercise the highest degree of care in its conduct towards a passenger. Special instruction No. 4 undertakes to define what is meant by the expression "the highest degree of care," and the definition there given of the care that should be exercised by the railway company is proper; but in view of the authorities in this state upon the subject, we are doubtful whether the expression "highest degree of care" should be used in a charge in instructing the jury what care should be exercised by railway companies. What the law exacts is a high degree of care, and we think the most approved charge upon that subject is that stated in *Railroad Co. v. Williams*, supra, and in other cases from the courts of this state (*Railroad Co. v. Welch*, 86 Tex. 204, 24 S. E. 390, 40 Am. St. Rep. 829), where a similar charge has been approved. It is to the effect that it is the duty of a railroad company towards passengers to exercise that high degree of care and prudence that would be used by very cautious, prudent, and competent persons under like circumstances, in order to the safe transportation of the passenger to his destination. We are of the opinion that in a case like this, where the railway company has advertised excursions, and, in the nature of things, would expect a large crowd, and that more than usual provision should be made for the transportation of passengers, they rest under the duty to exercise a high degree of care to furnish a sufficient number of cars, in one or more trains, if necessary, in order to transport the passengers, with a view to their comfort and safety, which they had the right to expect would avail themselves of the inducements offered by the excursion rates. Under the facts of this case, it would have been proper for the court, when requested, to have given a charge presenting this phase of the case in accord with the definition given in this opinion of the degree of duty required of railway companies in transporting passengers, and furnishing cars and seats sufficient for their safety.

The point presented in the fifteenth assignment is not reversible error. There is no question but that the plaintiff

was a passenger, and was entitled to transportation, whether his ticket was first class or second class; and there is no question but what he entered the coach that he was entitled to enter; but there would have been no error if the court had admitted the ticket in evidence, as set out in the bill of exceptions. But, however, upon another trial, if there is a controversy over the subject of the right of the plaintiff as a passenger upon the train, and as to whether he was a first or second class passenger, we would suggest that the evidence be admitted.

The court's definition of contributory negligence is in substantial compliance with the rule announced by the authorities upon that subject.

We have, in effect, disposed of the question raised in the seventeenth assignment of error; but, to remove all doubt upon this subject, it is well enough to say that the objection to the charge is well taken. It was a question for the jury to determine whether or not the plaintiff was guilty of contributory negligence in entering the train. It was an invasion of their province for the court to say that giving notice of the crowded condition of the train would absolutely charge plaintiff with negligence in going upon it as a passenger. These were questions of fact for the jury.

For the errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

On Rehearing.

(April 30, 1902.)

Appellee, on the first page of its motion for rehearing, makes this statement: "It is respectfully submitted that the findings of fact regarding the operation of the three trains which defendant ran on this occasion between New Braunfels and San Antonio do not conform to the facts proven, and the same appears to be taken from appellant's brief, which misstates and entirely perverts said facts, as appears from the record in this case and from the pages of appellee's brief heretofore referred to. On the occasion of the accident of which appellant complains, defendant ran from New Braunfels to San Antonio three trains at intervals of about six minutes. The first train was a regular mail and passenger train, which carried mail and passengers through from St. Louis. The two following trains were excursion trains,—one originating at Hearne, the other at Taylor. From the language of the opinion of the court, it appears that the court has taken no notice of the fact that the first train was a regular mail and passenger train, and that the second trains were excursion trains. It is not believed that the court is aware that this was the fact, for there is neither reason nor authority to support the proposition that the regular mail and passenger train should be laid out to allow excursion trains to precede it." We made no findings of fact, but stated what we understood

to be the facts as stated by the record, and we gathered the facts from neither the briefs of the appellant nor of the appellee, but they were taken from the statement of facts found in the record. There is no statement in the brief of appellant that we find of a misleading character, nor do we find that he has perverted or misstated the facts. We fully understood at the time of the disposition of this case by the court that the train boarded by appellant as a passenger was a mail and passenger train. We did not mention this fact, because we did not deem it one of importance, and do not so now consider it. We know of no rule of law that from the mere fact that a train carries the United States mail it can be so operated by the railway company as to relieve it of the responsibility, duty, and care it owes to its passengers. It is shown by the evidence that the mail train in question took on passengers who were traveling upon excursion tickets. Their stopping at stations and taking such passengers upon the trains can be regarded as an invitation to passengers traveling upon that class of tickets to board it. If, in the exercise of the duty and obligation resting upon the railway company to those that had procured tickets and were waiting at the depot as passengers, it should become necessary or proper to delay the mail train for a reasonable time, by side-tracking it and allowing other trains which were empty to receive passengers, we do not see why the railway company should be relieved of this duty, solely on the ground that the delayed train carried the United States mail. Whether the railroad rested under such a duty, and whether it should in the particular instance be performed, were questions of fact for the jury. This is the only question that we desire to notice in the motion for rehearing.

Motion overruled.

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INTERNATIONAL & G. N. R. CO. v. ANCHONDA.

(*Court of Civil Appeals of Texas, May 7, 1902.*)

[68 S. W. Rep. 743.]

**Passenger Separated from Children—Damages—Mental Anguish—Knowledge of Relationship.**

A woman, having her baby in her arms and her two children with her, purchased a railway ticket for herself and half-fare tickets for her two children, the agent looking at the children to see if they were entitled to half-fare tickets, but nothing was said as to the relationship of the parties: *held* to warrant a finding that the agent had notice of the relationship, so as to authorize a recovery for the mother's mental anguish on being separated from the children by failure to stop the train long enough to allow her to board it after the children were placed thereon.

**Same—Same—Same.**

The husband of a woman whose children were separated from her by reason of defendant's failure to stop its train long enough for her to board it after her children were placed thereon is entitled to recover for the mental anguish suffered by the wife without proof of any physical injury whatever.

International & G. N. R. Co. *v.* Anchonda

**Injury to Passenger—Stop at Station\*—Negligence and Contributory Negligence—Instructions.**

In an action for injuries alleged to have been caused by defendant railway company's failure to stop its train at a station long enough for plaintiff's wife to board it, where negligence of defendant's servants in starting the train when they knew plaintiff was in a position of danger was not alleged, an instruction to find for defendant if the train was stopped long enough, and failure of plaintiff's wife to board it was due to her own negligence, was erroneous, because requiring coincident freedom from negligence on the part of defendant and contributory negligence on the part of plaintiff's wife.

**Passenger Separated from Children—Damages—Knowledge of Relationship.**

The complaint charged that defendant's train did not stop long enough to allow plaintiff's wife to board it after her children were placed thereon, and that she suffered physical injuries and mental anguish therefrom. The evidence raised an issue as to whether defendant's agent knew of the relationship between the mother and children. The court charged that the jury should consider all physical pain and mental anguish suffered by the wife as the direct result of defendant's negligence, without referring to a portion of the charge where recovery for mental anguish on account of separation from the children was forbidden unless defendant's agent knew of the relationship: *held*, that the charge was erroneous, as leading the jury to award damages for mental anguish caused by separation from the children, in the absence of any finding that the agent knew of the relationship.

**Damages—Physical and Mental Suffering.**

In an action for personal injuries the elements of physical pain and mental distress are not susceptible of definite proof, and evidence of a general nature on these subjects entitles the case to go to the jury.

Appeal from district court, Frio county; M. F. Lowe, Judge.

Action by Felipe Anchonda against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Denman, Franklin & McGown and G. S. McFarland, for appellant.

R. W. Hudson and Mason Manney, for appellee.

JAMES, C. J. The action is to recover damages for physical injuries and mental anguish alleged to have been suffered by appellee's wife on account of a fall she is alleged to have received while in the act of getting upon defendant's passenger train at Moore, and on account of her two children and her niece, also a child, being separated from her, and carried on to Cotulla, sufficient time not being allowed her to board the train. The damages claimed and verdict were for \$2,500.

As we have concluded the judgment must be reversed for what is presented by the assignments of error Nos. 9 and 7½, we shall omit discussion of a number of assignments which relate to matters which cannot, or probably will not, arise on another trial.

\*As to the duties of carriers in taking on and setting down passengers, see note to Phillips *v.* St. Charles, etc., R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

The fifth assignment claims that, in order for plaintiff to recover for mental anguish suffered by the wife on account of having been separated from her children and niece, it must appear from the evidence that defendant's agent, at the time the contract for transportation was entered into, knew of the relationship existing between her and the children, and of her intention to carry them with her on the train; and defendant was therefore entitled to have this charge given: "The court instructs you that unless you believe from the evidence that the defendant knew of the relation existing between plaintiff's wife and the children which were carried away on defendant's train, plaintiff cannot recover for mental anguish caused his wife by reason thereof." The charge, we find, was substantially given in the court's main charge in all respects except that it was so worded as to state that plaintiff could not recover for mental distress if defendant did not know the relationship existing between the wife and the children, or any of them. It would, in any event, have been as well to omit the words "or any of them," as there was no evidence showing that the agent knew the relationship of one and not all of them, and we might assume that on another trial this criticism will be avoided. It was shown by evidence that at the depot two whole tickets and two half tickets were called for, one for plaintiff's wife's mother, one for plaintiff's wife, and the two half tickets for these three children, one being a baby. There was evidence that plaintiff's wife had her baby in her arms, and the other children with her, in the depot, and the agent, as the tickets were being purchased, came and looked at them, evidently to see how large the children were, and said it was all right. In our opinion, it was not necessary that the precise relationship between the wife and the children with her should have been communicated or known to the agent. The evidence was sufficient to warrant a finding that the agent had notice of the existence of some relationship between the woman and the children as would in all probability lead her to suffer mental anguish on their account by a separation such as shown here.

The sixth assignment alleges error in the refusal of the following charge: "The court instructs you that, in order for the plaintiff to recover herein for mental anguish suffered by his wife in consequence of having been separated from her children, you must believe that she also suffered physical pain in connection therewith, caused by the negligence of the defendant; and the court further instructs you that, if such physical pain was caused by the contributory negligence of plaintiff's wife, then she cannot recover for mental anguish." This charge was properly refused, because mental distress alone without physical injury would constitute a proper element of damages. The doctrine that no recovery can be had for mental suffering unaccompanied by physical injury does not prevail in this state. This disposes of the eighth assignment as well.

Assignment No. 7½ complains of the following charge: "The law requires all railroad companies transporting passengers to and from its stations in this state for hire shall stop its passenger trains at all of its regular passenger stations where passengers get on or off said train a sufficient length of time to permit any passenger to get on or off said train. And it is your province to determine, under the evidence in this case, whether the defendant's servants failed, as alleged in plaintiff's first amended original petition, to stop its said train at Moore a sufficient length of time for plaintiff's wife and children to get on the cars of defendant, and plaintiff's wife was injured by reason thereof, as claimed in his petition. And if you believe from the evidence that sufficient length of time was not given the plaintiff's wife and children by the servants and employees of the defendant to get on the cars at the time and place alleged by plaintiff, and you believe this was negligence on the part of the defendant, and that such failure was the direct and proximate cause of the injuries complained of (if any), then in such event you will find for the plaintiff, and assess the damages at such sum as you believe will compensate the plaintiff for the injury received by his wife (if any), not, however, to exceed the sum claimed in the plaintiff's first amended original petition, under the rules hereinafter given you. If, however, you believe from the evidence in this case that the defendant's servants and employees stopped its train at Moore on the day and date alleged by plaintiff a sufficient length of time which would have permitted the wife of plaintiff to get on said cars of defendant by the use of ordinary care, and that the failure to do so was through the negligence of the wife of plaintiff, and through no fault of the defendant, its servants and employees, you will find, for the defendant. And in addition the court instructs you that it was the duty of plaintiff's wife to use every means within her power to avoid damages which may have been occasioned by defendant's negligence, if you find that defendant was negligent; and unless you believe from the evidence that plaintiff's wife failed to use every means within her power to relieve her anxiety concerning her children she is not entitled to damages for any anxiety which she could have averted. By 'ordinary care,' whenever used in this charge, is meant that degree of care which a person of ordinary prudence would have exercised under like circumstances." The law is that trains should stop a reasonably sufficient length of time to enable a passenger to board the train, which, of course, means sufficient time to enable the passenger, in the exercise of reasonable diligence and care, to board it. If the train was thus held in the present case, defendant was not liable at all, under the pleadings; there being nothing alleged to the effect that the employees saw her in a position of danger, and did not use proper care not to injure her. No duty existed on appellant's part under the allegations except to

comply with the above rule. The charge should have been, if the train stopped long enough to have permitted plaintiff's wife to get on the car by the use of reasonable care, to find for defendant, regardless of what the wife did. In fact, a special charge to this effect was asked and given. But the last section of the charge quoted made it necessary for the jury to find also that the wife was guilty of contributory negligence; and, if she was guilty of contributory negligence, still no verdict could be awarded defendant unless the jury believed defendant, its servants or employees, were not at fault. The error in this charge is plain and affirmative, and the giving of a correct charge upon request, which in no manner referred to the erroneous charge, did not correct the error. *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801.

The ninth assignment also shows error. The court gave the following instruction: "If you find a verdict for the plaintiff, you will, in assessing his damages, consider all personal injuries, physical pain, and mental anguish, anxiety of mind, and distress suffered by his wife which you may find from the evidence to have been the direct result of the negligence of the defendant (if you believe from the evidence that the defendant was negligent) in failing to stop a sufficient length of time at Moore to enable the wife of plaintiff to get on the cars with her children, and the value of the tickets unused, and any extra expense occasioned by reason of having to stop over at Moore, and only assess as actual damages such amount as will, in your judgment, reasonably compensate plaintiff therefor. The amount so found, if any, you will state in your verdict." The jury might have found for plaintiff for physical, and not for mental, injuries. In other portions of the charge they were directed not to find for mental suffering of plaintiff's wife by reason of the separation, unless they believed that defendant had notice of the relationship between her and the children. But the charge quoted bore directly on the measure of damages, and told the jury, without qualification, if they found a verdict for plaintiff, to take into consideration mental suffering as well as personal injury and pain, to assess as damages such amount as would reasonably compensate plaintiff therefor, and the amount so found to state in their verdict. This charge would naturally be of influence with the jury, being their guide as to what they should assess as damages. This charge should have been qualified in terms, or should have referred in some manner to the other portions of the charge which qualified it, so that the jury could not have been misled by it. *Gonzales v. Adoue*, 94 Tex. 120, 58 S. W. 951; *Railroad Co. v. Lehman*, 66 S. W. 214, 3 Tex. Ct. Rep. 866; *Railway Co. v. McCullough* (Tex. Civ. App.) 33 S. W. 285.

There was evidence, as already stated, which made it an issue whether or not defendant, through its station agent, had notice of a relationship between plaintiff's wife and these

St. Louis, etc., Ry. Co. v. Wilson

children such as would make it in reasonable contemplation of the parties that a separation such as happened on that day would give rise to mental distress on her part.

There was evidence which raised the issue whether or not plaintiff's wife made all reasonable effort to lessen or relieve her anxiety. In determining what would be reasonable effort in this respect, the kind of people these were and their condition and circumstances should be considered. It could not be said as a matter of law that all reasonable effort in this direction, under the circumstances, was not made by plaintiff's wife, or in her behalf.

It is also contended by appellant that the proof of physical injuries was not sufficiently certain to authorize a recovery therefor. In this matter we may state that in respect to ordinary physical injury the proof can and ought to be reasonably certain as to its nature and extent. But physical pain as well as mental distress is not susceptible of definite proof, and evidence of a general nature upon these subjects entitled the case to go to the jury.

Reversed and remanded.

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ST. LOUIS, I. M. & S. RY. CO. v. WILSON.

(*Supreme Court of Arkansas, Jan. 25, 1902.*)

[66 S. W. Rep. 661.]

**Appeal—Review.**

An alleged failure to observe the preponderance of the evidence cannot be reviewed on appeal.

**Failure to Heat Waiting Room.\***

A failure of a railway company to properly heat its depot waiting rooms in midwinter for the comfort of prospective passengers is prima facie evidence of negligence.

**Same—Instructions.**

In an action by a prospective passenger against a railway company for its failure in midwinter to properly heat its waiting room at a station, an instruction making the company liable if it failed to keep a fire in its depot waiting room at a time when the weather required a fire there to make it comfortable, and a person waiting to become a passenger was in consequence injured, was not erroneous as eliminating the question of defendant's negligence, and making it an insurer, where it maintained that the waiting room was properly heated, and where it requested no instruction on the subject.

**Refusal to Unlock Station Room.**

A railway company is liable for its agent's knowingly permitting its waiting room at a station to be and remain locked, against the protest of a prospective passenger in the room, when, by the exercise of ordinary care, such agent could have prevented its being locked, or could have opened it.

**Same—Instructions.**

In an action by a prospective passenger against a railway company for its permitting its waiting room at a station to be locked, an instruction that if plaintiff went to the company's depot to take passage on its

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\*See note to *Muhlhouse v. Monongahela, etc., R. Co. (Pa.)*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.



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train, and it knowingly permitted such depot to be or remain locked after notice that it was locked, the verdict should be for plaintiff, was not prejudicial where defendant denied all knowledge of the depot being locked.

**Duty to Protect Prospective Passenger from Insults from Disorderly Persons in Waiting Room.**

A railway company is liable for injuries sustained by a prospective passenger at its depot waiting room through its failure to exercise ordinary care to protect him from annoyance and insults from disorderly persons congregating at such waiting rooms, where the agent in charge knew or might have known of the threatened injury, and could have prevented or lessened it.

**Same—Instructions.**

In an action by a prospective passenger against a railway company for injuries sustained at its depot waiting room by reason of annoyances and insults from persons at such depot, an instruction that it was the duty of a railroad company to protect prospective passengers at its stations from annoyance and abuse, and if the company's agent used toward, about, or in the hearing of the plaintiff any profane, obscene, or boisterous language, thereby injuring plaintiff's feelings, defendant was liable, though making the duty of the company in this respect absolute, was not prejudicial, since it was limited in its application to the conduct of the company's agent.

**Same—Same.**

Such instruction is erroneous in the absence of evidence of any improper language used by the agent toward plaintiff, or of what the language addressed to a third person was, and that the language was used with the intent of insulting plaintiff.

**Same—Same.**

In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for annoyances and insults, an instruction that plaintiff's damages should be such a sum of money as would compensate her for the pain and anguish of body and mind suffered on account of the injuries sustained, was prejudicial, as warranting damages for mental suffering for profane and boisterous language of the company's agent in the absence of sufficient proof of such language.

**Same—Punitive Damages—Instruction Not Warranted by Evidence.**

In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for annoyances and insults, an instruction allowing punitive damages in addition to the actual damages was prejudicial, as permitting the jury to award punitive damages for the profane and boisterous language of defendant's agent in the absence of sufficient proof of such language.

**Same—Same.**

Though a defendant may be liable to compensatory damages for the act of a servant, the jury are not warranted in finding punitive damages without finding that the wrong complained of was in the line of the servant's employment, and was willful, wanton, or malicious.

Appeal from circuit court, Saline county; Alexander M. Duffie, Judge.

Action by Dilsia Wilson, by her next friend, H. L. Wilson, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Dilsia Wilson, a colored girl under 18 years of age, by her next friend, charged in her complaint that on the 29th day of December, 1898, about 9 o'clock a. m., she went to the

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depot at Benton, Ark., for the purpose of taking the train to Traskwood; that the weather was cold and disagreeable; that she went into the colored waiting room, and was compelled to remain in the cold, without any fire, for about one hour, until the train arrived, in consequence whereof she was caused to have a chill, and was very sick during the remainder of that day, and during two weeks thereafter. The complaint further charged that shortly after she went into the waiting room defendant's servants wrongfully, willfully, and knowingly imprisoned her therein by locking or causing to be locked the only door to the colored waiting room, wrongfully depriving her of her liberty, and preventing her from peaceable egress from said room. It further charged that she was grievously insulted and offended and affrightened by profane and abusive language, and vile and insulting signs, directed to her by persons who were outside and in the adjoining white people's waiting room; that, notwithstanding oft-repeated demands and entreaties to defendant's servants for protection and for a fire, defendant's servants willfully refused and neglected to unlock said door, to build a fire in the room, or to protect her from said insulting remarks, to her damage in the sum of \$1,500. The answer denied explicitly and particularly each of the charges made in the complaint. The testimony on behalf of appellee tended to show that on the morning of December 29, 1898, she and two other negro girls and a negro man went to appellant's depot at Benton to take passage on one of its passenger trains. When they reached the depot they found the colored waiting room locked, but upon request the door was opened, and they went in. There was no fire in the waiting room, and it was cold. They requested the agent several times to make a fire, or have one made. The agent cursed, and told the one making the request to "go on, the train would be there in five or ten minutes." They remained in the waiting room about an hour and a half or two hours before the train came. A short while after they went into the waiting room one Walter McMann, a white boy, locked the door, and they remained locked in until the train came. They told the agent several times that they wanted a fire made and the door unlocked. They told the agent as soon as the door was locked. He gave no need to their request to have the door unlocked or to make a fire. The door was unlocked when the train came. While they remained in the waiting room, some "white fellows" came to the door, "licked out their tongues," "made faces at them," and were "swearing and cursing," calling them damn bitches, and using "other words." They did not know whether Rainey, the agent, heard this cursing and swearing or not. He was in his office, and they supposed he could have heard it had he been listening. Appellee was a little negro girl. She got "awful cold," as one witness expressed it, while she was in the waiting room; and after she left the train at Traskwood she got sick, and was sick

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about two weeks. She had not been sick before she went to the depot at Benton. The testimony for appellant tended to negative all the material facts which appellee's testimony tended to prove. The verdict was for \$300 compensatory and \$200 punitive damages.

Dodge & Johnson and J. E. Williams, for appellant.  
Murphy & Mehaffy, for appellee.

WOOD, J. (after stating the facts). We will consider the questions in the order presented by appellant's counsel.

1. It is contended that the cause should have been reversed because the jury failed to observe the rule of preponderance of the testimony. When the cause reaches this forum it is no longer a question of preponderance, but only of the legal sufficiency of the evidence to support the verdict. *Railroad Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Catlett v. Railway Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254.

2. Appellant objects to the following instruction: "If plaintiff went to defendant's depot on the day mentioned in the complaint, to take passage on defendant's train, and at that time the weather was such as to require a fire in the waiting room to make it comfortable, it was defendant's duty to build and keep a fire in said waiting room; and, if it failed to do so, and plaintiff suffered in consequence of defendant's failure to build and keep such fire, your verdict will be for the plaintiff." It was the duty of railroads, independent of the statute of March 31, 1899, to provide reasonable accommodations for passengers at their stations. *McDonald v. Railroad Co.*, 26 Iowa, 138, 95 Am. Dec. 114. This duty requires the exercise of ordinary care to see that station houses are provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for trains. *Caterham R. Co. v. London, B. & S. C. Ry. Co.*, 87 E. C. L. 410; 1 Fet. Carr. §§ 249, 250; *Railway Co. v. Cornelius* (Tex. Civ. App.) 30 S. W. 720; *Hutch. Carr.* §§ 516-521, inclusive; 2 Wood, Ry. Law, § 1338; *Elliott, R. R.* § 1590. By the exercise of such care as ordinary prudence would suggest for reasonable comfort, it could hardly occur that a waiting room, in mid-winter, would be devoid of the means necessary to make it comfortably warm at the times when such rooms are needed to accommodate those intending to become passengers. A failure to provide such means is, therefore, at least prima facie evidence of negligence. It is insisted that the instruction "eliminated all question of diligence and negligence," and made the company an "insurer against the consequences of not having a fire in the waiting room." But the company maintains that it was not negligent, because it built the fire in the waiting room as requested. It is not complaining of any latent defect or unforeseen exigency which ordinary care could not have anticipated and prevented. It could not

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have been prejudiced, therefore, by the instruction in the form given. Moreover, it did not request the court to declare the law to meet the objection it urges here to the instruction. Giving it as requested was not reversible error. *Railway Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

3. The Court also gave the following: "If plaintiff went to defendant's depot to take passage on defendant's train, and defendant's agent knowingly permitted it to be locked, or knowingly permitted it to remain locked after being notified that it was locked, so that plaintiff was restrained from going in and out, your verdict will be for the plaintiff." "A person," says Mr. Wood, "who is put in charge of a station by a railway company, has apparently all the power and authority requisite to do and effectuate the business of the company at that station. He has control over the depot, and authority to exclude persons therefrom who persist in violating the reasonable regulations prescribed for their conduct." 1 Wood, Ry. Law, § 165. The authority of railroads to make and carry into execution all reasonable regulations for the conduct of all persons resorting to its depots, so as to protect those who are or intend to become its passengers from unreasonable annoyances, insults, and injuries cannot be questioned. 1 Fet. Carr. § 247; *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; *Elliott, R. R.* § 303. This authority is the necessary correlate of the duty to provide reasonable accommodations, for a station house to which drunken, profane, obscene, abusive, riotous, and otherwise disorderly persons could resort with impunity would not be either comfortable or safe. The willful or negligent failure of railroads to make and enforce such reasonable regulations would render them liable in damages for any injuries directly resultant to those who repaired to their stations for the purpose of becoming passengers. If appellant's station agent, against the protest of appellee, knowingly permitted the only means of ingress and egress to the waiting room, where appellee was properly in waiting to become its passenger, to be locked, and to be so continued for any length of time, when same by the exercise of ordinary care could have been prevented or discontinued, he was guilty of a tort, and for the wrong thus inflicted upon appellee appellant was liable in damages. For in the unlawful imprisonment of the person of appellee and the deprivation of her personal liberty, even though for a moment, without her consent, there was an actionable wrong, an injury to her person, however slight. *Field, Dam.* § 679; *Cooley, Torts*, p. 195, § 169; 3 *Suth. Dam.* § 1257. Appellant does not contend that its agent exercised ordinary care to prevent the locking of the door, or to have it unlocked after being notified. Its defense on this point is confined to a denial of all knowledge of any such occurrence. The instruction, in the form given, was therefore not prejudicial.

4. Appellant insists that the court erred in giving the fol-

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lowing: "(3) You are instructed that it is the duty of a railroad company to protect all persons who are at its stations for the purpose of taking passage on its trains from annoyances, insults, and abuse, and if defendant's agent used toward or about the plaintiff, or in plaintiff's hearing, any profane, obscene, or boisterous language, which language insulted or injured plaintiff's feelings, your verdict should be for the plaintiff." "(6) If you find for the plaintiff in this case, her actual damages will be such sum of money as will be a just and fair compensation for all the pain and anguish, if any, both of body and mind, suffered by plaintiff on account of the injuries received. (7) If you find for the plaintiff, you may, in addition to actual damages, award punitive damages as a punishment of the defendant." What we have already said sufficiently indicates the duty of railroads to those intending to become passengers at their stations. While it is their duty to exercise ordinary care to protect them from unreasonable annoyances, and from insults and injuries from turbulent, riotous, or disorderly persons, yet to make them liable in damages it must be shown that there was an injury, that the agent in charge of the station "had knowledge or opportunity to know that the injury was threatened, and that by his prompt intervention he could have prevented or mitigated it." *Sira v. Railroad Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386, 58 Am. & Eng. R. Cas. 538. *Spohn v. Railway Co.*, 87 Mo. 74, and authorities cited; *Elliott, R. R.* The duty of railroads in this respect is therefore not absolute, as the first part of the third instruction assumes. This part of the instruction, however, could not be said to be prejudicial, for the latter part limits the application of the doctrine to "profane," "obscene," or boisterous language used only by appellant's agent. But the latter part of the instruction is abstract, erroneous, and prejudicial. We have searched the record in vain for evidence that appellant's agent used profane, obscene, or boisterous language toward or about appellee. The only evidence in the record of any improper language used by the agent at all was that he "began to swear a little at Dick," the boy who requested him to make a fire. Dick Canady, the boy who requested the agent to make a fire, said the agent "cussed," and told him to go on. There is no proof that he cursed appellee, or what he said to Dick Canady in her hearing was calculated to and did insult her feelings. There is no proof of what the language was. It is not shown to have been said for the purpose of insulting appellee. As the language was not addressed to appellee, in the absence of any evidence as to what the language was, the inference that it was said for the purpose of insulting appellee was not warranted. There is no proof of any connection between the cursing and the acts resulting in physical injury to appellee. Whether the use of profane, obscene, and abusive language by station agents, when uttered about or in the

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presence and hearing of those intending to become passengers while at stations, and for the purpose of insulting them, or injuring their feelings, would alone make the railroads liable for the mental suffering thereby produced, we need not decide; for that state of facts is not presented by the proof in this record. It is certain there could be no recovery for mental anguish unaccompanied by personal injury, where there was no willful, wanton, or malicious wrong done. Whether there could be recovery for mental suffering alone where there was willful, wanton, or malicious wrong done, we reserve for decision.

5. The complaint alleges three separate grounds for recovery, to wit, the failure to build a fire, the failure to prevent the locking of the door, and the failure to protect appellee from insulting remarks. The sixth instruction, on the measure of damages, allows the jury to find for all the pain and anguish of both body and mind without discrimination or designation of the specific grounds upon which the cause of action is based. This instruction, in view of what we have just said in reference to the third, is erroneous; for under it, in connection with the third, *supra*, the jury were warranted in finding for mental suffering on account of profane, obscene, and boisterous language of the station agent. The jury might have found such damages. Whether or not they did so, and, if so, what amount, on this account, entered into the verdict, it is impossible for us to tell. The instruction was erroneous and prejudicial.

6. It follows also that it was error to give the seventh, as to punitive damages, since the jury may have included punitive damages in their verdict for the use of profane, obscene, or boisterous language used by the station agent. Furthermore, under the proof it did not follow as matter of law that the jury might find punitive damages if they found for the appellee. The jury may have found that appellant was liable for compensatory damages on one of the alleged grounds of liability, but it did not follow that because they so found they should also find punitive damages on said ground, unless they should further find that the tort or wrong of the servant in the particular alleged was in the line of his employment, and was willful, wanton, or malicious. The instruction should have been framed so as to leave the jury to determine whether or not the elements essential to punitive damages existed, in connection with any or all of the alleged grounds of liability set forth in the complaint, to justify actual or compensatory damages. We find no other reversible error.

The other questions may not again arise. For the errors indicated, the judgment is reversed, and the cause is remanded for new trial.

DAVIS *v.* HOUSTON, E. & W. T. RY. CO.

(*Court of Civil Appeals of Texas, April 25, 1902.*)

[68 S. W. Rep. 733.]

**Injury to Prospective Passenger—Hole in Depot Grounds—Lights.\***

Evidence in an action against a railroad company by a prospective passenger for an injury occasioned by falling at night into a hole in the depot grounds considered, and *held* not to show negligence in defendant in failing to keep its grounds lighted and in a safe condition.

**Same—Same—Same.**

A corner of depot grounds, 130 feet from the passenger depot, occupied by a fuel company as a wood yard, near which a prospective passenger alighting from a hack has no occasion to pass, is not a place where such passengers may be expected to resort, so as to charge the company with the duty of keeping it lighted and in a safe condition.

**Same—Same—Invitation from Agent to Cross Grounds.**

A prospective passenger, injured by falling into a hole in a corner of depot grounds not for use by passengers, claimed that he was directed by the company's employee to go from the passenger depot to the freight depot to get a ticket. He believed, but would not swear positively, that defendant's night clerk was the one giving such direction, in attempting to obey which he came to his hurt. The night clerk and train dispatcher, who alone were about the premises at the time, positively denied giving any such direction, and both knew that tickets were not sold at the freight depot. The person accompanying plaintiff testified that afterwards, on purchasing a ticket from the night clerk, plaintiff said, "You came near getting me killed," to which no reply was made, but did not identify the clerk as the person giving the direction: *held*, that the evidence was insufficient to show such an express invitation by an authorized agent of the company as to require a reversal of judgment in its favor.

Appeal from district court, Montgomery county; L. B. Hightower, Judge.

Action by J. H. Davis against the Houston, East & West Texas Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Brockman & Kahn and J. V. Meek, for appellant.

Baker, Botts, Baker & Lovett and J. S. McEachin, for appellee.

PLEASANTS, J. This suit was brought by appellant against the appellee for the recovery of damages for personal injuries alleged to have been caused by the negligence of appellee. The negligence charged in the petition was the failure of appellee to have its passenger depot, platform, approaches, and contiguous grounds in the city of Houston properly lighted, and in having and maintaining upon its depot grounds a dangerous hole or excavation, into which appellant fell, and was thereby injured, as complained of in the petition. The petition alleged that appellant applied at appellee's passenger depot in the city of Houston for a ticket for the purpose of becoming a passenger upon a passenger train of appellee leaving Houston about 7 o'clock a. m. on

\*See note to *Muhlhouse v. Monongahela*, etc., R. Co. (Pa.), 2 R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

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February 19, 1901, and was directed by appellant's agent to whom he applied to go to another of appellee's depots about 100 feet distant from said passenger depot; that said agent did not warn appellant of the existence of said hole, and that in going across appellee's grounds from one depot to the other he fell into the hole, and was injured as alleged. The answer of appellee contained general and special exceptions, general denial, plea of contributory negligence, and a special plea, in which it is averred that, if any person directed plaintiff to go across its grounds as alleged, such person was not the agent of appellee. Appellant, by supplemental petition, excepted to the plea of contributory negligence contained in appellee's answer, and denied all the allegations of said answer. The court below overruled all exceptions to the pleadings, and a trial of the cause by a jury resulted in a verdict and judgment for the defendant, from which judgment the plaintiff below prosecutes this appeal.

The evidence adduced on the trial is, succinctly stated, as follows: Appellant was a deputy sheriff of Montgomery county, and, having process for parties who resided at Humble, in Harris county, left Conroe about 3 o'clock a. m. on the morning of February 19, 1901, to go to Humble for the purpose of serving said process. He was accompanied by J. H. Duke. They came to Houston over the International & Great Northern Railway, and arrived at the Houston depot of that road at 4:30 a. m. They walked from the International & Great Northern depot to Main street, where they procured a carriage, and were driven to the passenger depot of the appellee. When they reached appellee's passenger depot, the ticket office was not open, and there was no light except in the train dispatcher's office upstairs over the ticket office. They went upstairs, and found a man in the dispatcher's office, of whom they inquired for the ticket agent. He told them that was not the place to buy a ticket, and directed them to go to the freight depot, on the opposite side of appellee's yard. It was dark, and there were no lights in the depot yard. In crossing from the passenger to the freight depot they came in contact with a train of cars on a side track which ran between the two depots, and in order to get around the cars they turned to the right, and followed the track on which the cars stood. When they reached the end of the train, the appellant, who was walking ahead, fell into a large excavation or gully which ran across the southwest corner of the depot yard. Duke assisted him out of the hole, and they went on to the freight depot, and, finding no one there, returned to the passenger depot, where they procured a ticket, and pursued their journey to Humble. The hole into which appellant fell is 150 feet south from the nearest steps of the passenger depot, and about the same distance southwest from the freight depot. The freight and passenger depots are about 120 feet distant from each other.



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The corner of the yards through which the excavation extended is occupied by the Calhoun Fuel Company as a wood yard; the office of the said company being situate on the northeast side of the excavation, and between it and the passenger depot. There are wood tracks there, and a vacant place for unloading wood. Appellees depot yard is bounded on the south by Wood street and on the west by Walnut street. There is a high fence along the north line of the yard. The passenger depot is in the northwest corner of the yard. Between the depot and the fence there is a brick pavement, and at the west end of the depot adjoining Walnut street there is a cab stand, where passengers are received and deposited by vehicles which carry them to and from the city to the depot. In going from the city to the depot in a carriage or other conveyance, the route is along San Jacinto street to Wood street, along Wood to Walnut, and along Walnut to the cab stand at the west of the passenger depot. This was the route by which appellant was carried to the depot, and he was deposited on the brick pavement before mentioned, which runs along the north side of the depot. Persons going to the depot from the city on foot usually go through the yard of the Houston & Texas Central Railroad Company, and pass by the southwest corner of appellee's yard. Any one following this route would pass within 18 inches or 2 feet of the hole into which appellant fell. This hole is oblong in shape, being about 70 feet in one direction and about 40 in the other, and some 12 or 15 feet in depth. It is an old gully, and is crossed by several railroads, and has only been partially filled up. Appellee's passenger trains receive and discharge passengers at the southeast corner of the passenger depot. There is a brick platform adjoining the track on which the train comes into the depot, and passengers going from the train pass the east end of the depot onto the pavement before mentioned, and down this pavement to Walnut street. The platform approaches and grounds around the passenger depot were in good condition. Appellee's station agent was not at the depot before 8 o'clock on the morning of the accident. The night clerk in the freight depot sold the tickets to the passengers on the train on which appellant took passage. He testified that he sold appellant a ticket to Humble between 6 and 6:30 a. m. The schedule time for the train to leave Houston on the morning in question was 6:50 a. m. He went to the ticket office between 6 and 6:30, and appellant came to the window, and purchased the ticket. He had not seen appellant prior to this time. When he purchased the ticket, appellant was cursing, and complaining of having fallen into the hole. When this witness went to the depot, it was lighted, and there was a fire in the waiting room. Appellant's train dispatcher testified that he directed no one to the freight depot to purchase a ticket on the morning in question; that he was in his office during all the night of February 18th, and

does not remember any one coming into his office and asking for a ticket; that he knows that he directed no one to go to the freight depot to purchase a ticket because he knew the ticket office was in the passenger depot, the same building in which his office was situate; and that he saw no one on that morning who claimed to have fallen into a hole. The appellant testified that the person who sold him the ticket (the night clerk) looked like the same person who directed him to the freight depot; that he would not swear that he was the same person, but to the best of his knowledge he was. The witness Duke testified that when appellant purchased his ticket he said to the person who sold it to him, "You came very near getting me killed," and the person addressed made no reply. The testimony as to whether or not appellant reached appellee's depot and fell into the hole more than an hour before appellee's train was due to leave the depot is conflicting. He reached Houston at 4:30 and walked from the International & Great Northern Depot to Main street, a distance of about a mile. Duke testifies it took from 25 to 30 minutes to walk this distance; that they remained on Main street 5 minutes before they got a hack; that it took them 5 or 10 minutes to drive from Main street to appellee's depot; and that appellant fell into the hole about 50 minutes after leaving the International & Great Northern Depot, and about 30 minutes before appellee's train left. Appellant testified that it took between a half and three-quarters of an hour to go from the International & Great Northern Depot to Main street; that he supposed it was about 1 hour and 40 minutes after leaving the International & Great Northern Depot that he fell into the hole. The hack driver who carried them to the depot says that it took about 10 minutes to drive from Main street to appellee's depot, and that he arrived there about 30 minutes before the time for the train to leave, but he also testified that he thought the train left at 6 o'clock. All the witnesses testify that the train left Houston at 6:50, and that this was the schedule time for it to depart. There is testimony to the effect that appellant was very drunk the night before he reached Houston, was drunk at the time he received his injuries, and has been drunk very often since.

We deem it unnecessary to discuss the questions raised by appellant's various assignments of error at length, because, in our opinion, he has wholly failed to show any negligence on the part of appellee which would entitle him to recover for the injuries received by him. The assignments predicate error upon the refusal of the trial court to sustain appellant's exception to appellee's plea of contributory negligence, upon the admission in evidence over appellant's objection of the testimony that appellant was intoxicated at the time of the accident, upon the refusal of the court to permit appellant to show by the hack driver that he carried appellant to appellee's depot at the time that passengers usually went to said

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depot, and upon certain paragraphs of the court's charge. Conceding that all the assignments show error, under our view of the legal effect of the undisputed facts in the case no other verdict than one in favor of appellee could have been properly rendered, and the errors complained of were therefore harmless. In order to show actionable negligence on the part of appellee, the evidence must show that by some act or omission on its part it has violated a duty which it owed to the appellant. This, we think, the evidence fails to show. The duty charged in the petition to have been violated by the appellee was the duty to keep its grounds properly lighted and in a safe condition. While it was the duty of appellee to keep its depot, approaches, and grounds connected therewith which were likely to be visited by passengers or persons lawfully upon its premises properly lighted for one hour before the departure of its trains, no such duty devolved upon it as to that portion of its grounds not intended for the use of passengers, and to which they would not reasonably be expected to resort. We think it conclusively appears from the uncontradicted evidence that the place at which appellant was injured was not intended for the use of passengers, and was not a place to which passengers would naturally or ordinarily resort, and consequently no duty devolved upon appellee to keep such place lighted. *Railroad Co. v. Barnett* (Tex. Civ. App.) 47 S. W. 1039; *Railroad Co. v. Grubbs*, 67 S. W. 519, 4 Tex. Ct. Rep. 581; *Rozwadosfskie v. Railway Co.* (Tex. Civ. App.) 20 S. W. 872. The duty of appellee to keep its grounds in a reasonably safe condition was a duty which it owed only to its employees and to persons who might be upon its premises by its express or implied invitation. *Dobbins v. Railroad Co.* (Tex. Supp.) 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, 8 Am. & Eng. R. Cas., N. S., 179; *Shear. & R. Neg.* § 410; *Railroad Co. v. Grubbs*, 67 S. W. 519, 4 Tex. Ct. Rep. 581. Appellant could not have been misled by appearances into believing that the place at which he was injured was intended for the use of passengers, and there is nothing in the circumstances established by the evidence from which any implied invitation to appellant to go upon said premises can be found, and we think the evidence equally insufficient to show an express invitation. Conceding, for the sake of argument, that if appellant was directed by an employee of appellee to go from the passenger depot to the freight depot to purchase his ticket, and that in following such direction he, without any negligence on his part, fell into the hole, and was injured, as alleged, he would be entitled to recover because of the failure of such employee or agent of the appellee to warn him of the existence of the hole, no such case is made by the evidence. Neither the appellant nor his witness Duke identifies the person who they say directed them to the freight depot. Appellant says that he will not swear that the night clerk who sold him the ticket

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was the person who directed him to go to the freight depot, though to the best of his knowledge he was. The night clerk and the train dispatcher, the only two employees of appellee who were shown to be at or about the depot at the time appellant reached there, both swear positively that they did not direct the appellant to go to the freight depot, and their statements are strongly corroborated by the fact that they both knew where the ticket office was, and that tickets were not sold at the freight office. As against this testimony the mere opinion of the appellant that the night clerk was the person who directed him to go to the freight depot would not sustain a finding by the jury that such was the fact. Appellant's contention that he was directed to go across appellee's grounds by one of its agents or employees, being unsupported by any evidence legally sufficient to sustain his right of action if any he had, based upon such contention, must fall.

The case as presented by the pleadings and evidence is in no way affected by the fact that the hole into which appellant fell was near a public highway, or a path usually used by a person in going to or from appellee's depot. Appellant was not injured while traveling said highway or path, and the negligence of appellee, if such negligence is shown by the evidence, in maintaining the hole in proximity to said path or highway, was not the proximate cause of appellant's injury. *Simonton v. Power Co.*, 67 S. W. 530, 4 Tex. Ct. Rep. 584; *Gay v. Railroad Co.*, 141 Mass. 407, 6 N. E. 236. Appellant had reached the passenger depot in safety, and he would not have been injured had he remained at the depot or in that portion of appellee's yard intended for the use of passengers, and to which passengers would ordinarily resort. He chose not to do this, but went off in a distant part of the yard, not intended for the use of passengers, and where appellee could not reasonably expect its passengers to go; and while so using appellee's premises without its consent or invitation, either express or implied, fell into the hole, and received the injuries complained of.

Our conclusion being that the evidence fails to show the violation of any duty which appellee owed to the appellant, he has shown no cause of action, and the questions as to whether or not he was intoxicated at the time he was injured, and as to whether appellee's depot was properly lighted for the length of time required by law before the departure of its train, become immaterial. As before stated, any error in the charge of the court is also immaterial, because under the undisputed evidence in the case no other verdict than one in favor of appellee could have been properly rendered.

The judgment of the court below is affirmed. Affirmed.

On Motion for Rehearing.

Appellant, in his motion for a rehearing, complains that the finding of this court in our opinion filed in this case on

Gaukler v. Detroit, G. H. &amp; M. Ry. Co

April 25th, "that the hole into which appellant fell was 150 feet from the nearest steps of the passenger depot," is not supported by any evidence in the record. The only witness who testifies as to the distance from the hole to the depot says, "from the center of the hole to the nearest steps of the passenger depot is 150 feet." This witness also says that on a direct line from the passenger to the freight depot the nearest you could come to said hole would be 95 feet, but he nowhere says, as contended by appellant, that the hole was within 95 feet of the passenger depot. The map prepared by this witness shows that the distance to the edge of the hole from the nearest portion of the passenger depot is 130 feet. As the proximity of the edge, and not the center, of the hole is the material issue in so far as the question of distance is material to appellant's case, we will correct our finding so as to conform to the map, which, as before stated, shows this distance to be 130 feet. We adhere to the views expressed in our former opinion as to the law of this case, and, with the modification in our finding of fact above indicated, the motion for rehearing is overruled.

Overruled.

GAUKLER v. DETROIT, G. H. &amp; M. RY. CO.

*(Supreme Court of Michigan, June 3, 1902.)*

[90 N. W. Rep. 660.]

**Injury to Passenger—Place of Ejection—Evidence.**

The conductor and trainmen testified that plaintiff was put off the train at a certain junction, and one of plaintiff's witnesses testified that he did not know where plaintiff was put off, but that it was at the first stop, which was usually at the junction; and another that he thought plaintiff was put off at the first stop; that the train stopped at the junction, but that he saw no lights, which was his only reason for thinking that plaintiff was not ejected at the junction. Two other witnesses testified that plaintiff was put off at a street corner some blocks from the junction, and that he came to the place where they were standing near by, and spoke to them: *held* sufficient to make the place where plaintiff was put off a disputed question for the jury.

**Appeal—Review.**

On appeal from a refusal to direct a verdict for defendant in a personal injury action it will be assumed that plaintiff's contention as to disputed questions of fact was accepted by the jury, which found in his favor.

**Ejection of Passenger—Subsequent Injury—Substitution of Places.**

Where a person was ejected from a railway train at a street corner near the track, but afterwards left the vicinity of the track, and went to a place 25 or 30 feet distant in a well-frequented public street, and was subsequently injured by a train, the question of the fitness of the place where he was originally put off was eliminated in a suit for his injuries on the ground that he had been put off at an improper place, and the case should be viewed as if he had been originally ejected at the point in the street which he afterwards safely reached.

**Same—Negligence—Intoxication.\***

Plaintiff, while somewhat intoxicated, but able to walk and talk, was

\*See *Bohannon's Adm'x v. Southern Ry. Co. (Ky.)*, 23 Am. & Eng. R. Cas., N. S., 548, and foot-note.

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ejected from defendant's train, and left standing 25 or 30 feet from the track, in a frequented public street, talking to a constable and deputy sheriff, and afterwards went on the track and was injured: *held*, as a matter of law, that it was not negligent to leave plaintiff, in such state of intoxication, at the place described.

Error to circuit court, Oakland county; George W. Smith, Judge.

Action by Philip Gaukler, by guardian, against the Detroit, Grand Haven & Milwaukee Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (Gere & Williams, of counsel), for appellant.

Lillis & Beardslee, for appellee.

HOOKER, C. J. The plaintiff entered defendant's train at Detroit. The first stop regularly made upon this road is at a junction with the Lake Shore road some distance from the starting point, but within the city. Some blocks further on, the road crosses Farnsworth avenue, within the city limits. Demand was made upon plaintiff for his fare, which he refused to pay, and when the train made its first stop (according to the testimony of the witnesses upon the train) he was told by the conductor that he must get off. He had not yet sat down in the car according to some of the testimony, and he walked to the door, down the steps, and alighted without assistance. He was left upon the ground, the conductor staying with him until the train passed, when he mounted the rear platform. The conductor and trainmen say that this occurred at the Lake Shore junction, and the only testimony said to show the contrary from witnesses on the train is that of two of plaintiff's witnesses,—De Conick, who said he did not know where it was, but that it was at the first stop; and Addock, who testified that he thought he was put off at the first stop; that he knew that the train stopped at Lake Shore junction, but that he did not see any lights there, which was the only reason for thinking that plaintiff was not put off there. Two other witnesses testified to seeing a passenger train stop about 50 feet north of Farnsworth street, where a man was put off. The witnesses stood on Farnsworth street, and one or both of them stated that the rear end of the train passed them about the time the man got to them as they stood near the flagman's house on Farnsworth avenue. He came up to them as they stood by the shanty, 25 or more feet east of the track, and one said that he asked the way downtown, and both stated that he was told to come with them, and they would put him on a car going downtown. This he did not seem inclined to do, and he was left standing by the shanty. They agree that it was about 9 p. m. One of them said that he read the next morning of an accident at Farnsworth street corner to a man named Gaukler; the other heard of it two or three days after seeing the man. One was a constable and the other a deputy sheriff. Both said the man was drunk, and agreed that they

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did not see anything to indicate that he could not take care of himself. We think this testimony was sufficient to make the place where plaintiff was put off a disputed question, and therefore we must assume that the plaintiff's claim that he was put off at Farnsworth avenue was accepted by the jury. The next person who saw this man was the engineer of another train. He was walking between two tracks on the railroad right of way, and was struck by the engine as it passed by him, and injured. This was 100 or 200 feet from where he alighted from the train, and south of Farnsworth street. The negligence complained of is—'First, leaving him in a place of danger; second, abandoning him to look out for himself at a time when he was incapable of doing so by reason of his intoxication. The testimony of these two officers is all that shows that the man was put off north of Farnsworth avenue, instead of at the Lake Shore junction, and they agree that he left the track, and went with them to the flagman's shanty, 25 or 30 feet east of the tracks. We may treat the case, then, as though he had been left at that point, and taken 25 or 30 feet from the highway, in a public and well-frequented street in the city, and left in the presence of two citizens, and the question of the fitness of the place where the train stopped is eliminated. In this respect the case is like that of *Hamilton v. Railroad Co.*, 183 Pa. 638, 38 Atl. 1085, 10 Am. & Eng. R. Cas., N. S., 70, where one walked back to a station after being carried by, and was there injured. The court said it was as though he had gotten off at the station. Plaintiff's counsel insist that it must be left to the jury to say how drunk the man was, and whether, under the circumstances, it was negligence to put him off. We should add to that, "And leave him twenty-five feet east from the tracks on a public highway, in the presence of two officers, who were conservators of the peace." The evidence in this case is practically undisputed. Every witness who testified said that the man could walk and could talk. He knew that fare was required of him, and he insisted that the conductor should carry him for the same fare that the electric line charged, and when he was informed that he could not do so he refused to pay more, and at once acquiesced in the conductor's demand that he leave the train. He alighted unaided. He then left the track to go to Detroit, found some citizens, and inquired the way, but declined to go with them. All knew that he had been drinking,—perhaps considered him drunk,—but the testimony of no one indicates that he was unable to care for himself. All, from the saloon keeper, who testified that he was in the habit of keeping track of his patrons' trains, that they might not miss them, so that they might freely drink all that they were disposed to buy, and who obligingly assisted them to their respective trains, to the last man to talk to him, agree that he was able to care for himself, though drunk. There is nothing on this record to

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make it incumbent on this conductor to do more than to see that this man, in his apparent condition, left the railway premises, and was talking with citizens 25 feet away from a point of danger. If there was any negligence at any stage of the proceeding,—which we do not intend to intimate,—it ceased as a factor in this case when the plaintiff left the premises and reached a place of safety. It is unnecessary to cite and discuss the numerous cases which counsel have cited in their briefs. Each rests upon its own facts, as this one must do; and the rule that, wherever a claim of negligence is made, the case must be given to a jury, though the undisputed facts conclusively show an absence of negligence, does not obtain in this state, as numerous decisions show. A verdict for defendant should have been directed.

The judgment is reversed, and a new trial ordered.

LONG, J., did not sit. The other justices concurred.

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PRESCOTT & N. W. RY. CO. v. SMITH.

(*Supreme Court of Arkansas, Dec. 21, 1901.*)

[67 S. W. Rep. 865.]

**Application of Statute Prescribing Method of Making Up Passenger Train.**

Sand. & H. Dig. § 6195, providing that in forming a "passenger train" no freight or lumber cars shall be placed in the rear of passenger cars, and, if so placed, and a personal injury happens, the employees or agents directing or permitting such arrangement shall be guilty of intentional wrong causing the injury, is applicable to a train composed of several freight cars and a caboose, and carrying passengers for hire, made up by having the caboose in front, and operated by having the engine in the rear push the train backward, rendering the company, in an action for the death of a passenger on such train caused by the caboose leaving the track, guilty of negligence as a matter of law.

**Passenger Riding on Platform of Caboose to Avoid Danger.\***

In an action for the death of a passenger, caused by the caboose leaving the track, it appeared that he rode on the platform of the caboose in front of several cars of freight and lumber pushed backward by the engine in the rear, and the evidence tended to show that he did not ride there as a matter of choice, but because he thought that it was dangerous to remain in the caboose because of the manner of operating the train: *held*, that the question of the passenger's contributory negligence was for the jury.

**Evidence of Change in Method of Operating Train.**

The admission of testimony that after the accident the company changed the method of operating the train, as tending to show previous neglect, though erroneous, was harmless; other evidence conclusively showing defendant's negligence.

**Same—Argument of Counsel.**

The court improperly overruled defendant's exceptions to the argument of plaintiff's counsel that the evidence that after the accident the

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\*See 5 Am. & Eng. Enc. Law (2d Ed.) 649 et seq.; *Brockett v. Fair Haven & W. R. Co.* (Conn.), 20 Am. & Eng. R. Cas., N. S., 406, and foot-note.



## Prescott &amp; N. W. Ry. Co. v. Smith

company changed its method of operating its train was "alone sufficient proof justifying a verdict for plaintiff," and that the change was "a confession of liability."

Appeal from circuit court, Nevada county; Joel D. Conway, Judge.

Action by Mary Smith against the Prescott & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

C. C. Hamby, for appellant.

J. O. A. Bush, for appellee.

RIDDICK, J. This is an appeal from a judgment for \$1,200, recovered by Mrs. Mary Smith against the Prescott & Northwestern Railway Company as damages for causing the death of her son Ed Mechlin. The defendant company was the owner and operator of a short-line railroad used mainly to carry logs, but passengers were also carried. On the day of the accident a train composed of nine freight and log cars and a caboose for passengers was backed along the railway of the defendant company, having the caboose in front, and the engine in the rear pushing the train backward. Ed Mechlin, the son of the plaintiff, was a passenger on the train, and, while the train was being thus operated, the caboose left the track, and Mechlin, who was riding on the platform of the caboose, or was there in the attempt to escape from the caboose, was thrown to the ground and killed.

Our statute provides that "in forming a passenger train no baggage, freight, merchandise or lumber cars shall be placed in the rear of passenger cars, and if they, or any of them, shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement, and the conductor or engineer of the train, shall each and all be held guilty of intentional wrong causing the injury, and be punished accordingly." Sand. & H. Dig. § 6195. It is obvious that this statute was not intended to apply only to regular passenger trains, for such trains do not carry freight or lumber cars. It was plainly intended to apply as well to mixed trains carrying both freight and passengers, and it requires that such trains shall be so formed that "baggage, freight, merchandise or lumber cars" shall be placed in front of the passenger cars. The purpose of the statute was to protect passengers from the danger of being carried in cars placed in front of freight, lumber, or of other cars of that kind. If the defendant company was engaged in carrying passengers on this train for hire, then we think the statute applies, whether the passengers were carried in a caboose or in a regular passenger coach, and notwithstanding that the main business of the train was to carry logs. Now, it was alleged in the complaint that "Mechlin was a passenger on defendant's train going from Prescott to a point in Hempstead county," and this was not denied in the answer.

The testimony of defendant itself showed that while the train was a log train, yet that it also carried passengers, and for that purpose had a caboose attached, with seats inside for passengers, who under the rules were required to ride in the caboose. We must therefore take it as established, so far as this appeal is concerned, that the defendant company was engaged in carrying passengers for hire on this train, and that Mechlin was a passenger thereon at the time of the accident that caused his death. These facts being established, the statute applies, and it follows, as a matter of law, that the defendant was guilty of negligence in operating its train in a manner forbidden by the statute; and we think the facts in evidence were sufficient to support the finding of the jury that it was this negligence which caused the injury to Mechlin.

The defendant contends that Mechlin rode on the platform of the caboose, and was thus guilty of contributory negligence, which precludes a recovery. But the evidence tends to show that Mechlin did not ride on the platform as a matter of free preference. If he was there, the evidence tended to show that it was because the manner in which the train was being operated made it appear to him dangerous to stay in the caboose. It has often been decided that a passenger "placed in imminent peril by the negligence of the company may in a proper case recover for injuries received in attempting to avoid the danger if he exercised ordinary and reasonable care under the circumstances as they reasonably appeared to him at the time, although in acting upon the spur of the moment he did not do what was best, and would not have been injured if he had done nothing but remain quiet." 4 Elliott, R. R. § 1642, and cases cited. Now, at the time Mechlin was on the platform the train was being run backward at considerable speed on a down grade, and was approaching a sharp curve in the track. Mechlin, a boy 18 years of age, was the only occupant of the caboose. The evidence tends to show that he was apprehensive that the train might be derailed, and the caboose crushed by the heavy cars behind, and he feared that if he remained in the caboose, and an accident happened, he would be unable to escape in time to avoid injury. Under these circumstances we think it was a question for the jury to determine whether or not he was guilty of contributory negligence. When all the instructions on that point are taken together, we think the question was fairly submitted to them, and their verdict should stand, unless another ruling of the court, which we will next proceed to notice, calls for a reversal.

The court allowed the plaintiff to show to the jury that after the accident and death of Mechlin the company required its employees to change the manner of operating its train; that it required them to put the engine in front, and, when necessary to do so, to run the engine backward in front of the train, instead of backing the whole train with the caboose in front. We are of the opinion that this evidence should not have been admitted. As was said by the supreme court of

Minnesota, there is "no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is,—the more regard he has for the lives of others,—the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement to continued negligence." *Morse v. Railway Co.*, 30 Minn. 468, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168. These reasons have led a majority of the courts to reject such evidence as incompetent, as is shown by the large number of cases to that effect cited by counsel for appellant. The fact that the defendant exercised less or greater care after the accident than it did at that time does not show that it was either guilty or not guilty of negligence at the time of the accident. Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that it had been guilty of negligence in not sooner adopting such safeguards. *Menard v. Railroad Co.*, 180 Mass. 386, 23 N. E. 214. One who exercises the highest care in the operation of dangerous machinery may find, from experience or otherwise, that additional precautions are required. The law then demands that these precautions be taken, but it is not so unreasonable as to permit the performance of this duty which it imposes to be used as evidence of previous wrong. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Railway Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303.

But although we think the court erred in admitting this evidence, we are of the opinion that the evidence itself would have done no harm to the defendant, for it only went to show negligence on its part, which, as we have before stated, was already conclusively shown by other evidence. If there was nothing more than the evidence, we would have little trouble in disposing of the contention of appellant on this point. But the evidence was made the basis of an argument by one of the attorneys for plaintiff, which presents a more serious question. He contended in his argument before the jury that this change in the method of operating the train was not only evidence of negligence, but that it was in effect an admission of liability for the injury on the part of the company. "That alone," he said, speaking of the charge, "is sufficient proof to justify a verdict for plaintiff. If it was not negligence to back the train with the engine in the rear, why did they change after killing the boy? By making the change they confessed their liability." To this language and argument defendant excepted at the time, the court overruled the

objections, and defendant excepted. This was an improper argument. It does not follow, because the defendant was negligent, that it was liable for the injury. It may have been negligent, and yet that negligence may not be the cause of the injury; and it was necessary to show, not only negligence on the part of the defendant, but to go further, and show that the injury of Mechlin was the result of the negligence. Even if that was shown, the company may still not be responsible for the injury, for Mechlin himself may have been guilty of contributory negligence. Admitting that the company was negligent, it was still for the jury to determine whether this negligence caused the injury, and, if so, whether the defendant was guilty of contributory negligence. The jury should have determined these questions on proper evidence, and the assertion of counsel that the change in the manner of operating its train was a "confession of liability" on the part of the company, and that this change alone "was sufficient proof to justify a verdict for plaintiff," was well calculated to mislead the jury, and was prejudicial to defendant. Counsel, we know, are entitled to freely discuss and comment upon the legitimate evidence, and we have no desire to curtail such right or to encourage frivolous exceptions to the rulings of trial judges upon objections made to arguments of counsel. Such rulings must, of necessity, be made offhand, and are no ground for reversal unless clearly prejudicial. But the argument in question here was based on incompetent evidence, and went much further than such evidence would have warranted even had it been competent. We are compelled, therefore, to hold that the presiding judge erred in overruling the objection. It should have been sustained, and the jury cautioned to disregard the evidence. This was not done, and we have no means of knowing what influence this argument had on the verdict of the jury. The mere fact that it was made before the closing argument on the part of the defendant does not justify us in saying that the jury were persuaded to disregard it, and did so. The verdict shows that the jury adopted the views contended for, not by defendant's attorney, but by counsel for plaintiff. We cannot say that they disregarded a portion of this argument, and based their verdict on the legitimate evidence only. If they adopted the view urged by plaintiff's counsel,—that the change in the manner of operating the train was a confession of liability, and of itself justified a finding for plaintiff,—and based their verdict on that fact only, then they did not pass on real questions at issue in the case. As we do not know whether they did so or not, and as this uncertainty was brought about by an improper argument of plaintiff's attorney, she must bear the consequences.

Our conclusion is that, for the error in refusing to sustain the objection of defendant's attorney to this argument, the judgment must be reversed, and remanded for a new trial. It is so ordered.

## FRAZIER v. NEW YORK, N. H. &amp; H. R. Co.

*(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 26, 1902.)*

[62 N. E. Rep. 731.]

**Carriers—Injury to Passenger in Station of Terminal Company.**

Acts 1896, c. 516, § 1 declares that the Boston Terminal Company is created to maintain a station, and to provide and operate adequate terminal facilities for several railroad companies and for the accommodation of the public in connection therewith. Section 2 authorizes each of five railroads to subscribe to one-fifth of the terminal company's stock. Section 3 places the immediate government and direction of the affairs of the company in five trustees, one of whom may be appointed by each of the five railroads. Section 8 provides that on completion of the station the company shall make rules and regulations for its use, which may be modified by the railroad commissioners on application of either of the railroads or the mayor of the city. Section 9 provides that on completion of said station all said railroads shall use the same, and that the company may contract with either of the railroads for the use of such separate portion as may be necessary for their respective use. Section 10 provides that the expenses of the company shall be paid by the railroads in proportion to their use of the station: *held*, that a railroad which uses the station only as required by the statute, and has not contracted for the use of any separate portion thereof, discharges its duty to a passenger whom it has contracted to carry to Boston when the passenger alights in safety on the platform of the station, and is not liable for injury received by him while going through the station.

Report from supreme judicial court, Suffolk county; Edgar Y. Sherman, Judge.

Action by Mary A. Frazier against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and the case is reported for the determination of the supreme judicial court. Judgment for defendant.

Geo. Fred Williams, for plaintiff.

Samuel Hoar, for defendant.

LORING, J. In this case the plaintiff sues for an injury caused by the falling over an unguarded wooden platform, about six inches in height, in that part of the South Terminal Station in the city of Boston lying between the waiting rooms, on the one side, and the fence which shuts in the tracks, on the other side. The unguarded platform which caused the accident was stated at the argument to be the floor of a booth for the sale of articles, which was then being built. It is stated in the report "that the station in which the plaintiff was injured was owned and operated and controlled exclusively by the Boston Terminal Company, a corporation organized under chapter 516 of the Acts of 1896, and that there were no instruments or agreements under which defendant entered and used said station, and under which said station was used, operated, and maintained, other than said statute. There was no evidence that the defendant owned, leased, occupied, used, maintained, or controlled the premises where the plaintiff was injured, except as stated." The only other statement in the report which is material is that the South

Terminal Station is the "regular terminus in said Boston at which passengers were received and discharged by the defendant in the regular course of its business as a common carrier of passengers." The ground on which it is sought to cast upon this defendant a liability for the negligence of another corporation on the premises of that other corporation, and within the control of that other corporation, is that such was the intention of the act, taken in connection with the rule that one railroad using the tracks of another railroad, by arrangement, in place of building its own tracks, is liable, although it has no control over the tracks of the other road. As the contention of the plaintiff depends to some extent on this rule of law, it will be convenient to come to a definite understanding of the rule before considering the construction of the act. It was laid down in *Littlejohn v. Railroad Co.*, 148 Mass. 478, 481, 20 N. E. 103, 2 L. R. A. 502, that a passenger has his remedy against the carrier, which has undertaken to transport him over the line operated by it, for an accident which occurs while he is being transported by that carrier over the tracks of another railroad, even if the owner of the tracks alone was in fault. Although no decided case has presented that proposition, we have no doubt that what is laid down in *Littlejohn v. Railroad Co.* is the law of this state. This rule rests upon the ground that it is immaterial what arrangements are made by a carrier for transportation within the two terminal points between which it is operating a railroad; that it is liable to a passenger between those two points, whether it conducts its business by its own servants, or by contract with others, over whom it has reserved to itself no control. The same conclusion was reached in England, on the ground that a carrier who sells a ticket to a point on the road of a connecting carrier is liable, in the absence of a stipulation to the contrary, as matter of contract, for the whole transportation,—even for the part not performed by it. That the rule in question in England rests on that ground, see *Railway Co. v. Blake*, 7 Hurl. & N. 987, 991, 993, 995, and *Thomas v. Railway Co.*, L. R. 6 Q. B. 266, 273, 275. But the rule as to connecting carriers is otherwise in this commonwealth (*Nutting v. Railroad Co.*, 1 Gray, 502; *Darling v. Railroad Corp.*, 11 Allen, 295; *Moore v. Railroad Co.*, 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298); and here the rule in question must rest on the ground already stated. We have no doubt that this rule applies in case of the use of a station as well as in case of the use of the tracks of another railroad. See, in this connection, *McClure v. Railroad*, 13 Gray, 124, 74 Am. Dec. 624. This brings us to a construction of the provisions of the act, and of the defendant's relation to the terminal company under it.

The only relation which the defendant had to the terminal company or to the station was that it acted in obedience to section 9, which provided that "upon the comple-

*Frazier v. New York, N. H. & H. R. Co*

tion of said station" all said railroad companies "shall use the same." In determining what relation the defendant came under by using the station, it is to be noted in the first place that section 9 provided that the terminal company "may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station \* \* \* as may be reasonably necessary for their respective use," but that no contract was made under that clause. The act not only provides, in section 1, that the terminal company is created to "maintain" the station, and "to provide and operate adequate terminal facilities for the several railroad companies \* \* \* and for the accommodation of the public in connection therewith," but it also provides in section 3 that "the immediate government and direction of the affairs of" the company shall be in five trustees, and in section 8 that the terminal company, "upon the completion of said Union Passenger Station and grounds, shall make reasonable rules and regulations for their use." Section 8 also provides that, "upon the application of either of said companies or of the mayor of the city of Boston," the railroad commissioners may, after hearing, modify these rules and regulations. By section 10 it is provided that the expenses of the terminal company, including a dividend of 4 per cent. upon its capital stock, shall be paid by the five corporations using the station, in proportion to the use made by each; and by section 4, that in case the bonds issued to pay for the Union Station are not paid, the several corporations using the station shall be liable for the deficit in proportion to the use they have severally made of the station. By section 2 the capital stock was fixed at \$500,000, and each of the five corporations was authorized to subscribe to one-fifth thereof. This case does not come within the rule that a railroad corporation which voluntarily uses the station of another railroad as its terminal station, without reserving to itself any control over it, is liable for an accident which happens to one of its passengers within the limits of the station. In this case the defendant was compelled by the legislature to "use" this Union Station, which is the property of another corporation, and in the control of that other corporation. It was a stockholder, and as such had a vote as to the conduct of the other corporation, but that did not make it liable for the acts of the corporation. It could appoint one of the trustees, but that does not make the acts of the corporation its acts. It could apply to the railroad commissioners to have the regulations governing the use of the station changed, but so could the mayor of the city of Boston. That did not make either one or the other liable for the negligence of the corporation. The provision that it shall "use" the station would have been significant, had any option been given to the defendant railroad; but when the defendant railroad was compelled to use a union station owned and operated by a

separate corporation, in the opinion of a majority of the court, it was intended that it should deliver its passengers to the care of the owner of the union station, and that, however it may be in case an accident occurs while the defendant's trains are being drawn by the defendant over the tracks of the terminal company, the defendant's liability to the plaintiff is at an end when the passenger alights in safety from its cars onto the platform of the station of the terminal company. The relation between the five railroad companies and the terminal company is virtually that between connecting railroads.

The case of *Eaton v. Railroad Co.*, 11 Allen, 500, 87 Am. Dec. 730, was much relied on by the plaintiff. That was a case where the defendant and the Eastern Railroad used the tracks of the Essex road in common, under permission given by a special statute (St. 1851, c. 128). The accident was caused by the wheels of a cart getting caught between one of the rails of the Essex Company tracks and some planking. This stopped the train of the defendant, and while so stopped it was run into from behind by a train of the Eastern Railroad. The jury were instructed that if the Eastern Railroad was alone in fault the defendant was not liable, but, if the neglect of the defendant contributed to the injury, it was liable. The points decided were that a clause in St. 1851 providing that, in case of any accident, the company in fault should be liable, was intended to regulate the liability between the corporations, and not to affect the liability of either road to its passengers, and that the fact was immaterial that, by another clause in the act, if the two railroads did not agree as to the arrangements to be made for the common use of the Essex Railroad tracks, it was provided that the points of difference were to be settled by the county commissioners. In that case the defendant was in fact using the tracks in question in transporting the plaintiff, and its use of them was voluntary. It might or it might not have availed itself of the permission to use the tracks of the Essex Railroad, as it pleased; and there was no suggestion that the rule of the county commissioners in any way affected the control of either train, or the movements of the cart. In the case at bar the defendant's transportation was at an end, and it had been compelled by the legislature to end its transportation by delivering its passengers to the Boston Terminal Company, in place of furnishing a station of its own.

We do not think that the fact "that the plaintiff had purchased a ticket of the defendant for transportation from a station on one of its lines in Scituate, Mass., known as 'Egypt,' for Boston," would warrant a finding that the defendant had contracted to carry the passenger to any point in Boston beyond its line, within the rule that, although a carrier *prima facie* does not contract to carry beyond its own line (*Nutting v. Railroad Co.*, 1 Gray, 502; *Darling v. Railroad Corp.*,



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11 Allen, 295; Moore v. Railroad Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298); yet it may do so, and, if in fact it does so, it is liable for an accident beyond the terminus of its line (Najac v. Railroad Co., 7 Allen, 329, 83 Am. Dec. 686; Hill Mfg. Co. v. Boston & L. R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Feital v. Railroad Co., 109 Mass. 398, 12 Am. Rep. 720).

The judge was right in directing a verdict for the defendant. Judgment for the defendant.

## YAZOO &amp; M. V. R. CO. v. FAUST.

(Supreme Court of Mississippi, May 19, 1902.)

[32 So. Rep. 9.]

**Carriers—Failure to Stop—Action—Punitive Damages.\***

Where, in an action by a passenger for the failure of a railroad train to stop at a flag station, it appeared that the conductor did not see the passenger's signal, and that the engineer stopped a short distance beyond the station in response to a signal which had been given without his knowledge to enable a passenger to alight, and that he started the train, in obedience to the signal of the conductor, after such passenger had alighted, believing plaintiff had boarded the train, it was error to submit the question of punitive damages to the jury.

Appeal from circuit court, Wilkinson county; Jeff Truly, Judge.

Action by M. E. Faust against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Mrs. Faust brought this suit against appellant company to recover damages for injuries alleged to have been sustained by her by reason of the failure of a train to stop for her at Morgan station. This was a flag station. On the trial Mrs. Faust testified that she had been on a visit to some friends a mile and a half from Morgan station; that the mixed train on which she desired to take passage to her home was due at Morgan station at about 4 o'clock, but the train was late, and the carriage in which she went to the station went back, and she waited on the platform two hours before the train came. As the train approached, her brother flagged it with a handkerchief, and the engineer responded to the signal, but the train was running so fast it ran by the station, and stopped, and before she could get to it it left, and she was compelled to walk home several miles in the rain, and was made sick. There is no dispute as to the signal being given, or as to its being seen by the engineer, or that he stopped in response to it. The explanation of how it happened that the train left before Mrs. Faust reached it is this: There was a passenger

\*See note appended to Phillips v. St. Charles St. R. Co. (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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on the train who desired to get off at Morgan station, and this the conductor of the train knew, and instructed a brakeman to signal the engineer to stop. The lamp of this brakeman went out, and he ran some distance to another brakeman, and requested him to signal the engineer to stop, which was done. The engineer stopped the train as soon as he could after seeing the two signals. After stopping, the conductor, who was ignorant of the fact that a passenger desired to board the train at Morgan station, signaled the engineer to go ahead as soon as the disembarking passenger left the train, and the engineer, in obedience to this signal, started the train, thinking the party who had signaled him to stop had gotten on the train. The conductor stated that he did not back the train up because he did not know anybody was at the station to take passage, having received no signal to that effect, and the passenger getting off did not require him to back the train to the station. The opinion indicates the other facts sufficient for an understanding of the case. From a verdict and judgment for plaintiff, defendant appeals.

Mayes & Harris, for appellant.

A. G. Shannon, for appellee.

WHITFIELD, C. J. It was error to submit the question of punitive damages to the jury on the facts of this case. The case presents merely, as counsel for appellant accurately puts it, "a chapter of accidents." There is an utter absence of any testimony showing willfulness or intentional wrong.

Reversed and remanded.

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BROWN v. RAPID RY. CO.

(*Supreme Court of Michigan, May 8, 1902.*)

[90 N. W. Rep. 290.]

**Carriers—Mistake of Conductor—Ejecting Passenger—Refusal to Pay Fare—Damages.\***

Plaintiff purchased a return-trip ticket of defendant railway. The ticket was in eight coupons, four for the outward and four for the return trip, each containing a notice that it was void if detached from the signature coupon. On the outward trip the first two conductors tore off coupons from the wrong end of the ticket. The third conductor told plaintiff of the mistake, and delivered to him the coupons which should have been first taken, stating that he could use them in place of those taken. On the return trip the conductor refused to take the detached coupons, and on plaintiff's refusal to pay fare put him off the car. Plaintiff boarded the next car, paid the fare, 40 cents, and rode to his destination, and sued for breach of contract, with aggravated damages: *held*, that he was entitled to recover only the 40 cents which he was compelled to pay for the extra fare.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Samuel J. Brown against the Rapid Railway

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\*See note, 10 Am. & Eng. R. Cas., N. S., 273.

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Company. From a judgment for defendant, plaintiff brings error. Reversed.

Bacon & Yerkes, for appellant.

L. S. Trowbridge, Jr., for appellee.

HOOKER, C. J. The plaintiff has sued for damages arising upon his expulsion from a car by defendant's conductor. He purchased three tickets on the afternoon of May 5th, at defendant's ticket office in Detroit, for passage to Marine City and return. Each ticket consisted of eight coupons. Four of these coupons, colored respectively white, pink, yellow, and blue, were the "going portions of the ticket" between the stations in the following order; M. C. R. Depot, Junction Line, Chesterfield, Broadbridges, and Marine City. Four coupons, colored respectively blue, yellow, pink and white, were for the return trip in inverse order. Each coupon contained the names of the stations between which it was good, and the words "Detroit to Marine City, and Return," and, "Void if Detached from Signature Coupon." Plaintiff, with his wife and daughter, entered defendant's car at the M. C. Depot. He handed the three tickets to the conductor, within the city limits, and he tore from each a portion, and kept the same. Defendant's conductor in charge of the car between Junction Line and Chesterfield tore off and kept another portion of each. At Chesterfield defendant's conductor Jones took charge of the car, and, on being shown the tickets, told plaintiff that the previous conductors had made a mistake, and had taken coupons from the wrong end of the tickets, and then for the first time the plaintiff discovered that the last two returning coupons had been detached from each of the tickets. Jones then tore off from each ticket the first two going coupons, and handed them to the plaintiff, and then took the third going coupon, leaving the remainder with plaintiff. Plaintiff asked if he could use the detached portions, and was told that they would be accepted by succeeding conductors. On their return the defendant's conductor Gordon refused to honor these coupons, and, notwithstanding plaintiff's explanation, and offer to corroborate his statement by other passengers, on his refusal to pay another fare, expelled the passengers from the car at New Baltimore, and plaintiff and family took the next car an hour later, paying \$1.20 fare, after offering the coupons to the conductor, who refused to accept them after learning of Gordon's action. Testimony was offered to show that the plaintiff had been sick, and suffered a relapse, being confined to his bed for four or five weeks thereafter. The plaintiff recovered a judgment for \$500 in justice court, and defendant appealed to the circuit, where a verdict was directed for the defendant, and the plaintiff has taken a writ of error.

The evidence shows conclusively that the defendant's conductor detached the wrong coupons from the tickets in the

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first instance. The next conductor, Jones had no means of taking his fare but to take off the coupons preceding the one covering his own section of the road. These he returned to the plaintiff, but it was obvious to the plaintiff that he was left without transportation for his return, and it is equally plain that, notwithstanding that fact, he insisted on being carried by a conductor who had no personal knowledge of the circumstances, without the surrender of appropriate tickets, or any other payment that he was authorized to receive, or that the plaintiff had a right to insist that he should receive. It seems to be conceded that the trouble was the result of the mistake of defendant's first conductor. The most serious inconvenience that the plaintiff need have suffered was to pay 40 cents for his return fare, present his tickets, with proof of the circumstances, and get his money refunded. He was not content to do this. Rather than lose 40 cents, or be to the trouble of asking that it be refunded, he preferred to refuse to recognize the reasonable rule of the company. He refused to leave the car, notwithstanding the suggestion of the conductor that he pay his fare, and have it refunded later, and allowed the conductor to drag him through the car, and actually made him lift him off. The other members of his family appear to have used better judgment, and left the train when required to do so. We have several cases that hold that under such circumstances as these the conductor does not commit a wrong by ejecting from his train one who has no ticket, and refuses to pay, and that it would be absurd to hold that the conductor must take his passenger's word regarding his failure to have an appropriate ticket, or take the evidence of fellow passengers, and determine the matter at his peril, or that of the company. These two coupons which the plaintiff had were the first that should have been detached. Had he succeeded in riding over the first two sections without detection by the conductor, and detached them himself, he could have made the same claim, or sold them to another for second use. The law permits these companies to make reasonable rules for their protection, and the plaintiff has no cause of action arising out of his ejection from the car, as the learned circuit judge properly held. It is unnecessary to append a list of our own cases upon the subject. They are cited in the briefs of counsel. Under the proofs this plaintiff paid 40 cents by reason of the inadvertence of the conductor. Under this declaration he had a right to recover that amount, but he had no right to expect a verdict of \$500. We cannot agree with the defendant's contention that the declaration counts only on the expulsion of the plaintiff. The action is not trespass, but case, and the declaration alleges the contract and its breach, as well as the expulsion in aggravation of it.

We are therefore constrained to reverse the judgment, and order a new trial, but it will be without costs to either party.

LONG, J., did not sit. The other justices concurred.

SPENCE *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, May 14, 1902.)

[90 N. W. Rep. 346.]

**Carriers—Construction Trains—Apparent Authority of Conductor—Liability to Persons Accepted as Passengers.\***

Plaintiff, who had formerly been a railroad employee, when passengers were carried on all trains, purchased a ticket, and was accepted by the conductor of a construction train as a passenger thereon, which was against defendant's orders, except on official permit, of which plaintiff had no notice. Plaintiff knew nothing about the construction train, except that he had ridden thereon before as a passenger, and that other passengers were on the train when he took it. Construction trains were not on defendant's passenger time tables, but two other freight trains were, and the train in question looked like an ordinary freight train, except that it carried only a single car: *held*, that the conductor had such an apparent authority to accept plaintiff as a passenger that such acceptance made him a passenger, and as such he could recover for injuries caused by defendant's negligence.

Appeal from district court, Muscatine county; P. B. Wolfe, Judge.

Action at law to recover damages for personal injuries sustained by plaintiff in a collision between trains on defendant's line of road. From a verdict and judgment for plaintiff, defendant appeals. Affirmed.

Carroll Wright, John I. Dille, and Carskadden & Burke, for appellant.

E. M. Warner, for appellee.

DEEMER, J. There was evidence tending to show, and from which the jury may have found, that on the morning of November 18, 1898, an accident had occurred on defendant's line of road at Moscow, the first station west of Wilton; that one Roberts, who had charge of the construction train at Wilton, was directed to take his train and crew and go to the scene of the accident, to clear away the wreck; that pursuant to these orders Roberts made up a train, consisting of a locomotive and an ordinary freight caboose, similar in all respects to those in which defendant carried passengers on its freight trains, and placed the same on the main line of defendant's road. At this time what is known as defendant's "Fast Mail," which did not stop at Wilton, was due. Some precautions were taken against accident, but they were evidently not sufficient, for in a few minutes the fast mail came along at its usual high rate of speed, and, before the engineer thereof could stop it, it ran into the construction train, in the caboose of which were a number of men, including plaintiff, and as a result of the collision plaintiff received the injuries of which

\*As to who are passengers, see *Gradert v. Chicago & N. W. Ry. Co. (Iowa)*, 20 Am. & Eng. R. Cas., N. S., 118, and extensive note, 121 et seq.; *Menaugh v. Bedford Belt Ry. Co. (Ind.)*, 22 Am. & Eng. R. Cas., N. S., 1; *Chicago & E. I. R. Co. v. Jennings (Ill.)*, 22 Am. & Eng. R. Cas., N. S., 127; *Baldwin v. Grand Trunk Ry. Co. of Canada (Mich.)*, 23 Am. & Eng. R. Cas., N. S., 117.

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he complains. Plaintiff is an elderly man, and 25 or 30 years before the accident had been a railway employee, working at that occupation for 12 or more years. At the time of the collision he was a painter by trade, and was employed in painting two houses and a barn at Moscow. He had frequently ridden on this construction train, as had others, and on the morning in question asked Conductor Roberts for permission to ride on the train. His request was granted, and, having procured a ticket, he took his seat in the caboose with others, and was in this position when the accident occurred. At the time when plaintiff was engaged in railroading, passengers were carried on all trains; but he knew that at the time in question printed schedules were posted in depots, and given employees, permitting passengers to ride on certain trains, and forbidding them to ride on others; but he did not know what this schedule showed, and knew nothing about the construction train, except as he had ridden thereon before, as a passenger, had seen others do the same, and was permitted and directed by Conductor Roberts to take the train, to get to his work at Moscow. As a matter of fact trainmen were not allowed to carry passengers on construction trains, except when the passenger had a permit from the superintendent or train dispatcher, nor upon any freight trains except what were known as "Numbers 51 and 52." Defendant's negligence is practically conceded, and the only serious question made by defendant is that plaintiff was not a passenger when he received his injuries, and therefore cannot recover.

The decided cases on similar facts are apparently in some conflict, and the question has not heretofore received extended consideration by this court. It must be conceded, of course, that this train was not intended by defendant as a passenger train, and persons were not allowed to ride on it as such except under the conditions named. It does not appear, however, that plaintiff had notice of these conditions, and there is evidence which affirmatively shows that he did not. Construction or work trains do not appear on the time tables of the defendant company, but these tables did show that trains 51 and 52 were permitted to carry passengers. The train in question presented the appearance of an ordinary freight train which carried passengers, except that it was made up of an engine and the single car or caboose. Conductors, however, had the right to permit passengers to ride, even on construction trains, with the consent of the superintendent or train dispatcher. There was no rule of absolute exclusion from the train. We have a case, then, where there is no absolute prohibition of the train's carrying passengers; where the schedules posted in the ticket office did not show whether or not this particular train carried passengers; where the train in question not only carried plaintiff, but others, as passengers; where the conductor in charge of the train, and with apparent authority, at least, to determine who might

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ride thereon, permitted plaintiff to take a position in the caboose as a passenger; where the plaintiff did not know of any limitations on the conductor's authority, and where there was nothing about the train to indicate that it did not carry passengers the same as other freight trains of the defendant company; and where plaintiff did not in fact know of what was posted in the ticket office, but relied on the authority of the conductor to permit him to ride upon the train. In *Fitzgibbon v. Railway Co.*, 108 Iowa, 614, 79 N. W. 477, 14 Am. & Eng. R. Cas., N. S., 270, where the facts were stronger against the plaintiff than in this case, we said, among other things: "Even if the train was not made up for the carriage of passengers in general, the defendant, through its conductor, had the right to accept such passengers; and if the conductor did accept the plaintiff as a passenger, he will be treated as such, in the absence of notice or knowledge on his part of any limitations upon the conductor's authority." A number of authorities were cited in support of this rule, which we think fairly sustain it, although it must be conceded that there is not entire harmony in the adjudicated cases on this subject. We are now asked to modify that rule, or, at least, to limit its application; and in support of the argument a number of cases are cited, to some of which we will refer during the course of the opinion.

Taking it for granted that, as a matter of fact, the construction or work train was not intended for ordinary passengers, and that no one could ride on it as such without the consent of the train dispatcher or superintendent, and that plaintiff did not have this consent, we have to inquire whether or not the fact that plaintiff and others did ride on the train as passengers, and that plaintiff was authorized by the conductor in charge of this particular train on the occasion in question to ride thereon as a passenger, and that plaintiff did not know of any limitations on the authority of the conductor, made plaintiff a passenger on that train. The general rule with reference to the limitations upon the authority of an agent is well understood. A master is bound by the acts of his agent within the general scope of his authority; and while persons dealing with an agent are, as a general rule, bound to know the extent of his authority, yet they may reasonably take the visible and apparent interpretation of that authority by the principal himself as the true one, and as the one by which he chooses to be bound. It therefore follows that third persons, who have reasonably and in good faith relied upon the apparent authority of the agent, cannot be prejudiced by any limitations, of which they had no notice, and could not with reasonable diligence have ascertained. *Mechem*, Ag. § 279; *Palmer v. Cheney*, 35 Iowa, 281; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276. The conductor of the construction train had entire charge thereof, and in its management acted for and represented the defendant.

He had apparent authority to say who should and who should not ride thereon. True, his instructions were limited, but the jury evidently found that plaintiff had no notice of these limitations. Of course the railway company had the right to use separate trains for freight and for passengers, but if it undertook to carry passengers on some of its freight trains, and a person about to board one, having no knowledge that it did not carry passengers, is authorized and permitted by the conductor in charge to do so, he is, we think, justified in presuming that such permission is within the scope of the agent's authority; and the person so boarding the train is not a trespasser, but a passenger. With these rules in mind we are the better prepared to consider the cases cited by defendant's counsel. In *Eaton v. Railroad*, 57 N. Y. 382, 15 Am. Rep. 513, the car in which plaintiff rode, on invitation of the conductor, was not such as the defendant company usually used for the carriage of passengers. It is described in the opinion as "a storeroom" used for carrying provisions; and there was no evidence that passengers either habitually or occasionally rode in the car. It also appeared that the defendant company made a complete division of its freight and passenger business; that no conductor had authority to carry passengers on freight trains; and that plaintiff had, or should have had, knowledge of this division of defendant's business. Moreover, the condition of the car was held to be such as to give notice that it was not intended for passengers. The court held on this state of facts that the conductor of the "coal train" did not have apparent authority to accept plaintiff as a passenger. The facts clearly distinguish that case from the one now before us. In *Railroad Co. v. Barnes* (Ind. Sup.) 36 N. E. 1092, the road had not been opened for public travel, and the court held the conductor could not open "an imperfect and incomplete road." In *Powers v. Railroad Co.*, 153 Mass. 188, 26 N. E. 446, there was a complete division of defendant's business, and it was held that the conductor of a freight train did not have apparent authority to accept passengers thereon. *Wilton v. Railroad Co.*, 107 Mass. 108, 9 Am. Rep. 11, cited in the *Fitzgibbon Case*, was approved and distinguished on the ground that the car on which plaintiff rode in that case was for the carriage of passengers, although, as a matter of fact, the driver of the car had no authority to accept him as a passenger. In *Railway Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98, the defendant knew that passengers were not allowed on plaintiff's freight trains, and that conductors had no authority to accept him as such except on special conditions. There was also a complete division by the company of its freight and passenger business. In *Cooper v. Railroad Co.* (Ind. Sup.) 36 N. E. 272, the plaintiff went upon the train with the consent of the conductor to assist the brakeman. Neither the conductor nor the brakeman had authority to employ assistance. Plaintiff was manifestly upon the train



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by sufferance of the defendant's employees, and was not a passenger, nor was he accepted as such. In *Smith v. Railroad Co.*, 124 Ind. 394, 24 N. E. 753, there was a complete separation of defendant's freight and passenger business; and it was not shown that plaintiff did not know when he went on the train that it did not carry passengers. *Railroad Co. v. Lynch* (Civ. App.) 28 S. W. 252, is another Texas case, wherein it appeared there was a complete division of freight and passenger business, and plaintiff was held to know that the conductor of a freight train had no authority to accept him as a passenger. *Cook v. Navigation Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52, is a tugboat case, and *Gulf Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982; *Hoar v. Railroad Co.*, 70 Me. 65, 35 Am. Rep. 299; *Willis v. Railroad Co.* (N. C.) 26 S. E. 784; and *Railway Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190, 43 Am. St. Rep. 38,—are "hand car" cases. These appliances, as every one well knows, are not intended for the carriage of passengers or persons other than employees. *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118, is another case where there was a complete separation between freight and passenger business, and Black was held to a knowledge of this fact. In that case it is said: "If, however, a railroad company permits its freight trains to carry passengers, then they are bound to such passengers to the same extent as if carried by their regular passenger trains, excepting such inconveniences and risks as are peculiarly incident to this means of transportation. Although a railroad company may not authorize the carriage of persons on its freight trains, or may prohibit it, yet if the servants carry passengers on such trains, to the knowledge of the company's officers authorized to make and enforce rules, or if they are carried to that extent that such officers, in a proper discharge of their duties, should know of the facts, and no effort is made to stop it, then a passenger is authorized to presume that it is permitted by the company, and will be protected as a passenger on such trains. But it cannot be said that a disobedience of orders can annul the order, except upon the principle that the officers, knowing of the violation, ratify it and waive the rule forbidding it. Whatever falls short of this will not serve to confer authority upon or enlarge the power of the agent." The other Texas cases to which defendant refers are all based on this distinction. Vide *Railroad Co. v. White* (Tex. Civ. App.) 34 S. W. 1042, 3 Am. & Eng. R. Cas., N. S., 441-442; *Wilcox v. Railroad Co.* (Tex. Civ. App.) 38 S. W. 379. In the last case plaintiff was riding on the footboard of the "switch engine" when injured. It is manifest from this review of the authorities that none of them are exactly in point, and that none call for a modification of the rule announced in the *Fitzgibbon Case*. Defendant had not made a complete separation of its freight and passenger business. It carried passengers on some of its freight trains, and in cars

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exactly similar in all respects to the one which plaintiff took. Plaintiff had no notice of any limitations on the conductor's authority, and the posted notices did not indicate that the train in question did not carry passengers. The conductor had the right to take passengers on this train, under certain conditions, but plaintiff had no notice of these conditions. He and others had frequently ridden on this train as a passenger, and we think, under all the circumstances, the conductor had the apparent right to accept him as a passenger. These conclusions find ample support in the authorities. See *Dunn v. Railway Co.*, 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Railway Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Railroad Co. v. Hailey* (Tenn. Sup.) 27 L. R. A. 549; *Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Everett v. Railway Co.*, 9 Utah, 340, 34 Pac. 289; *Wilton v. Railroad Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Railway Co. v. Caldwell*, 74 Pa. 421; *Creed v. Railroad Co.*, 86 Pa. 139, 27 Am. Rep. 693; *Hanson v. Transportation Co.*, 38 La. Ann. 111, 58 Am. Rep. 162; *McGee v. Railway Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Sherman v. Railroad Co.*, 72 Mo. 65, 37 Am. Rep. 423; *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Railroad Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Railway Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 158, 7 Am. St. Rep. 451; *Whitehead v. Railway Co.* (Mo. Sup.) 11 S. W. 751, 6 L. R. A. 409; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360; *Rosenbaum v. Railroad Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653, 34 Am. & Eng. R. Cas., N. S., 274; *Railroad Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923; *Railroad Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447, 3 Am. St. Rep. 715; *Edgerton v. Railroad Co.*, 39 N. Y. 227. Appellant insists, however, that the testimony shows, without conflict, that plaintiff knew the train did not carry passengers. This is evidently a mistake; for plaintiff testified in express terms that he knew nothing of the rules of the company, or of that train, except as the conductor in charge of it told him, and that he did not know that the conductor had no authority to carry passengers on that train. The instructions given by the trial judge were in harmony with the views herein expressed; and, as there is no error in the record, the judgment is affirmed.

JOHNSON v. DETROIT, Y. &amp; A. A. RY.

*(Supreme Court of Michigan, May 8, 1902.)*

[90 N. W. Rep. 274.]

**Carriers of Passengers—Liability for Assault by Conductor.\***

The rule relieving the master from liability for a malicious injury inflicted by a servant when not acting within the scope of his employ-

\*See note to *Birmingham, etc., R. Co. v. Baird* (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

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ment does not apply between carriers and passengers, so as to relieve a carrier from liability to a passenger for assault of the conductor.

**Costs.**

3 Comp. Laws 1897, § 11,258, finding that in an action for assault and battery, if the recovery is less than \$50, plaintiff shall recover no more costs than damages, applies where the action is against the master of the servant committing the assault.

Error to circuit court, Wayne county; Byron S. Waite, Judge.

Action by William Johnson against the Detroit, Ypsilanti & Ann Arbor Railway. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Andrus & Leete, for appellant.

Edward M. Vining, for appellee.

MONTGOMERY, J. Plaintiff boarded defendant's car in Detroit, paid his fare to Wayne, and received a check or ticket in receipt for it. Conductors were changed before the car reached Wayne, and plaintiff testified that he presented the check given him by the first conductor to the second conductor. The conductor informed plaintiff that the ticket was not good, and, on plaintiff's refusing to pay his fare, ejected him from the car. A ticket was received in evidence, which the conductor testified was the one in question, and which obviously did not entitle plaintiff to ride from Detroit to Wayne. One of defendant's assignments of error relates to the refusal of the court to charge that the ticket offered by plaintiff was not good between Detroit and Wayne. We think plaintiff's testimony on this point was in conflict with the theory of the request to charge, and that the request was properly modified by the statement that it was true if the ticket received in evidence was the one given the conductor by the plaintiff. Plaintiff again boarded the car, paid his fare again, and, it was testified, demanded the return of the ticket, which was refused. A few minutes later, plaintiff went to the rear platform, where the conductor was, and again demanded the return of the ticket. In an altercation which ensued, the conductor struck the plaintiff, and inflicted the injuries sued for.

The principal contention of the defendant is that the company is not liable for this act of the conductor, because not within the scope of his authority. We think the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply between a common carrier of passengers and a passenger, and that it is the duty of the carrier to protect its passengers against injury from the willful misconduct of its servants while performing the contract to carry. See *Haver v. Railroad Co.*, 62 N. J. Law, 282, 41 Atl. 916, 34 L. R. A. 84, 72 Am. St. Rep. 647, 17 Am. & Eng. R. Cas., N. S., 490; *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, 44 Am. & Eng. R. Cas. 384; *Bryant v. Rich*, 106 Mass. 189, 8 Am. Rep. 311; *Hanson*

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v. Railway Co., 75 Ill. App. 474; Railroad Co. v. Henry, 55 Kan. 721, 41 Pac. 952, 20 L. R. A. 465; Dillingham v. Russell, 73 Tex. 51, 52, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753, 37 Am. & Eng. R. Cas. 1.

The court instructed the jury that the circumstances occurring before plaintiff's return to the car were material only as they bore on the credibility of witnesses, and that the plaintiff could not recover if he provoked the assault or was the aggressor. We think this sufficiently favorable to defendant, and that other parts of the charge complained of could not have prevented the jury from understanding that it was the rule which must govern the case.

The action was brought in circuit court, and the jury awarded plaintiff \$100 damages. Defendant asked for judgment for costs. This was refused. The declaration states the form of action as trespass on the case, but sets forth the acts constituting the wrong complained of. The statute (3 Comp. Laws 1897, § 11,258) provides, "If the plaintiff in an action for assault and battery, or false imprisonment, or for slanderous words, or for libel, recover less than fifty dollars, such plaintiff shall recover no more costs than damages." It is contended that this case does not fall within the statute, as the action is brought against the corporation, and not against the conductor. Nevertheless the action is one for an assault and battery, and comes within the express words of the statute.

Judgment affirmed.

LONG, J., did not sit. The other justices concurred.

#### CAMERON *et al.* v. ORLEANS & J. RY. CO., Limited.

(*Supreme Court of Louisiana, March 31, 1902.*)

[32 So. Rep. 208.]

#### Liability of Railroad for Material Furnished Contractor for Construction of Road.

One who furnishes ties and lumber to a contractor who is building a railroad, and who has received payment for the same in accordance with the terms of his contract, has no claim against the company for which the road is being built, where he has served no notice and taken no steps to preserve his rights, and his seizure of the material which has been delivered to and paid for by such company is unauthorized.

#### Right of Railroad to Enjoin Contractor from Removing Material Collected for Construction of Road.

Where a contractor undertakes to build and equip a railroad, the mere fact that he has assembled material suitable, and which he contemplates using, for that purpose, gives to the other contracting party no right to control his disposition of such material, and an injunction will not lie to restrain him from removing it elsewhere. Nor does the fact that the other contracting party has given him information which has led to the obtention of such material make it obligatory upon the contractor to put it into the road, or to sell it to the contractee at cost.

#### Liability of Material Man to Railroad for Unlawful Seizure of Material Furnished Contractor, but in Railroad's Possession—Damages.

Where one has furnished material to a contractor engaged in building a railroad in the honest belief that he will be protected by reason of the

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fact that the money to be used is to be drawn upon the joint checks of the contractor and the company for which the road is being built, but it turns out that he is not protected, and the material furnished is in the possession of such company, but legally beyond his reach, and he levies a seizure upon property belonging to the contractor, and also sues the company, and seizes such material, he is liable in damages to the company; but if it appears that the seizure, as against the contractor, is good, and would of itself have stopped the work, no greater damages will be allowed than are clearly proven.

**Partnership.**

Partnership, no doubt, results from intention, but the question in any given case is, what is the intention of the parties? If, by their representations, dealings, and conduct, it appears that they have agreed to everything that, as a matter of law, is necessary to constitute a partnership, and that by reason of the rights which they have secured to, and the obligations which they have imposed upon, themselves, they occupy towards each other the relation of principals, and really share the profits of the business in which they are engaged in that relation, and not as employer and employee, it must follow that the business is theirs, and they are liable for the obligations incurred for its purposes for that reason, and the disclaimer, in their contract, of the intention to enter into the partnership relation, and the assertion, thus contradicted, that they occupy, or intend to occupy, the relation of employer and employee, are not conclusive as to third persons.

**Same—Status and Liability.**

The status of a partnership and the character of the liability of its members are matters to be determined by the law of the domicile, and, where a partnership created in another state does business in Louisiana, are presumably to be determined by the law merchant, of which this court takes judicial notice as prevailing in this country, save where it is shown to have been modified by statute.

**Pledge—Bills of Lading.**

Where money is borrowed upon a promise to furnish, as collateral security, bills of lading for property then in the hands of a carrier, and unpaid for, and the borrower pays for the property, and retains the bills in his possession, with the consent of the lender, until the property itself, still in the hands of the carrier, is seized at the suit of his creditor, the lender has no pledge, and the subsequent delivery of the bills to him does not affect the seizure.

**Contract—Recovery for Breach.**

Where a contractor agrees to pay for material half in cash and half in bonds secured by mortgage upon the work on which he is engaged, to be delivered at their market value, and, receiving and disposing of the material, he fails to go on with his contract, and thereby give value and entitle himself to the bonds, the furnisher of material has the right to demand the full amount due him in money.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Theard, Judge.

Action by Flora B. Cameron and others against the Orleans & Jefferson Railway Company, Limited. Judgment for defendant and intervener, and plaintiffs and such defendant appeal. Modified.

McCloskey & Benedict, Carroll & Carroll, and Dinkelspiel & Hart, for appellants.

George W. Flynn, for appellees Costello & Burke.

Rouse & Grant, for appellee Atlas Nat. Bank.

Hunter C. Leake and Gustave Lemle (J. M. Dickinson, of counsel), for appellee Illinois Cent. R. Co.

E. L. Simonds, for appellee International Const. Co.

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MONROE, J. Mrs. Flora B. Cameron and others, as executors of the will of William Cameron, filed suit alleging that the Orleans & Jefferson Railway Company, Limited (which will be called the "Orleans Company"), was incorporated for the purpose of building and operating a railroad in the parishes of Orleans and Jefferson, and that it made a contract with the International Construction Company (which will be called the "Construction Company"), agreeably to which the latter was to build the road; that petitioners sold and delivered to said Construction Company and to said Orleans Company cross-ties, lumber, and other material, for which they were to be paid one-half cash and the balance in the bonds of the Orleans Company at their market value, and that said ties and material had been delivered to and were in the possession of said Orleans Company; that the Construction Company was a commercial firm domiciled at Detroit, Mich., and composed of Charles H. Lawrence, of that city, E. M. Costello and M. D. Burke, of Cincinnati, and other persons, nonresident in this state, and that said company had property within the jurisdiction of the court and under the control of the Orleans Company; and plaintiffs prayed for writs of sequestration and attachment and process of garnishment, and for judgment against the defendants in solido in the sum of \$12,207.38, as the contract price of said ties and material, with privilege upon the property to be seized. Agreeably to the prayer of this petition, a writ of sequestration was issued, under which certain ties were seized, and a writ of attachment, under which a quantity of steel rails, loaded on cars in the possession of the Illinois Central Railroad Company, were also seized; and thereafter, by motions, exceptions, answers, interventions, and reconventions, the different parties now before the court set up their various defenses, claims and counterclaims, as follows:

The Orleans Company, by way of defense, denies that it made any contract with the plaintiffs, or that it bound itself to pay for any material which the plaintiffs might deliver to the Construction Company, and alleges that the Construction Company was to build the road, and was to be paid upon estimates to be furnished from time to time for work done and material delivered. It further alleges that the ties in question had been delivered to and paid for by it in accordance with this contract, and without notice of plaintiffs' claim, and it prays that plaintiffs' suit be dismissed, and that it recover damages in reconvention for the seizure of its property. By way of intervention said company alleges that the rails were bought by the Construction Company at the suggestion of one of its (the Orleans Company's) officers for the purposes of the road in question, and that, inasmuch as they could not be replaced without prejudicial delay, intervener, though not required so to do by its contract, offered to pay for them, but that the offer was declined by the Construction

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Company and also by Costello and Burke; that said Construction Company claims to have paid for said rails; that Costello and Burke claim to have paid for them; that the Atlas National Bank of Cincinnati claims to have advanced part of the purchase money, and to have a privilege and right of pledge on them; and that plaintiffs have seized them under their attachment, but that intervener is entitled to them upon paying the cost price, and it prayed judgment accordingly. The Orleans Company also filed a separate suit, entitled "Orleans & Jefferson Railway Company, Limited, vs. International Construction Company" (which appears in this court under No. 13,809, 32 South. 218), after the attachment had been levied, setting up its claim to the rails, and praying that the Construction Company be perpetually enjoined from removing them from beyond the jurisdiction of the court; and as the issues in the two cases are identical up to a certain point, and the transcript in this case is used for the purposes of the other, the cases have been argued together, and will be so dealt with in this opinion.

The Construction Company denies that it is a commercial firm composed of the parties named in the petition. It admits that it made a written contract with the plaintiffs for ties, etc., which were to be paid for when delivered, but it denies that the same have been delivered, and alleges that this action is premature, and it prays for damages in reconvention, with reservation of its rights against the Orleans Company, which, it alleges, has failed to comply with its contract.

E. M. Costello and M. D. Burke, in answer to the demand made against them individually and as members of the Construction Company, deny that they were members of said company, or were ever connected therewith except as employees, and, assuming the character of plaintiffs in reconvention, they allege that the rails in question were shipped to New Orleans by the Illinois Central Railroad Company, to be delivered to the Construction Company when paid for, but that the Construction Company failed to pay for them, and delivery was refused; that thereafter appearers bought said rails, and that \$5,200 of the money used in paying for them was advanced by the Atlas National Bank, to which bills of lading for all of said rails were delivered as security for the money so advanced. They deny that the failure of the Orleans Company or the Construction Company to build the road is attributable to them, and they pray that the attachment be dissolved, with damages, and that the rails be surrendered to them, subject to the pledge in favor of the Atlas National Bank for its advances. These parties—that is to say, Costello and Burke—also appear as interveners and reiterate generally the statements made in their answer and demand in reconvention, and further allege, in explanation of their connections with the Construction Company, that in

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1898 they became acquainted with C. H. Lawrence, of Detroit, "who stated that he was the representative and general manager of the International Construction Company," and that he desired to secure their services in carrying out a contract for the construction of a railroad near Cincinnati, but that said road was not built, and they had nothing more to do with Lawrence or his company "until about March 15, 1899," when they received a letter from him, in consequence of which they went to Detroit, and that he there exhibited to them a contract which had been entered into between the Orleans Company and the Construction Company, and informed them that he desired to secure their services in executing the same; that, as a result of their interview, Costello came to New Orleans about March 19th for the purpose of investigating, and that on his return interveners agreed to give their services in the contemplated work for one-half of the profits, which were to be paid as salary, and a further allowance of \$25 per week, which was to be paid to Costello; that they thereupon came to New Orleans, and began to work for the Construction Company, and that the plaintiffs and the public generally had full knowledge of the fact that they were employees "by the letter heads and stationery of said company"; that about June 22d they received a letter from Lawrence stating that he had bought some rails from the Illinois Central Railroad Company for which he was unable to pay, and requesting them to pay for the same, and that they thereupon "wired" the Orleans Company, asking if they would be allowed a lien for the amount which they might advance for that purpose; that the Orleans Company gave an affirmative answer, subject to the condition that the assent of the Construction Company, and its surety and a certificate from "Hunt's Inspection Bureau" be obtained, and that they then wired the Orleans Company that they had communicated with Lawrence, and that, if his answer was favorable, they would begin laying the track the following week; that in response to this communication Lawrence met them in Cincinnati, and again requested them to pay for the rails, and that they agreed to buy the rails for their own account, provided Lawrence would transfer to them the contract with the Orleans Company, which they agreed to assume if they found, on returning to New Orleans, that Lawrence had succeeded in raising \$60,000 in New York, which, by the terms of said contract, he had undertaken to borrow for the purposes thereof on the bonds of said company. They further allege that on or about June 26th the Illinois Central Railroad Company agreed to accept them as purchasers of the rails in place of the Construction Company, and that Lawrence, for said company, assigned to them the contract aforesaid, which was to be accepted by them, and presented for approval to the Orleans Company only upon the conditions stated. They further allege that Lawrence did not succeed in borrowing the



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money necessary to carry out said contract, and that they therefore refused to assume the same, and that they "now tender said rails to said [Orleans] company for the amount paid by them for the same, \* \* \* provided said company will pay for same within a reasonable time,—say August 15, 1899." They allege injury resulting from the seizure, and pray judgment decreeing them to be the owners of the rails, and awarding them damages.

The Illinois Central Railroad Company intervenes, claiming \$638 for the use of 22 cars for 29 days during which they were held loaded with the rails.

The Atlas National Bank intervenes, claiming to be pledgee of the rails for the sum of \$5,200, with interest.

The writ of sequestration was dissolved by the district court in an interlocutory proceeding, and there was judgment on the merits, rejecting the claim of the plaintiffs as against the Orleans Company and as against Costello and Burke, recognizing the latter as owners of the rails, subject to the claim of the Illinois Central Railroad Company and the Atlas National Bank, and dissolving the attachment, with damages; also condemning the plaintiffs in damages upon the reconventional demand of the Orleans Company and condemning the Orleans Company in damages upon the reconventional demand (set up in the injunction suit) of Costello and Burke, and in favor of the plaintiffs and against the Construction Company on the main and reconventional demands of those parties, respectively.

1. The International Construction Company has no corporate existence, but is merely the name under which C. H. Lawrence transacts business, either alone or in connection with other persons,—one of the issues in the case being whether Costello and Burke were associated with him as partners in the business out of which this suit arises. Lawrence, in the name of Construction Company, contracted to build and equip for the Orleans Company the road contemplated by its charter, and it was part of his contract that he should borrow the money necessary for that purpose, with the exception of \$7,377, upon the mortgage bonds of the Orleans Company, a certain proportion of which were to be "underwritten" by several of the officers of the Orleans Company acting individually. The \$7,377 mentioned was to be furnished by the Orleans Company in cash, and of that amount \$1,000 was to be paid at once to the Construction Company and \$6,377 was to be deposited in bank, together with the money to be borrowed by Lawrence, subject to the joint order of the contracting parties, and paid to the Construction Company for material delivered and work done upon presentation of bills of lading and engineer's estimates. It may as well be stated here that Lawrence did not succeed in borrowing any money, but that some of the members of the Orleans Company advanced \$10,000 in addition to the cash

called for by the original contract, and that the fund so created, together with certain amounts advanced by Costello and Burke, constituted the only fund that was available until the enterprise failed. One Conroy, and T. Gordon Reddy, Jr., representing the plaintiffs, were endeavoring, whilst the negotiations between the Orleans Company and the Construction Company were in progress, to obtain the contract to supply the ties and other lumber needed for the building of the road. Conroy was called off elsewhere, and Reddy, the manager of the Cameron Mills, took charge of the matter, and had some conversations with the president of the Orleans Company, with Zell, director, vice president, and acting treasurer of that company, and who was also the engineer upon whose certificates the money was to be paid, and with Lawrence, representing the Construction Company. He also, before entering into any contract, made the acquaintance of Costello. The evidence justifies the conclusion that it was originally contemplated, as between the Orleans Company and the Construction Company, that when money was drawn upon their joint checks on the presentation of bills of lading showing the delivery of material, or of engineer's estimates showing work done, such money should be used to pay for the particular material represented by the bills or the particular work represented by the estimates so presented; and it can hardly be doubted that Reddy acted under the impression that the payment of the amount to become due under any contract which he might make would, to some extent at least, be secured, by reason of the fact that all such payments were to be made by the joint authority of both the parties to the main contract. That contract, however, in terms provided that upon presentation of the bills of lading, etc., the money was to be paid, not to the parties furnishing the material, but to the Construction Company, and it was therefore left to that company either to pay for the particular material called for by the bills presented or to use the money so obtained in paying for some other material or work; and the evidence does not make it clear that any assurances for which the Orleans Company could be held bound were given to Reddy that the latter course might not be pursued. The main contract also provided that after the completion of the work, and before receiving the final payment, the Construction Company should present receipted bills for all materials furnished, and it is probable that Reddy relied somewhat upon this stipulation, of which he was informed. As a matter of fact, it does not appear that he ever saw the main contract, or asked to see it; and his contract to supply ties, etc., consists of a written proposition, addressed to the "International Construction Company, Detroit, Michigan," and an acceptance thereof by "C. H. Lawrence, Contracting Agent International Construction Company of Detroit, Mich.," the Orleans Company being in no manner a party thereto. It is true that,

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after the proposition had been forwarded, and after acceptance had been mailed, Reddy wrote a letter to Zell, in which he speaks of having submitted a proposition to the Construction Company and the Orleans Company; and that Zell replied, saying that Lawrence would return in a few days, that all financial matters had been arranged, that Reddy could go on sawing the lumber and would run no risk in shipping it, and that all parties furnishing material would be protected, as the Construction Company would be required to furnish receipted bills within 10 days after the completion of the work before it could obtain a final settlement. But this letter was written in his private office, was unauthorized by the Orleans Company, and was not brought to the knowledge of any of its officers until just before the institution of this suit. And as Reddy knew the president of the Orleans Company, and ought to have known that a vice president is an officer who usually acts only in case of the absence or disability of the president, there appears to us to have been no good reason for his addressing Zell, or for his relying upon Zell's assurances. Beyond this, it is claimed that the ties and material were shipped to the Construction Company and the Orleans Company, but this claim is not sustained by the evidence, the fact, as we take it, being that the shipments were made to the Construction Company alone. Under these circumstances we are of opinion that the plaintiffs made no contract with the Orleans Company, and have no claim against it, and that the sequestration of the ties, which had been delivered to and paid for by that company, was properly set aside. We do not think, however, that the Orleans Company is entitled to recover any damages other than so much of its attorney's fees as are fairly attributable to the services rendered in dissolving the sequestration. After the plaintiffs had delivered almost all of the ties and material called for by their contract, they learned from the president of the Orleans Company that the money to pay for the same had been turned over to the Construction Company, and he expressed great surprise that it had not reached the plaintiffs; the fact being that it had been used for some other purpose, and that the Construction Company had no means of replacing it. The plaintiffs then determined to bring suit, and, whilst the officers of the Orleans Company endeavored to dissuade them from so doing, and particularly from suing the Orleans Company, they furnished certain data upon the basis of which the suit against the Construction Company was brought. Even if this were not the case, the Orleans Company would have no right to complain of the suit brought against the Construction Company, and we are satisfied that the joining it as a defendant in that suit inflicted no particular injury that would not have been sustained by the suit against the Construction Company alone, accompanied, as that suit was, by the seizure of the rails, without which no progress could have been made in the building of the road. The ties

were never removed from their positions, and were not long under seizure. We are therefore of the opinion that the amount allowed in damages on the reconventional demand of the Orleans Company should be reduced to \$250.

2. There was judgment in the district court in favor of plaintiffs and against the International Construction Company for the amount claimed in the petition, but it was held that Costello and Burke were not members of the company, and, as Lawrence was not condemned individually, and as the property which was seized was released as belonging either to the Orleans Company or to Costello and Burke, the judgment, as rendered, can be of no great value to the plaintiffs, and the Construction Company took no appeal therefrom.

3. Probably the most serious question presented is whether Costello and Burke were partners of Lawrence for the purposes of the business out of which this litigation has arisen. The evidence shows that prior to 1899 C. H. Lawrence, who lived in Detroit, was operating under the name of the International Construction Company, save when, for the purposes of particular transactions, he associated other persons with him. It also appears that E. M. Costello, of Cincinnati, was operating in the same way under the name of the Queen City Construction Company, and that he at times associated M. D. Burke with him, either under that name or under the firm name of Costello & Burke. During the year 1898 these parties—Lawrence, Costello, and Burke—using the name of their so-called companies or otherwise, entered into an arrangement for the building of a railroad near Cincinnati, known as the "Mill Creek Valley Road," but by reason of the failure to obtain some necessary franchise the scheme was abandoned. A similar arrangement appears to have been made for the building of a road near Erie, Pa., and, as we understand the testimony, they were engaged upon that work whilst operating in Louisiana, the proposition which led to their association for the purposes of the work at Erie and for that at New Orleans having been made at the same time. Thus, on February 21, 1899, Lawrence wrote, from Detroit, to Costello, at Cincinnati: "I have some work which I believe we could take together and make some money. \* \* \* I think both contracts which I have would prove enticing to both yourself and Major Burke." And he invited Costello to visit Detroit, in order that they might discuss the matter. After writing this letter, he appears to have come to New Orleans, and on his return to Detroit to have found a letter from Costello awaiting him. He accordingly wrote Costello again on March 4th stating what work he had on hand, and repeating the invitation contained in the previous letter. And on March 6th Costello and Burke went to Detroit, and had an interview with him, as the result of which, on March 7th, he offered them a partnership interest in the New Orleans work, and, as we infer, also made them a similar offer with regard to the

work at Erie, Pa. The proposition as to the New Orleans work was made dependent upon their approval of his contract with the Orleans Company, which had not then been signed, and it contained the following stipulation, to wit: "If the foregoing proposition is satisfactory to the Queen City Construction Company, a copy of this communication shall be made by the Queen City Construction Company, and indorsed across its face, 'Accepted and approved. Queen City Construction Company, by E. M. Costello and M. D. Burke,' and this shall constitute the contract for the Orleans and Jefferson Railway job between the International Construction Company and the Queen City Construction Company." Judging from this language, and from the subsequent conduct of the parties, we understand the idea to have been that the contract with the Orleans Company should be submitted to Costello and Burke as soon as it was signed, and, if it met with their approval, they would close the contract of partnership with Lawrence by writing the words "Accepted and approved" across the face of the written proposition which the latter had submitted, or a copy thereof, and affixing their signatures. The contract with the Orleans Company, having been signed upon March 11th, was forwarded to Costello on March 13th, and was, presumably, found satisfactory, since there appears in evidence Lawrence's proposition, in which some slight changes had been made in the meanwhile, with the words "Accepted and approved" written across its face, and duly signed, in literal compliance with the stipulation above quoted, the instrument still bearing the date March 7th. By the 15th of March, therefore, the three parties named had entered into partnership by written agreement for the carrying out of the contract for the construction and equipment of the Orleans & Jefferson Railway. Thereafter, about March 19th, Lawrence and Costello came to New Orleans, and the latter was introduced to Castleman, the president of the Orleans Company; to Grunewald, a director of that company; to Reddy, who shortly afterwards, as the representative of the plaintiffs, made the contract here sued on; and to a number of other persons,—as Lawrence's partner, and as a member of the International Construction Company, in the matter of building and equipping the Orleans & Jefferson Railway. The evidence leaves no room for doubt that when Costello came to New Orleans on or about March 19th the question whether he and Burke and Lawrence would form a partnership had been settled by a written contract, signed after they had made all the inquiries that they thought proper to make; and the position which Costello and Burke now assume—that Costello came here to make an investigation in order to enable them to determine whether they would form such a partnership or not—does not accord with the facts, nor, as we shall see, does it accord with their subsequent representations and conduct. They claim that when Costello

returned to Cincinnati they had an interview with Lawrence upon the evening of March 23d, and entered into a new contract, whereby it was stipulated that all former agreements as to the New Orleans work should be considered void, but that they would advance \$750, so as to enable Lawrence to go to New York and borrow the money called for by the contract with the Orleans Company, and, if he succeeded in doing so, that they would procure for him the bond of \$15,000 in favor of the Orleans Company required by that contract, and would render their services in the capacity of employees in carrying out said contract, and that in consideration thereof there were to be delivered to them one-half of the cash and securities that Lawrence might receive, after paying expenses, but that said contract should be executed by and in the name of the International Construction Company, and that neither Costello nor Burke, nor the firm of Costello & Burke, nor the Queen City Construction Company, should be authorized or required to sign any paper obligating them, or either of them, in any amount, or for any purpose connected therewith; and there is in the record an instrument purporting to witness such a contract, and to have been signed March 23, 1899, by the International Construction Company, the Queen City Construction Company, Lawrence, Costello, and Burke. This instrument also contains the stipulation that "a bookkeeper or accountant, satisfactory to Costello and Burke, shall be placed in charge of the New Orleans office of the International Construction Company, and the payment and accounts of the entire venture shall be under the supervision of said accountant, and at all times accessible to Costello and Burke." Both Costello and Burke were examined at great length, and they testified, without qualification, that this contract was entered into at the Stag Hotel, in Cincinnati, upon the evening of March 23, 1899. The impression conveyed by them in their examination in chief, and, for the most part, in their cross-examination, is that the agreement was completed and signed at the Stag Hotel, as it now appears in evidence, upon March 23d. Towards the close of the cross-examination, however, Burke was asked the direct question, "When was the instrument signed?" and he replied that it was signed at his office on the 1st of April. We think this circumstance is worthy of some attention, because, whilst it may have happened just as the witness states, this is not the only instance in which papers presumably having an important bearing on the rights of the parties have been found to bear dates long anterior to their execution.

Proceeding to the consideration of subsequent events, notwithstanding that Lawrence did not succeed in borrowing the money required by and for the contract with the Orleans Company, Costello and Burke procured for him the bond of \$15,000 to secure the Orleans Company with respect to the execution of that contract, and in order to do so gave to the security

company furnishing it a bond of indemnity, signed by themselves, for a like amount; thus placing themselves in a position to bear the losses resulting from the enterprise, even though it was not so stipulated in the Stag Hotel contract. About April 4th Burke came to New Orleans, and Castleman, calling upon Lawrence at his hotel, found him in Lawrence's room, and was introduced to him by Lawrence in the following terms: "Mr. Castleman, let me introduce you to Major Burke, a member of our company, and our chief engineer," to which Burke responded by saying, "Yes," and by further saying: "Now you have seen the entire firm, or the principal members, and it is a good one. Mr. Lawrence is a financier, Mr. Castello is the contractor, and myself the engineer. \* \* \* It is a good firm, and we are going to build you a splendid piece of work." Burke remained in New Orleans some ten days or two weeks, and was joined, about April 14th, by Costello. During that time he occupied himself with such engineering work as the situation demanded, and, having supplied himself with the necessary data, returned to Cincinnati to place orders for certain of the material needed. Lawrence also went North, and Costello remained here, in charge of the business, until about June 20th. During his stay he represented the International Construction Company in all respects, and by his language and conduct at all times held himself out to be a member of that company. The letter headings, specifically referred to in the pleadings as informing the public that he and Burke were not members of the firm, when considered in connection with the other representations and the conduct of the parties, appear to us to convey the opposite meaning. They read as follows: "Home Office: Detroit, Mich. New Orleans: 508 Hennen Building. E. M. Costello, Manager. C. H. Lawrence, General Contracting Agt. M. D. Burke, Chief Engineer. International Construction Company, Contracting Engineers." It is true that Costello and Burke deny in their testimony that they made the representations attributed to them, or that they were introduced and held out as has been stated; but their denials are absolutely unsupported by that of any other witness, and are overwhelmed by evidence from every direction. One circumstance, among many, which has attracted our attention, is the following: Burke was charged with the ordering of some two car loads of "special work," consisting, as we understand it, of iron or steel for switches, curves, frogs, etc., and he placed the order with the Weir Frog Company, a Cincinnati concern, with which he seems to have been friendly. He testifies that he dealt directly with Mr. Abby, the engineer of the company, and that he gave the order merely as an employee of the International Construction Company, and not as a member, and that he in no way guaranteed the bill, or made himself or the firm of Costello & Burke liable for it. He also testified that he is aware of the fact that Abby had

testified to the contrary. The testimony of Castleman, Zell, and Clark is to the effect that both Costello and Burke stated that they had made themselves responsible for the special work, and had actually paid \$1,000 on account of it from their individual funds. But a further refutation of Burke's testimony appears over his own signature. It became necessary to raise some \$12,000 to pay for the rails, and the money was obtained by Costello and Burke. In connection with their action in that behalf, they obtained an assignment from Lawrence of the contract with the Orleans Company, upon the face of which assignment it appears that Lawrence was entirely eliminated. There was, however, an understanding, which was reduced to writing by Burke in the form of a letter addressed to Lawrence, reading in part as follows: "404 Pike Building, Cincinnati, Ohio. C. H. Lawrence, the International Construction Company, Chamber of Commerce Building, Detroit, Michigan—Dear Sir: Costello left for New Orleans yesterday afternoon, and, allowing for a stop over in Birmingham, he will reach New Orleans on Friday morning. A little money was wired to Hall yesterday, to pay laborers and other pressing demands, and to signify something more than a mere promise that he was coming. The draft for rails is here paid. It was a close call for us, but we made it. \* \* \* Regarding the agreement between us, there was so much to do before Costello left that it was thought best that I should write you a letter stating the general terms, and that you should keep the letter in place of the formal agreement until that should be executed. It is this: That E. M. Costello and M. D. Burke having advanced their money and pledged their credit to secure the rails, special work, car barn, and other property necessary for the building of the Orleans and Jefferson Railway Company, \* \* \* that, in consideration of such advances, C. H. Lawrence, for himself and for the International Construction Company, does, on June 24th, 1899, assign all his or its interests in said contract to said Costello and Burke, yet, notwithstanding said assignment, said three individuals agree to act unitedly in carrying to completion the original agreement with the Orleans and Jefferson Railway Company; said Costello and Burke agreeing to relieve said Lawrence of so much of the work at New Orleans as they can; and neither individual being empowered, after said date, to pledge any of the securities to be received for the said work or to obligate either of the persons, but all to work for the best interests of the three, and at the completion of the work the net profit, if any, arising from said contract, to be divided equally between E. M. Costello, M. D. Burke, and C. H. Lawrence. This agreement between said three individuals to be kept strictly private, each agreeing with the other two not to use it in any business way without the knowledge and consent of the other two parties to this agreement," etc. Of course, Lawrence must have known whether Costello and



Burke had advanced "their money and pledged their credit to secure the rails, special work, car barn, and other property necessary for the building" of the road. And the statement that they had done so would hardly have been made to him as a reason why he should ostensibly assign the contract to them, and really reduce his interest in the prospective profits from one-half to one-third, unless that statement was true. We must assume, therefore, that it was true, and that the testimony of the witnesses who swear that the same statement, in substance, was made to them, or in their presence, was equally true.

There is a great deal more testimony and there are a great many more circumstances disclosed by the record bearing upon the point at issue, and leading to the same conclusion, but which it would unnecessarily lengthen this opinion to consider, or even to recapitulate. No one doubts that partnership is a matter of intention, or that a share of profits may be given in lieu of salary or wages without making the recipient a partner, or liable as a partner. This latter doctrine was recognized, not only before the decision in *Cox v. Hickman* (in 1860) 8 H. L. Cas. 268, but before and after the decisions in *Grace v. Smith*, 2 W. Bl. 998, and *Waugh v. Carver*, 2 H. Bl. 235, which had been rendered nearly a century before, and which were overruled by *Cox v. Hickman*. The question in any given case is, what is the intention of the parties? If, by their representations, dealings, and conduct, it appears that they have agreed to everything that, as a matter of law, is necessary to constitute a partnership, and that by reason of the rights which they have secured to, and the obligations which they have imposed upon, themselves, they occupy towards each other the relation of principals, and really share the profits of the business in which they are engaged in that relation, and not as employers and employees, it must follow that the business is theirs, and that they are liable for the obligations incurred for its purposes for that reason; and the disclaimer in their contract of their intention to enter into partnership, and the bald assertion, thus contradicted, that they occupy or intend to occupy the relation of employers and employees, is not conclusive as to third persons. Upon the facts as presented, we may properly apply to the particular litigants here concerned the following language from the opinion of Sir George Jessel, M. R., in a case in which *Cox v. Hickman* and other leading English cases involving the law of partnership were exhaustively reviewed, to wit: "It was said, and said with considerable force, by Mr. Chitty and Mr. Mathew, that they never intended to be partners. What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they intended to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend

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to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners. \* \* \* It is an elaborate device—an ingenious contrivance—for giving these contributors the whole of the advantages of partnership without subjecting them, as they thought, to any liabilities. I think the device fails, and that, looking at the law as it stands, I must hold that they are partners, and liable for the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts." *Pooley v. Driver*, 5 Ch. Div. 458.

4. The contract upon which the plaintiffs sue resulted from a written proposition addressed by Reddy, the manager of the Cameron Mills, to the International Construction Company, dated March 24, 1899, and accepted in writing upon the 29th of the same month. The proposition contained the following stipulation: "Settlement to be made as soon as shipment is completed, on terms as follows: One-half of the entire amount in cash, and balance (less freight as per expense bills) to be paid in first mortgage bonds of said railroad at market value or price of said bonds at time of settlement." The contract called for 100,000 feet of "pecky" cypress, 25,000 ties, and a number of pieces of timber for bridges and other work; and the evidence shows that the whole of it has been delivered, with the exception of 695 ties, the price of which is not claimed. It is shown, however, that six car loads of ties had been shipped prior to the bringing of this suit, that the defendants had failed to take them, and that Costello had notified Reddy to temporarily discontinue shipments. And it was at this juncture that Reddy, upon making inquiries at the office of the Orleans Company, learned that the ties previously shipped had been estimated for, and that the money to pay for them had been turned over to the Construction Company, and used for some other purpose. The efforts of Lawrence to borrow money upon the bonds of the Orleans Company, as he had undertaken to do, had, in the meanwhile, proved unsuccessful; the work of building the road had been suspended; and the evidence justifies the conclusion that the scheme was a failure. Whether it would have been successful under any circumstance is a question. But its chances of success appear to have been effectually destroyed by a blunder, for which, though Lawrence was perhaps mainly responsible, the Orleans Company was not altogether blameless. It appears that there had been a previous issue of bonds secured by first mortgage, and, although most of them were under the control or within reach of the company, they had not been called in when the attempt was made by Lawrence to float the second issue upon the New York market as first

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mortgage bonds. The president of the Orleans Company went to New York as soon as he was informed of it, and explained the situation as best he could; but it was a mistake that ought not to have occurred, and it had the effect of shaking the confidence of the capitalists from whom it was hoped that the money might be obtained to such an extent that, considering the character of the security offered, we are not persuaded by the evidence before us that anything more could have been done. This being the case, and the material which had been delivered having been placed beyond their reach, and, though wholly unpaid for, so far as plaintiffs were concerned, the price received by the Construction Company for the same having been diverted to other use, we think that plaintiffs' suit and attachment against the Construction Company and its members was fully authorized, and that there was error in the judgment of the court *a qua* dismissing the same as to Costello and Burke and awarding them damages against the plaintiffs. Plaintiffs' contract contemplated that they should be paid half cash and half in the bonds of the Orleans Company at their market value, and that from the proportion due in bonds there should be deducted the bills for freight, which were to be paid by the Construction Company. This arrangement was predicated upon the assumption that the Construction Company would do the work necessary to entitle it to the bonds, and to give those bonds a market value; and as the Construction Company has failed in that respect through no fault of the plaintiffs, the latter, we think, are entitled to a judgment in money based upon the contract price of the goods actually delivered by them, less the freight charges paid by the Construction Company. The amount of those charges we are unable to ascertain from the record, and we think that justice requires that the rights of the members of the Construction Company with respect thereto should be reserved. For the purposes of the plaintiffs' claim it is, perhaps, unimportant whether the rails which have been seized belong to the Construction Company or to Costello and Burke, since, although a contracting firm is an ordinary partnership under the law of this state, the construction company is a juridical personage, the character of whose liability is to be determined, in the absence of proof of a special law in the state of its origin, by the law merchant; and by that law the partners are liable in *solido*. Nevertheless, as the question has some bearing in another direction it will be considered.

5. It appears that the president of the Orleans Company informed Lawrence that the Illinois Central Railroad Company had the rails in question for sale; but, if the Orleans Company had any contract or option giving it a preference in the matter of the purchase of the rails, it has not been established. Lawrence bought the rails, at \$17.50 per ton, for the Construction Company, and the Illinois Central Railroad Company shipped them to New Orleans for delivery

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when paid for, retaining the bills of lading in its possession. Upon June 21, 1899, Lawrence wrote, from Detroit, to Costello, at Cincinnati, in part as follows: "I am very fearful of the Ill. Cent. R. R. Co. pulling the rails away \* \* \* unless we can meet this draft of \$12,100 which I had Cliff to draw on us here in order to hold the rails there as long as possible. What I want to know is whether there is not some way that you can arrange in Cincinnati to borrow this sum of money for a short time, and to take the rails as security. We could sell the rails to-day in New Orleans for two or three dollars more a ton than we paid for them. If these rails get away, we cannot replace them short of \$22.00 or \$23.00 per ton, and then it will take quite a time to get them down there. The idea is simply this: The security is worth a great deal more than the loan which we have to have, and everything can be smoothed out if you can arrange the matter. \* \* \* I wish you would telegraph me upon receipt of this, and after conference with Major Burke, and see if there is not some way we can whip the devil around the stump, and save these rails. We accepted the draft, and it lays at the American Express Co.'s office here awaiting payment next Monday. Kindly consider this letter addressed to Major Burke as well as yourself, and let me hear from you." In response to this appeal, made to him not as an employee but as a member of the Construction Company, Costello raised \$7,000, which was deposited in the Atlas National Bank, and he and Burke borrowed from that bank, upon a note signed by them and by Mrs. Costello, the further sum of \$5,200 which was needed to make up the amount necessary to pay for the rails, and which was similarly deposited. The draft for the price of the rails, amounting, with interest and charges, to \$12,180.44, was then paid by the bank, and the bills of lading for the rails, which, with the rails themselves, were in New Orleans, were turned over to Costello and Burke, who retained possession of them until September 13th following,—more than two months after the rails had been seized in this suit,—and then delivered them to the bank in connection with a written act of pledge, which was then executed. There were various transactions between Lawrence and Costello and Burke at that time, which we consider it unnecessary to go into in detail. Among others, an assignment from the former to the latter, dated June 24th, of the contract with the Orleans Company, which the assignees now repudiate as having been inoperative. Later on, in September or October, there was another such assignment, which specially included the rails, and which was given the date June 27th, and is also repudiated. Before the rails were paid for, Costello and Burke inquired, by wire, of the Orleans Company, whether, if they made the payment, they would be allowed a lien on the rails. After they were paid for, and had been seized in this case, Costello and Burke executed the act of pledge to the bank, in which it is recited,

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as showing the character of their interest in the rails, "that the said Costello and Burke having agreed to pay for the same on the pledge or security of said rails and splices and the indorsement and delivery of the bills of lading for the same," etc. Upon the whole, the evidence convinces us that the money to pay for the rails was advanced, so far as Costello and Burke were concerned, for account of the Construction Company, and that when the payment was made the title to the property vested in that company, and it does not show that it has ever been divested.

6. The Atlas National Bank alleges in its intervention that the rails had been sold by the Illinois Central Railroad Company to the Construction Company, and, the latter having failed to pay for them, that they were sold to Costello and Burke, and that at their request it (the bank) paid the price, to wit, \$12,180.44, on condition that the bills of lading should be delivered to it, "to be held as security for the repayment of that sum"; and that the said bills were, as signed, transferred and delivered to it by Costello and Burke to secure the repayment of said advances, "whereof there is still due and owing" the sum of \$5,200 and interest. The allegations that the Illinois Central Railroad Company sold the rails to Costello and Burke, and that the bank paid for them on condition that the bills of lading should be delivered to it to secure the whole of the purchase price, must have been made in error. The president of the bank testifies that the \$5,200 was advanced to Costello and Burke on condition that it should be used for the payment of the rails, and on the further condition that the Illinois Central Railroad Company should turn over to it, or hold subject to its order, the bills of lading for said rails, which bills of lading were pledged to it by Costello and Burke to secure the repayment of the money so advanced. He further testifies that "Costello and Burke were authorized to go to New Orleans, and receive, for the Atlas National Bank, the bills of lading covering the rails paid for by the advance of \$5,200, and under no circumstances to surrender the bills of lading unless cash in hand was paid for the rails." He further testifies that the original agreement of June 27th, when the \$5,200 was advanced, was oral, and that it was reduced to writing in September, 1899, when Costello and Burke returned from New Orleans, and delivered to the bank the bills of lading for 27 cars of rails, which they had previously received from the Illinois Central Railroad Company. There is annexed to this testimony the act of pledge in favor of the bank, executed by Costello and Burke, and dated September 13, 1899, which apparently includes not only bills of lading for the rails, but also bills of lading for two cars of special work shipped by the Weir Frog Company to the International Construction Company; and it may be remarked in this connection that, although Costello and Burke claim and testify that they had no concern with the special work

save as employees of the Construction Company, to which it was consigned, and although they and the bank claim that the rails were pledged to the latter, nevertheless it was by their order alone that six car loads of rails and the two car loads of special work, which had not been attached, were removed from here to Mississippi, after the other rails had been seized, and the Weir Frog Company obtained judgment against them in that state predicated upon a seizure of the property so removed. From the facts as presented, we are entirely unable to devolve any pledge in favor of the Atlas National Bank which will affect the rights of the plaintiffs under their attachment. When the \$5,200 was advanced, neither the Construction Company nor Costello and Burke were the owners of the rails, nor did they have the rails or the bills of lading in their possession. The rails belonged to the Illinois Central Railroad Company, and it held possession of them, subject to what may be called a past-due option in favor of the Construction Company to take them on paying the price. Assuming that Costello and Burke represented the Construction Company, the most that they could do was to promise that the rails should be pledged to the bank. But a promise to pledge gives no privilege on the thing promised. Succession of D'Meza, 26 La. Ann. 35. When the price was paid, the rails belonged to the Construction Company, of which Costello and Burke were members; and the delivery to them and their retention of the bills of lading was not such a delivery as to constitute a pledge in favor of the bank, for they were the debtors, and not third persons. Succession of Lanaux, 46 La. Ann. 1036, 15 South. 708, 25 L. R. A. 577; Civ. Code, art. 3162. Nor did the delivery of the bills to the bank in September,—two months after the rails had been attached,—or the written instrument which was then executed constitute such a pledge, in so far as the attaching creditors were concerned, since the bank cannot be said at that time to have acquired the bills as an innocent third holder without notice. We think, however, that, inasmuch as the claim of the bank is not contested by the Construction Company or by Costello and Burke, there is no reason as to them why it should not be recognized; and, as Costello testifies that the rails are now worth about \$30 a ton, it may be that the bank will get its money.

7. The Illinois Central Railroad Company claims for demurrage or storage by reason of the fact that the rails remained on its cars for 29 days after notice to remove them. This claim does not appear to be seriously disputed, and is shown to be reasonable. The company is, however, charging for 22 cars, when, from the return on the writ of attachment, it seems that only 21 cars were included in the seizure. The amount allowed by the district court should therefore be reduced from \$638 to \$609.

8. We are unable to find any sufficient legal foundation for

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the claim of the Orleans & Jefferson Railway Company to the rails. They constituted part of the material that the Construction Company attempted to assemble for the purposes of its contract, but the Orleans Company never acquired any rights in or to them, and can no more control the disposition which the Construction Company may choose to make of them than it could have controlled the disposition of the working force of that company. The injunction which was issued at the instance of the Orleans Company to restrain the Construction Company from removing the rails was therefore unauthorized, and was properly dissolved by the district court. Upon the other hand, holding, as we do, that Costello and Burke were not the owners of the rails, they cannot be allowed to recover damages in the matter. Such damages, if any are due, are recoverable only by the Construction Company.

For these reasons it is ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it rejects the demand of the plaintiffs as against the Orleans & Jefferson Railway Company, Limited, and in so far as it rejects the demands in reconvention and by way of intervention of said Orleans & Jefferson Railway Company, Limited, save as to the damages allowed, which are reduced to \$250, and that it be affirmed in so far as it condemns the International Construction Company and rejects its demand in reconvention; that it be amended by reducing the amount allowed to the Illinois Central Railroad Company to \$609, and by holding and decreeing that the Atlas National Bank of Cincinnati be paid the amount of its claim, if the fund proves sufficient, from the proceeds of the property attached, after payment of the amounts herein allowed in favor of the Illinois Central Railroad Company and the plaintiffs, respectively; and that said judgment be annulled, avoided, and reversed in all other respects. And, proceeding to render such further judgment as should be rendered in the case, it is ordered, adjudged, and decreed that there now be judgment in favor of the plaintiffs, Flora B. Cameron, W. W. Cameron, R. H. Downman, and F. A. McDonald, testamentary executors of William Cameron, deceased, and against the defendants Charles H. Lawrence, E. M. Costello, and M. D. Burke, in solido, in the full sum of \$12,207.38, with legal interest from judicial demand until paid. It is further ordered and adjudged that the writ of attachment herein issued be maintained, and that the amount of this judgment in favor of the plaintiffs be paid from the proceeds of the property attached in preference to any other claims save that of the Illinois Central Railroad Company as herein recognized and allowed, subject, however, to the condition that the right is reversed to the defendants, or either of them, to have the amount for which this judgment is rendered reduced by the amount that they or the International Construction Company may have paid as freight upon the ties and other material shipped by the plaintiffs to said com-

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pany under the contract sued on. It is further ordered, adjudged, and decreed that the demands set up by said E. M. Costello and M. D. Burke and by Costello & Burke by way of reconvention and intervention be rejected. It is further ordered and adjudged that for all the purposes of this suit the property attached be held to belong to the International Construction Company, composed of Charles H. Lawrence, E. M. Costello, and M. D. Burke, but that the rights of the said parties inter sese with respect to the same and as members of said company be reserved. It is further ordered and adjudged that the costs of the lower count be paid by the International Construction Company and by Costello & Burke, save those incurred by reason of the intervention of the Orleans & Jefferson Railway Company, which shall be paid by that company, and that the costs of the appeal be paid by Costello & Burke, the Orleans & Jefferson Railway Company, the Atlas National Bank of Cincinnati, and the Illinois Central Railroad Company.

STEWART v. WALTERBORO &amp; W. RY. CO.

*(Supreme Court of South Carolina, April 21, 1902.)*

[41 S. E. Rep. 827.]

**Consolidation—Liability for Tort Previously Committed.\***

Under Rev. St. §§ 1615-1618, providing that it shall be lawful for any railroad company organized under the law of the state to consolidate with another road, but all rights of creditors shall be preserved unimpaired, where two railroad companies consolidate, a corporation so consolidated is not relieved of its liability for a tort previously committed.

**Same—Same—Pleading—Inserting Name of Defendant.**

Where an action for tort is commenced against a railroad company, which, after commission of the tort, but before action brought, has consolidated with another, the complaint cannot be amended by inserting the name of the new corporation for that of the consolidating company.

McIver, C. J., dissenting.

Appeal from common pleas circuit court of Colleton county.

Action by Ben Stewart, administrator of Lisbon Stewart, against the Walterboro & Western Railway Company. From an order dismissing the complaint, plaintiff appeals. Reversed.

C. C. Tracy and Griffin &amp; Padgett, for appellant.

Howell &amp; Gruber, for respondent.

GARY, J. The appeal herein raises two questions: (1) Whether his honor the circuit judge erred in ruling that the defendant, the Walterboro & Western Railway Company, was dissolved upon its consolidation with the Green Pond, Walterboro & Branchville Railway Company, thereby rendering it necessary that the action should be brought against the new consolidated corporation; and (2) whether there was error in

\*See note, 11 Am. &amp; Eng. R. Cas., N. S., 597.



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refusing the application for leave to amend. The complaint alleges that in April, 1897, Lisbon Stewart, the plaintiff's intestate, was injured through the negligence of the defendant, and died on the 25th October, 1898, in consequence of such injury. Letters of administration were granted on the 10th October, 1900, and soon thereafter this action was commenced. The defendant in its answer interposed two defenses, the first not being involved in this appeal. The second defense alleges that in February, 1900, the Walterboro & Western Railway Company and the Green Pond, Walterboro & Branchville Railway Company, each being a domestic corporation owning and operating a railroad (the roads owned and operated by the said corporations forming a continuous line with each other, and all being within this state), were consolidated under the general statute law of this state; the new consolidated corporation being the Green Pond, Walterboro & Branchville Railroad Company. The defendant moved for judgment on the pleadings dismissing the action, which was granted. The plaintiff asked leave to amend by striking out the name of the Walterboro & Western Railway Company, and inserting instead thereof the name of the Green Pond, Walterboro & Branchville Railroad Company. His honor refused the application because he did not think he had authority to allow the amendment, under the case of *Lilly v. Railroad Co.*, 32 S. E. 142, 10 S. E. 932.

We will first consider whether the circuit judge erred in ruling that the action could not be maintained against the defendant. The Revised Statutes contains the following sections:

"Sec. 1615. It shall be lawful for any railroad company organized under the laws of this state, and operating a railroad either wholly within or partly within and partly without this state, under authority of this and any adjoining state, to merge and consolidate its capital stock, franchises and property with those of any other railroad company or companies organized and operated under the laws of this or any other state, whenever two or more railroads of the companies proposed to be consolidated shall form a continuous line of railroad with each other or by means of any intervening railroad. \* \* \*"

"Sec. 1617. Upon the making and perfecting the agreement and act of consolidation, and filing the same or a copy with the secretary of state, as provided in the preceding section, the several corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possessing within this state all the rights, privileges and franchises, and subject to all restrictions, disabilities and duties of each of such corporations so consolidated."

"Sec. 1618. Upon the consummation of the act of consolidation as aforesaid, the rights, privileges and franchises of

each of said corporations, parties to the same, and all the property, real and personal and mixed, and all the debts due on whatever account, as well as stocks, subscriptions and other things in action, belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate either by deed or otherwise under the laws of this state, vested in either of such corporations, shall not be deemed to revert, or to be in any way impaired by reason of this article; *but all rights of creditors and all liens upon the property of said corporations shall be preserved unimpaired; and the respective corporations may be deemed to continue in existence to preserve the same;* and all debts and liabilities and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." (Italics ours.)

We will first determine whether the word "creditor" comprehends the claim for damages set forth in the complaint. In 8 Am. & Eng. Enc. Law (2d Ed.) 238, it is said: "In a strict, literal sense, a creditor is one who voluntarily trusts or gives credit to another for money or other property; but, in a more general and extensive sense of the term, a creditor is one who has a right to recover money of another on any account whatever. Thus, in statutes avoiding sales and conveyances in fraud of creditors, the term 'creditors' has been held to include persons entitled to damages for torts." In the note on page 240 of that volume, we find the following: "A new York statute provided that, upon the dissolution of a corporation, its directors should, unless other persons were appointed, be the trustees of the creditors and stockholders. It was held that the word 'creditors' included all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted, and therefore one having a cause of action for the loss of services of his son, who had been injured while in the employment of the company, was a creditor,"—citing *Marstaller v. Mills*, 143 N. Y. 398, 39 N. E. 370. The note on page 573, 4 Am. & Eng. Enc. Law (1st Ed.), is as follows: "The term 'creditor' does not mean simply a person to whom a debt is due. That is but its usual meaning. But it further denotes a person to whom any obligation is due, and this is its unusual meaning. A creditor, according to the definition of Bouvier, 'is he who has the right to require the fulfillment of an obligation or contract.' In this large sense, it means more than the person to whom money is owing. Webster's definition of the word is a 'person to whom a sum of money or other thing is due by obligation, promise, or in law.' *Beasley, C. J., in Insurance Co. v. Meeker*, 37 N. J. Law, 300."

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The author also cites the following from *Stanly v. Ogden*, 2 Root, 261, to wit: "In a strict, legal sense, a creditor is he who voluntarily trusts and gives credit to another for a sum of money or other property, upon bond, bill, note, book, or simple contract. In a more liberal sense, he is a creditor who has a legal demand upon another for money or other property which has got into the hands of another without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for, upon the ground of an implied promise. In a more general or extensive sense of the term, he is a creditor who has a right by law to demand and recover of another a sum of money on any account whatever." These authorities are in harmony with our cases of *Lowry v. Pinson*, 2 Bailey, 324, 23 Am. Dec. 140, and *Flenniken v. Marshall*, 43 S. C. 80, 20 S. E. 788, 28 L. R. A. 402. Having reached this conclusion, it necessarily follows from the express language of the statute which we have italicized that the defendant was not dissolved as a corporation, in so far as the rights of this plaintiff are involved, and his honor erred in ruling otherwise. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 434, 23 S. E. 363.

We proceed to consider whether there was error in refusing the application for leave to amend. The case of *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 932, sustains the ruling of the circuit judge. The writer of this opinion takes occasion to say that he is not satisfied with the doctrine announced in that case, as it is out of harmony with the liberal spirit of amendment manifested by the Code. It is, however, binding as an authority until the court reaches a contrary conclusion, and disposes of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

McIVER, C. J., dissents, believing that the action should have been brought against the new corporation.

*CUSHING v. CHAPMAN et al.*

(*Circuit Court, E. D. Missouri, E. D. May 5, 1902.*)

[115 Fed. Rep. 237.]

**Railroad Bonds—Equitable Assignment.**

Plaintiff's assignor, in consideration of the assignment of a judgment against a railroad company, received a contract by which another railroad company agreed to transfer and deliver to such assignor its first mortgage bonds, to be thereafter issued, to the face value of such judgment, the bonds to be delivered as soon as practicable, and as early as any issue of bonds were delivered to any one else in the work of constructing the railway. The judgment was assigned, and thereafter all of the bonds authorized by the issue were issued, and transferred to other parties, under separate contracts, without the delivery of any bonds to plaintiff's assignor, who assigned a part of his claim therefor

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to plaintiff: *held*, that such contract was a mere promise to pay a debt out of a particular fund or mass of property to be thereafter created, and did not constitute an equitable assignment thereof, enforceable against the bonds issued.

**Same—Charge—Equitable Lien.\***

Such contract did not create a charge or equitable lien either on the entire issue of bonds so issued in the hands of subsequent holders, nor on any particular bonds issued separately to other parties under separate contracts.

**Same—Implied Contract.**

Where a railroad company contracted, in consideration of the assignment of a judgment, to deliver to the judgment creditor certain bonds of such railroad to be thereafter issued, but the contract did not specify any particular bonds to be delivered, nor otherwise give such judgment creditor any prior right to his aliquot part of the total issue, and the company failed to perform its contract, such judgment creditor had no enforceable equitable interest in the bonds issued to other parties, but was only entitled to recover the value of the bonds in money under an implied contract.

**On Demurrer.**

In 1893 the Tennessee Central Railroad was organized under the laws of Tennessee for the construction and operation of a railroad between designated points. Newton & Co. contracted for the construction of a portion of this road, and filed a mechanic's lien thereon to secure an account amounting to \$47,000 for such work. The railroad becoming insolvent, under a creditors' bill filed in a court of chancery in Tennessee was placed in the hands of a receiver. Newton & Co. obtained judgment for the enforcement of their mechanic's lien in one of the state courts. This judgment was presented to the chancery court administering the property under the receivership, which recognized the claim, and fixed the order of its payment. Under the decree of foreclosure the court fixed an upset price, to wit, \$125,000, which the railroad property was to bring at the foreclosure sale. A new company was chartered by the parties interested in the Tennessee Central Railroad, which was incorporated as the Tennessee Central Railway, for the purpose of buying in the property at foreclosure sale, and building and operating the old line, with extensions to other points. The bill alleges that, by conventional arrangement between the syndicate representing the new railway and Newton & Co., it was agreed that if Newton & Co. would not become competing bidders at the foreclosure sale, the new company would take care of their claim out of the first mortgage bonds to be issued by the new company for construction purposes to the extent of 47 bonds of the face value of \$1,000 each. After the purchase of the railroad at foreclosure sale, and the execution of the deed of conveyance therefor, said agreement between the Tennessee Central Railway and Newton & Co. was recognized, and the contract was reduced to writing, the controlling pro-

\*See *Carpenter v. Greene County* (Ala.), 23 Am. & Eng. R. Cas., N. S., 190; *First Nat. Bank v. Wyman* (Colo.), 23 Am. & Eng. R. Cas., N. S., 277.

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vision of which is set out in the opinion of the court. Afterwards the Cumberland Construction Company was organized for the purpose of constructing the railroad, and bonds, secured by a first mortgage lien on the railroad property, were issued to the extent of \$1,550,000, and placed with the Mississippi Valley Trust Company, defendant herein, to be delivered by them from time to time for the purpose of raising money in the construction of the road. The bonds were afterwards delivered in part to Naugle, Holcomb & Co., subcontractors, for work done in the construction of the road, and the others were put up as collateral security for moneys borrowed from some of the defendants, to be used in the work of construction, or sold and transferred to other parties for money borrowed for such purpose. The said Tennessee Central Railway failed to carry out its contract with Newton & Co. in not delivering to them the 47 bonds. Newton & Co., becoming insolvent, assigned their interest to different creditors. Forty of the bonds in question, the complainant alleges, were so assigned to him. He brings this suit against said Mississippi Valley Trust Company and all the parties who received any of said bonds as aforesaid who are residents of this jurisdiction to enforce his alleged equitable claim for 40 of said bonds. One Spalding, a citizen of Chicago, Ill., who bought from Naugle, Holcomb & Co. \$300,000 of the bonds received by them for construction work, and a large number of the other bonds so obtained as aforesaid by some of the parties who advanced money as above stated, not being within the jurisdiction of this court, is not made a party hereto. To this bill the defendants have demurred.

George A. Mahan and Wm. H. & Davis Biggs, for complainant.

Boyle, Priest & Lehmann, for defendants.

PHILIPS, District Judge (after stating the facts as above). Without undertaking to recapitulate all the facts presented by the amended bill, or discussing all the questions raised by the demurrer, the court will briefly state the grounds of its conclusion. The theory of the bill, as contended by counsel for defendants, is that the Tennessee Central Railway, by its contract with Newton & Co., under whom the complainant claims as assignee, made an equitable assignment and appropriation of 47 bonds, of the denomination of \$1,000 each, to be issued by said railway, to be secured by a first mortgage on the railway property. The contention of complainant's counsel is that under the averments of the bill Newton & Co., by said contract, "obtained an equitable estate or title to forty-seven of said bonds to be first thereafter issued, and as soon as issued the railway company held them in trust for Newton & Co." The said 47 bonds, the bill discloses, were to be a part of a total issue of \$1,550,000, of equal dignity, secured by a first mortgage on the railway's

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property, as the full limit of such issue. This claim depends and turns upon the third paragraph of the written contract between the railway and said Newton & Co., as follows:

"In consideration of said sale and assignment [that is, the assignment of a certain judgment Newton & Co. held against the Tennessee Railroad Company, and assumed by the Tennessee Railway], the party of the second part [the Tennessee Railway] agrees to transfer and deliver to the parties of the first part [Newton & Co.] its first mortgage bonds, to be hereafter issued in the construction of its railway, to the amount of said decree, one dollar of bonds, at their face value, for each dollar of the amount of said decree. The delivery of said bonds to be made as soon as practicable and as early as any issue of bonds are delivered to any one else in the work of constructing said railway."

In its fullest import and broadest construction this is an executory contract or agreement to thereafter deliver to Newton & Co. 47 of the first mortgage bonds to be thereafter issued by the railway "in the construction of its railway," and "to be made as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway." I understand the law to be that a mere promise, however clear or solemn in character, to pay a debt out of a particular fund, does not operate as an equitable assignment of the fund, and especially so when it is a part of a mass of property to be thereafter created. To constitute such an equitable assignment, there must be such an actual or constructive appropriation of the fund or subject-matter "as to confer a complete and present right on the party meant to be provided for, although the circumstances do not admit of its immediate existence"; that, if the holder of the fund could retain control over it, with the power, *sua sponte*, on his part, to satisfy the promise in cash, it is fatal to an equitable assignment. *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Bank v. Beal* (C. C.) 54 Fed. 577; *Badgerow v. Trust Co.* (C. C.) 74 Fed. 925; *Ex parte Tremont Nat. Bank*, 24 Fed. Cas. 184; *Foss v. Cobler*, 105 Iowa, 731, 75 N. W. 516; *Stearns v. Insurance Co.*, 124 Mass. 63, 26 Am. Rep. 617; *Williams v. Ingersoll*, 89 N. Y. 518; *Hicks v. Brick Co.*, 94 Va. 746, 27 S. E. 596; *Hassack v. Graham*, 20 Wash. 192, 55 Pac. 36.

There is also, from the facts apparent on the face of the bill, an insuperable difficulty in fixing the alleged equitable lien upon any specific bonds issued by the Tennessee Central Railway, and turned over, for a valuable consideration, to different parties at different times, to raise money for the construction of the railway. It appears from the bill that \$300,000, par value, of bonds issued by Tennessee Central Railway, were delivered to Naugle, Holcomb & Co., as subcontractors, for work done by them in constructing the railway; and the contract made between the complainants'

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assignor and the Tennessee Railway contemplated that such bonds might be issued and delivered to the contractor, as it also contemplated that first mortgage bonds might also be issued and delivered "in the work of constructing said railway." It also appears from the face of the bill that the other bonds issued by the railway were put up as security and delivered to the Mississippi Valley Trust Company in trust to secure \$1,550,000, borrowed for the purpose of constructing the railway. The bonds issued to Naugle, Holcomb & Co., together with other bonds, issued and delivered by the railway as security for moneys borrowed in the work of construction, to Chapman and others, the first lenders, were transferred in part to one Spalding, of Chicago, Ill., who is not a party to this suit. Is the complainant entitled to enforce an equitable lien upon all of the \$1,550,000 of first mortgage bonds issued by the railway? Or is he entitled to have his alleged lien enforced upon any particular numbers of said bonds, and, if so, upon which particular numbers? Under the contract the complainant's assignor was only entitled to the delivery of the bonds "as soon as practicable, and as early as any issue of bonds are delivered to any one else in the work of constructing said railway." Was he entitled to the first 47 bonds issued in kind? If so, who holds them? It does not appear that they are held by the defendants. If he was not entitled to have received the first 47 bonds issued, but was entitled to receive 47 bonds in order next to those issued and delivered to the first taker, which one of these defendants holds said 47 bonds? If this be the proper construction of his contract, and the limitation of his rights, upon what principle can any of the defendants who do not hold said 47 bonds be brought into this suit to be held here while the complainant is litigating and establishing his lien upon 47 bonds, unless the bonds are held in common by all the defendants? If the proper construction of the contract be that Newton & Co. became the equitable assignee of, or acquired equitable title to, 47 bonds, and the complainant is entitled to fix such charge upon the whole mass of \$1,550,000 of bonds issued by the railway, the court will have to make ascertainment of the number of bonds held by each taker upon which the equitable lien charged is to be enforced and make an equitable apportionment among all the purchasers of bonds who took with notice. As Spalding, who, the bill discloses, holds a large bulk of the bonds, is not a party to this suit, no decree made by the court could affect any bonds in his hands, or make any apportionment of the loss as to him. In this aspect of the case the court would have to proceed as to the defendants before it, and fix the alleged equitable lien or charge upon the bonds held by them, and make an equitable apportionment of the loss and burden among them pro rata. The learned counsel for complainant, anticipating this objection, in his brief asserts that, as all the takers of the bonds are, as to Newton & Co., tortfeasors, they are jointly and

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severally liable to answer for the injury to the extent of their several holdings. But under the allegations of the bill all the takers of the bonds issued by the Tennessee Railway are not joint wrongdoers. Naugle, Holcomb & Co., the contractors who did the work on the road, Chapman, and others, who made the first loan, and Van Blarcom and the National Bank of Commerce, who made the second loan, each took under separate, independent contracts, at different times, acting entirely independent of each other, without preconcert of action or common understanding. Therefore there can be no accountability of the several designated classes of takers of the several distinct numbered bonds, except for their own individual wrongful act, if any; and therefore the bill must be multifarious.

The bill, moreover, discloses that this complainant is the assignee of only \$40,000 of the claim of Newton & Co. against the Tennessee Central Railway; the remaining \$7,000 of the \$47,000 claim is outstanding in the hands of third parties not before this court. To which, then, of the 47 bonds, is this complainant entitled? If, under the contract, his assignor was entitled to have issued and delivered to them the first 47 bonds after those issued to Naugle, Holcomb & Co., is he to have the first 40 of the next 47? And, if so, which one of the defendants obtained and holds the particular 40 bonds? Furthermore, if the contract be construed to mean that the Tennessee Central Railway could proceed to issue its bonds "in the work of constructing said railway" up to the limit, leaving a margin of 47 first mortgage bonds for delivery to Newton & Co., in fulfillment of the contract, it would seem to follow that his specific lien, if he have any, could be enforced only against the party who took the last 47 bonds with knowledge that Newton & Co. were entitled to receive 47 of the whole number of first mortgage bonds issued. For it must be conceded that parties advancing money to the construction company for building the road, to be paid for by the issue of first mortgage bonds, would have had a perfect right to make such contract, and be entitled to receive first mortgage bonds within 47 of the whole number issuable; and, inasmuch as there would then have remained in the hands of the railway's trustee 47 first mortgage bonds, the complainant would have been compelled to look to them alone for recovery. In other words, the defendants who advanced to the construction company the money with which to construct the road, to qualify it to give a mortgage to secure the issue of bonds, had a perfect right to do so, and take the bonds as security, up to the point where the margin was left of 47 first mortgage bonds remaining undistributed. As all the first mortgage bonds issued for construction purposes, within the limitation, were of equal value and dignity, it was quite immaterial to Newton & Co. whether they received the first or last numbered 47 bonds. And as Newton & Co. had not contracted for any particular numbered bonds, I am unable to perceive how it can be main-



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tained that their contract created a charge or equitable lien upon the whole mass of bonds issued separately to other parties under separate contracts.

Counsel for complainant, also recognizing the rule respecting equitable assignments of a fund asserted in the first part of this opinion, seeks to avoid its force by saying that he is not seeking to enforce an equitable lien, "but is asking the court to protect his alleged equitable title or estate in the bonds in question, which he contends is enforceable in equity not only against the Tennessee Central Railway, but also against all subsequent creditors of the Tennessee Central Railway, and all other persons holding or claiming under the Tennessee Central Railway, as purchasers or otherwise, with notice of such title." In other words, that "he had an equitable estate in the bonds," and therefore these defendants "must answer for the resulting damage, provided they had notice of such title." This broad statement includes the further proposition that the contract gave to Newton & Co. an undivided equitable interest in the whole issue of \$1,550,000 of first mortgage bonds. But the contract does not say so. Newton & Co. were to receive 47 bonds out of a permissible issue of 1,500, and not before any other bonds were issued to any other person, but under terms and circumstances that indicated that a large number of such bonds would be issued by the railroad company to other persons "in the work of constructing such railway," and that this entire number might be issued as early as those to Newton & Co. Therefore Newton & Co. acquired no prior right to their aliquot part of the 47 bonds. Indeed, the contract was in no legal sense for the sale of specific personal property by the railway to Newton & Co. It was simply and purely a contract providing a method for the payment of a debt owing by the railway company to Newton & Co., which was out of the promissory obligations to be thereafter issued by the debtor, secured by a first mortgage lien on the railway property. And because the debtor did not keep his promise, but issued like obligations to pay other persons from whom it borrowed money to build the road, the disappointed creditor seeks to charge the bonds—the promises to pay—in the hands of such other creditors with the payment of his debt. I know of no precedent or rule of law supporting so broad a proposition. The provision of the contract for satisfying Newton & Co.'s debts for \$47,000 by delivering to them 47 bonds of the first mortgage class was one for the benefit of the debtor, to avoid paying in money, as the money would be needed in the construction of the road. On failure to so pay it could be liquidated in money. *C. Aultman & Co. v. Daggs*, 50 Mo. App. 280-289, and cases cited. And that was the implied contract, and, as far as these defendants are concerned, it was the complainant's remedy, provided all the bonds had been delivered by and had passed out of the hands of the trustee.

The demurrer to the bill is sustained.

## EVANS v. SOUTHERN RY. CO.

*(Supreme Court of Alabama, May 21, 1902.)*

[32 So. Rep. 138.]

**Misjoinder of Causes of Action—Negligence in Running over Stock and Breach of Contract Requiring Company to Fence Track.\***

A count in a complaint charging that defendant railroad company negligently ran over plaintiff's hogs, being in case, cannot be joined with a count in assumpsit, charging that the hogs were killed by defendant's train through the failure of defendant to comply with a contract with plaintiff requiring defendant to fence its track and maintain cattle guards.

**Injury to Stock—Contract Requiring Company to Fence Track—Presumption of Negligence.†**

An agreement by a railroad company with a landowner to fence its right of way and construct cattle guards, in consideration of a grant of such right of way, renders the company prima facie liable for the killing of stock of the landowner entering the track by reason of the failure of the company to maintain such fence and cattle guards.

**Same—Same—Breach—Pleading.**

A complaint which charges the killing of hogs by a railroad company as a result of a breach of a contract to maintain fences and cattle guards is not subject to demurrer, in failing to allege when the contract was first broken, as such contract is continuing, and breaches may be several and continuous.

**Same—Same—Same—Same.**

The failure of such complaint to allege that the contract was in writing does not render it subject to demurrer, though the contract is obnoxious to the statute of frauds if oral, but such objection can only be raised by plea.

Tyson, J., dissenting in part.

Appeal from circuit court, Hale county; John Moore, Judge.

Action by A. P. Evans against the Southern Railway Company for stock killed by defendant company. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action brought by the appellant, A. P. Evans, against the appellee, the Southern Railway Company. This suit was originally commenced in a justice of the peace court, and was carried by appeal to the circuit court. In the circuit court the plaintiff filed a complaint containing two counts. In the first count the plaintiff sought to recover the sum of \$30 for the killing of two hogs by a train operated on the defendant's railroad track, and averred in said count that the defendant "so negligently operated said locomotive and train of cars attached thereto that in consequence of the negligence

\*Georgia S. & F. Ry. Co. v. Wisenbaker (Ga.), 22 Am. & Eng. R. Cas., N. S., 186.

†Atchison, T. & S. F. R. Co. v. Billings (Kan.), 10 Am. & Eng. R. Cas., N. S., 740; Texas, etc., Ry. Co. v. Bigham (Texas 1896), 6 Am. & Eng. R. Cas., N. S., 791; Davis v. Florida Cent. & P. R. Co. (S. Car.), 5 Am. & Eng. R. Cas., N. S., 324; Alabama Midland Ry. Co. v. Gassett (Ga.), 5 Am. & Eng. R. Cas., N. S., 607; Western & A. R. Co. v. Robinson (Ga.), 23 Am. & Eng. R. Cas., N. S., 508; Central of Ga. Ry. Co. v. Howard (Ga.), 21 Am. & Eng. R. Cas., N. S., 15.

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of the defendant, its agents, servants, or employees, two hogs of the plaintiff were run over" by said locomotive or train of cars and were killed. In the second count, after averring that the plaintiff's two hogs were run over and killed by a train of cars operated on the defendant's track, the plaintiff then averred as follows: "That the defendant had contracted with him in construction of a right of way through and over this plaintiff's land, that they would keep said railroad fences on both sides through plaintiff's land, and keep and maintain cattle guards at the boundary of plaintiff's land; and plaintiff avers that defendant did construct such fences and cattle guards, but that the defendant negligently and carelessly allowed the said fences and cattle guards to get out of repair or become destroyed. And plaintiff avers that, by reason of such negligence and failure of duty on the part of defendant, plaintiff's hogs entered upon the right of way and railroad track of defendant." The defendant demurred to this complaint upon the ground that there was a misjoinder of counts, in that count No. 1 was *ex delicto*, and count No. 2 was *ex contractu*. This demurrer was sustained. After the demurrer to the complaint containing the two counts was sustained, the plaintiff filed another count, numbered 3, in which he averred the operation by the defendant of a train of cars along its road, and that said train of cars so operated by the defendant ran over and killed the two hogs belonging to the plaintiff. The third count of the complaint then continued as follows: "And plaintiff avers that the defendant had contracted with him, to wit, January 1, 1876, in consideration of a right of way through and over the plaintiff's land, that it would keep its said railroad track fenced on both sides through plaintiff's land, and to keep and maintain cattle guards at both ends or boundaries. And plaintiff avers that defendant did construct such fences and cattle guards in consideration of the grant of the right of way by plaintiff to defendant over plaintiff's lands, but that the defendant prior to October 25, 1899, failed and refused to keep the same in repair, and that, by reason of such failure and refusal to do and perform what they had contracted to do, two hogs of defendant entered upon the right of way of defendant, and were killed by defendant's engine and cars, to the damage of plaintiff \$30." The defendant demurred to this complaint upon the following grounds: "(1) Because said count fails to allege where said contract was made. (2) Because said count fails to allege whether said contract was in writing. (3) Because said count fails to allege when said contract was broken by defendant. (4) Because said count fails to state any cause of action against defendant. (5) Because said plaintiff in said count does not claim damages for a breach of said alleged contract, but claims damages for the killing of two hogs, and fails to state or allege any facts that would entitle the plaintiff to

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recover in this action." This demurrer was sustained. Thereupon the defendant filed another count of the complaint, numbered 4. Upon the objection to the filing of the count No. 4, and a motion by defendant to strike the same from the file, the court sustained said objection, and granted said motion. Thereupon the plaintiff declining to plead further, judgment was rendered for the defendant. The judgment entry contains several rulings upon motions made by the defendant, and to which rulings the plaintiff separately excepted. There is no bill of exceptions set out in the transcript. The plaintiff appeals, and assigns as error the several rulings of the trial court upon the pleadings.

Thos. E. Knight, for appellant.

F. L. Pettus and A. M. Tunstall, for appellee.

SHARPE, J. Count 1 of the complaint first filed in the circuit court was in case, and count 2 was in assumpsit. Those counts were improperly joined. *Morris v. Bank*, 122 Ala. 480, 25 South. 499, 82 Am. St. Rep. 95.

Count 3 was not subject to the demurrer. An agreement by a railroad company with a landowner to build and maintain fences and cattle guards in consideration of his grant of a right of way is prima facie binding on the company to pay the landowner for injuries to his animals entering on the track in consequence of the company's fault in failing to maintain fences in accordance with the terms of the contract. *Railway Co. v. Barnes*, 116 Ind. 126, 18 N. E. 459; *Railway Co. v. Sumner* (Ind. Sup.) 5 N. E. 404, 55 Am. Rep. 719; *Railroad Co. v. Kenney*, 82 Ky. 154.

While such a contract is continuing, breaches of it may be several and continuous. *Phelps v. New Haven & North Hampton Co.*, 43 Conn. 453. It is therefore unnecessary for a complaint, in declaring on the contract, to aver when the contract was first broken.

If the contract was not in writing, and is for that reason obnoxious to the statute of frauds, the objection is matter for plea, and not for demurrer. *Strouse v. Elting*, 110 Ala. 132, 20 South. 123.

Recitals in the minute entries are not proper evidence on appeal that exceptions were taken to rulings on the several motions assigned for error, and, there being no bill of exceptions, those assignments are without support.

Reversed and remanded.

TYSON, J., concurs in the result, but dissents as to the first point; being of the opinion that count 2 is in case, and that there was no misjoinder. *White v. Levy*, 91 Ala. 179, 8 South. 563; *Bank v. Jeffries*, 73 Ala. 191.

**SAPPINGTON v. CHICAGO & A. RY. CO.***(Court of Appeals at St. Louis, Mo., June 10, 1902.)*

[69 S. W. Rep. 32.]

**Killing Stock—Defective Cattle Guard—Proximate Cause.**

In a stock-killing case it appeared that plaintiff's mules got into the railway inclosure through an opening between a cattle guard and an adjacent wing fence. Afterwards the animals, apparently running in fright, passed over a public crossing and two other cattle guards a half mile distant from the place where they entered the railway grounds, and were killed by a train some distance beyond: *held*, that the defective condition of the cattle guard where the animals entered might be reasonably found to be the proximate cause of the killing of the animals by the train.

**Same—Same—Same.\***

If cattle enter the inclosure of a railway company's tracks by its neglect to perform a statutory duty in regard to fencing or cattle guards at the place where the cattle entered, it is no defense that the cattle were killed at a place on the track where no breach of duty is shown to exist.

**Same—Same—Knowledge of Defect.**

Where a defective condition of a structure is open to casual observation and is shown to have existed for several months, that lapse of time, without other proof, warrants the inference of notice to the party bound to maintain the same, and it therefore warrants a finding of negligence in failing to put the structure into proper condition.

**Same—Sufficiency of Cattle Guard—Instruction.**

Where the court instructs, at the request of defendant, that a cattle guard is sufficient within the meaning of section 1105, Rev. St. 1899, if it ordinarily, usually, or generally prevents cattle from getting on the track, defendant cannot complain of the instruction on appeal.

Appeal from circuit court, Audrain county; Elliott M. Hughes, Judge.

Action by S. F. Sappington against the Chicago & Alton Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Franklin Houston, for appellant.

P. H. Cullen, for respondent.

**BARCLAY, J.** This case is due to a collision of four mules with a train of the Chicago & Alton Railroad to the damage of the former. The owner of the mules sues for statutory (double) damages under section 1105, Rev. St. 1899.

The petition charges that the animals got upon defendant's railway at a place where it was the duty of defendant to build and maintain lawful fences on each side of its railroad and to maintain cattle guards and cross fences sufficient to prevent mules from getting on the railway, and that in consequence of the failure of defendant to maintain such fences and guards plaintiff's mules went upon the railway of defendant, and were struck by the locomotive and cars of defendant and killed. The damages were alleged at \$400, and judgment for double damages was prayed. The petition was not challenged

\*Liability for injury to animals fixed by place of entry through railroad fence, see *Eaton v. McNeill* (Ore.), 8 Am. & Eng. R. Cas., N. S., 680, and note, 684; *Patrie v. Oregon Short Line R. Co.* (Idaho), 14 Am. & Eng. R. Cas., N. S., 39.

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in any way. The answer was a general denial. The case was tried before Judge Hughes with the aid of a jury. The result was a verdict for plaintiff for \$375, which the court doubled in accordance with the statute. Rev. St. 1899, § 1105; *Kingsbury v. Railway Co.*, 156 Mo. 379, 57 S. W. 547, 19 Am. & Eng. R. Cas., N. S., 719. The only point made on this appeal is that the case should not have been submitted to the jury for want of testimony to prove plaintiff's case.

The testimony tends to show that plaintiff was the owner of the mules which were killed, and that their aggregate value was \$350 or \$400. Plaintiff lived a few miles from the defendant's railway, in Audrain county. The mules escaped from his inclosure one night in February, 1901. There was snow two inches deep on the ground at the time. The next day about noon plaintiff traced their wanderings. The mules ran along the public roads until they reached defendant's railroad. The testimony tends to show that the footprints of the mules were discovered in an open space between a cattle guard and a wing fence connecting the former with the main line of fencing alongside of defendant's railway at that place. The general direction of the public road which the cattle guard adjoins is north and south. On the east side of the public road there a space is open between the cattle guard and the wing fence of about 14 inches (according to plaintiff's account) by actual measurement, and the line of fencing runs from that point out from the railway track at an angle of about 45 degrees until the general level of the connecting fence parallel with the railway is reached. Through the opening thus described the tracks of the animals were clearly traced by the plaintiff on the morning following the escape of the animals from his inclosure. The aperture in the fence was so large that plaintiff easily rode through the place mentioned on horseback, following the tracks of his animals. The accident to them, however, did not happen there, but further east, beyond another public road, which crossed the railway at a right angle about a half mile east of the first-named road. On each side of that road were cattle guards. The animals passed over both of these cattle guards (as their tracks indicate) running at a high rate of speed, as plaintiff said he could tell by their hoof marks. They were killed, or at least their bodies were found bearing every evidence of that fact, on defendant's right of way, near the track, beyond the public road last mentioned. That they were killed by a locomotive or cars of defendant is a very obvious inference from the plaintiff's testimony. It was contradicted in many respects by that of defendant, but the issue of fact was for the jury and trial court. There is nothing in this record to warrant any interference by this court on that branch of the case.

The learned trial judge, at the instance of defendant, instructed the jury that, although they might believe from the evidence that "the barbs on one of the strips of the third cattle guard were mashed down, yet if the jury also find from

the evidence that the mules did not get upon the right of way at this point by reason of such defect, and that this cattle guard was otherwise in good condition, and was of a pattern in general use, and was usually and ordinarily sufficient to prevent stock from getting upon the right of way," then the verdict should be for defendant. At defendant's instance the jury were also told that it devolved on plaintiff to prove, by the greater weight "of the evidence, that the cattle guards over which the mules came upon the right of way and track of defendant were not ordinarily or usually sufficient to prevent horses, cattle, mules, etc., from getting on its line of railroad; and unless he has so proved your verdict must be for the defendant." Another instruction for defendant in regard to its duty concerning cattle guards was as follows: "The jury are further instructed that the defendant is not required by law to construct and maintain a cattle guard that will, absolutely and under all circumstances, prevent a horse or mule, or a breachy and fence-jumping animal, or one under fright or excitement, from passing over it. If the jury find from the evidence that the cattle guards in question were usually and ordinarily sufficient to prevent such animals from passing over them and getting on its right of way and tracks, then the defendant was not guilty of negligence in constructing and maintaining said cattle guards, and your verdict must be for the defendant." The instruction for plaintiff are not complained of. They need not be copied. Defendant asked a peremptory instruction to force plaintiff to a nonsuit, before making the requests above mentioned. But the court refused to give it, and exception was duly saved. After the verdict already mentioned and judgment for double the damages, defendant moved unsuccessfully for a new trial and, after the usual exceptions, appealed.

1. By asking for instructions on the merits of the case, which the court held should be submitted to the jury, defendant did not waive its exception to the refusal of its request in the nature of a demurrer to the evidence.

2. Defendant's point in reference to the facts in evidence is that the killing of the animals was not due to their getting on the railway at the place first mentioned, but to other causes not connectible with the first cause as proximate to the injury. The argument is that, as the animals passed into the second public road after getting within the railroad inclosure near the first road through the defect in the first cattle guard, the latter defect has no direct causal connection with the killing of the animals. A very able and ingenious argument has been presented on that phase of the case by the learned counsel for appellant, but it has not disposed of all the difficulties in his way under the rules of law applied in this class of litigation by prior decisions of the appellate courts of Missouri. We are satisfied from an examination of the testimony that it might fairly and reasonably be inferred by the jury that the animals ran over the second and third cattle guards under the

*Sappington v. Chicago & A. Ry. Co*

impulse of fright produced by an approaching train. The verdict indicates that the jury drew that inference, as they were entitled to do. The law has been declared most clearly to be that, if cattle get within the inclosure of a railway company's track by neglect to perform its statutory duty in regard to maintaining proper fences or cattle guards at the place where the cattle enter, it is no defense to show that at some distant point, where the damage occurred no fence or other statutory protection for cattle was required by the statute to be maintained. *Witthouse v. Railroad Co.*, 64 Mo. 523; *Edwards v. Railroad Co.*, 74 Mo. 117; *Moore v. Railway Co.*, 81 Mo. 499; *Warden v. Railway Co. (K. C.)* 78 Mo. App. 644. In this action there is testimony far more persuasive than in some of the cases cited, tending to show that plaintiff's animals were frightened by a train in the first inclosure they entered, and ran along the railway track and over all obstacles to the point where they were killed. Under the decisions cited and the testimony before us, it cannot properly be held as a conclusion of law that there was no testimony to connect directly the killing of the animals with the negligence in leaving the first cattle guard and adjacent wing fence in an obviously defective condition.

3. There was evidence for plaintiff that the condition of the fences, etc., as described, had existed for several months before the killing of the mules. That was sufficient lapse of time to warrant the inference of notice on the part of defendant of that condition without other proof thereof, and of negligence in failing to put those safety barriers into proper condition.

4. At defendant's request the trial court, by instructions we have quoted, announced the law of the case to be in accord with the rulings of our learned brethren of the Kansas City court of appeals, which declare that if a cattle guard is ordinarily, usually, or generally sufficient to prevent cattle or other animals from getting on the track it is "sufficient" within the meaning of section 1105, Rev. St. 1899. *Cole v. Railroad Co. (K. C.)* 47 Mo. App. 624; *Jones v. Railway Co. (K. C.)* 59 Mo. App. 137. As the trial court gave defendant the benefit of the construction of the law claimed by it in this particular, no ground of complaint on its part exists on that account. Parties are bound on appeal by the positions they voluntarily assume in the trial court.

Nor are we bound to investigate the claim made by respondent that said instructions were more favorable to defendant than was warranted. Plaintiff did not appeal, and if his contention is good it is merely a moot one now. We consider that the evidence justified the learned trial judge in submitting the case to the jury, and that there is no error in the record of which defendant may rightly complain.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.



TEXAS & P. RY. CO. *v.* SEAY.*(Court of Civil Appeals of Texas, June 4, 1902.)*

[69 S. W. Rep. 177.]

**Killing Horse on Track—Failure to Fence—Defenses—Permitting Animals to Run at Large within Corporate Limits.**

In an action against a railway company for running over plaintiff's horse—the right of way not being fenced,—a plea that he negligently permitted his horse to run at large within the corporate limits of a town, and to graze on defendant's track, stated no defense.

**Same—Same—Evidence.**

Where plaintiff's horse was killed on defendant's railway track, 70 or 80 yards east of the east end of defendant's switch, and it introduced evidence that to fence the track so near the switch would interfere with its employees in switching its trains, it was not error to admit evidence that the track was fenced to within 30 or 40 feet of the west end of the switch.

**Same—Same—Instruction.**

Where the undisputed evidence showed that the accident occurred outside the switch limits, it was not error to refuse to instruct that if the accident occurred within the switch limits, so that the track could not be fenced, or because the company was constructing a switch, the defendant was not liable, unless its employees failed to exercise ordinary care in avoiding the collision.

Appeal from Lamar county court; Wm. Hodges, Judge.

Action by R. G. Seay against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Latimer, for appellant.

W. F. Moore, for appellee.

NEILL, J. On the night of June 7, 1901, appellant's train struck and run over appellee's horse in the town of Blossom, on a bridge of its road, and killed him. Appellant's right of way was not fenced at the place where the collision occurred, and the evidence is such as to warrant the conclusion that public necessity or convenience did not require it to be left open. The reasonable market value of the horse at the time and place it was killed was \$100.

**Conclusions of Law.**

1. The exceptions to appellant's plea in reconvention that appellee negligently caused and permitted his horse to run at large within the corporate limits of Blossom, and to go upon and graze on its railway track, were properly sustained. No acts of negligence were alleged in the plea. In the absence of statute or ordinance, it is not unlawful in this state for the owner to permit animals of their own volition to enter and remain upon the uninclosed lands of another. *Railroad Co. v. Cocke*, 64 Tex. 153.

2. The third assignment of error complains of the court's permitting certain witnesses to testify, over appellant's objec-

tions, "that defendant's track west of Blossom station, and about 30 or 40 feet from the west end of the switch, was fenced at the time plaintiff's horse was killed"; the objection being that such testimony was immaterial and inadmissible, as the accident occurred one-eighth of a mile east of said station. To the bills of exception taken to the admission of the testimony, the court appends this explanation: "The proof established that plaintiff's horse was killed at a point on its [defendant's] railway track 70 or 80 yards east of the east end of defendant's switch in the town of Blossom. The defendant introduced evidence which tended to show that to have fenced its track at a point that near the switch would interfere with its employees in switching its trains; and, in rebuttal of this testimony, plaintiff was permitted to prove by the witnesses Henderson and Liles that the defendant had in fact fenced the track on the west of the main switch to within 30 or 40 feet of its west end." This, in connection with the record, demonstrates that the evidence was admissible for the purpose stated in the explanation.

3. The uncontroverted evidence shows that the collision occurred beyond the limits of the railway switches. Therefore the court did not err in refusing to instruct the jury, at appellant's request, that if the horse was killed on a bridge at a place within the switch limits, and such place could not have been fenced with safety to its employees, the burden would be upon plaintiff to show negligence of the defendant in operating the train. The evidence did not tend to bring the case within the rule announced in *Railroad Co. v. Blankenbeckler* (Tex. Civ. App.) 35 S. W. 331.

4. The evidence is uncontroverted that the switch which was being constructed at the time of the accident was not to extend to the bridge where the accident occurred, and from such undisputed evidence it clearly appears that it could have been built as well with the right of way fenced at the point of collision as without its being fenced there. Therefore the court did not err in refusing to charge the jury, at appellant's request, that if they believed the defendant could not have fenced its track at the place of the killing, by reason of building and constructing a switch railway, then they would only find for plaintiff in case defendant's employees failed to exercise ordinary care in avoiding the collision.

5. The charge of the court correctly and fairly presents the law upon the issuable facts to the jury, and is not obnoxious to any of the objections assigned as error.

6. The evidence embodied in the record, we think, is reasonably sufficient to support the verdict.

The judgment is affirmed.

**ARMISTEAD v. SHREVEPORT & R. R. VAL. RY. CO.***(Supreme Court of Louisiana, June 21, 1901.)*

[32 So. Rep. 456.]

**Navigable Streams—Obstruction by Railroad Bridge—Liability.**

A railroad company constructing a bridge across a navigable stream so negligently as to obstruct the navigation of the stream is responsible for the damages caused by the obstruction.

**Negligence—Duty to Minimize Damage.**

It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and care, or at a moderate expense, for which effort and expense he may charge the wrongdoer; and where, by the use of such means, he may prevent loss, he can only recover for such loss as could not thus be prevented.

**Same—Same.**

The duty of preventing or minimizing a loss about to occur rests primarily on the party by whose negligence or fault it is about to occur; and if such party voluntarily fails in this duty, having means ready to hand for the performance of it, he alone will be held responsible, and it will not avail him to say that the injured party might have lessened the damages by performing the duty for him.

**Damages—Loss of Profits.**

The plaintiff chartered a boat to convey some cotton seed to his cotton seed oil mill. The defendant's bridge obstructed the passage of the boat, and deprived plaintiff of the profits he expected to realize from the milling of the seed: *held*, plaintiff can recover for these profits.

**Same—Same.**

On the same voyage plaintiff expected to realize profits from the selling of liquors and fruit; also he expected to procure other cotton seed, and to realize a profit from the milling of the same. All these profits are too uncertain and contingent to serve as a basis for a judgment.

On Rehearing.

**Enhancing Damages.**

The authorities agree that after a wrong has been committed the damaged party shall not increase it and that if he does he shall have no right to complain of loss or injury sustained by his willful acts of omission or commission. *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256.

**Carriers of Freight—Failure to Carry—Measure of Damages—Abandonment of Goods by Shipper—Prospective Profits.**

In this case a carrier having failed to take certain cotton seed and to carry it from one point to another according to a contract, and the other contracting party, being in possession of the seed at the place of intended shipment, having abandoned it, so that it was lost or destroyed, it is *held* that the measure of damages for which the carrier is liable is the value of the seed at the place of intended delivery, after deducting its value at the place of intended shipment and the freight, as agreed on, and adding to the remainder the expense which would have been incurred in preserving the seed. The carrier is not, however, liable for the loss resulting from the abandonment of the seed, nor for the prospective profits to arise from its conversion into manufactured products at the point of delivery.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Alfred Dillingham Land, Judge.

Action by W. W. Armistead against the Shreveport & Red River Valley Railway Company. From the judgment, plaintiff appeals. Modified.

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Sutherland & Hall and Nettles & Carter, for appellant.  
Leonard, Randolph & Rendall, for appellee.

PROVOSTY, J. The plaintiff, owner of a small cotton seed oil mill, chartered a steamboat for the purpose of transporting to his mill a lot of cotton seed he had accumulated on the bank of Lake Bisteneau; also for the purpose of transporting from his mill to certain customers of his mill some cotton seed meal, the product of his mill, and incidentally for the purpose of carrying some freight for the public; also he thought to turn an honest penny on the trip by having on the boat some fruit and liquors for sale. For the privilege of selling these liquors and fruit he paid an internal revenue license of \$9.50. The bridge of defendant across Loggy bayou barred the passage of the boat, and put an end to the voyage, to plaintiff's alleged damage as follows: •

120 tons of cotton seed at \$7 per ton.....	\$840 00
2,000 seed sacks at 10 cents.....	200 00
Fruits and liquors. ....	125 00
Revenue license.....	9 50
Loss of profits on same.....	200 00
Miscellaneous freight.....	100 00
Inconvenience and trouble.....	100 00
Net profits on the manufacture of the seed.....	428 00
Damages by failure to get other seed.....	500 00
Loss of profits on 100 tons of meal.....	225 00
Loss of profits on hulls.....	47 75

The defendant does not seriously deny its responsibility, but pleads a compromise, and strenuously contests the amount of the damages. The compromise stipulated the payment of a certain sum to plaintiff in full of all claims, and stipulated further as follows: "The party of the second part \* \* \* hereby bind and obligate themselves to have a steamboat at the landing of said Armistead [the plaintiff] at Cabin Point, on Red river, on or before March 27th, 1899, to receive a cargo, or such part thereof as said Armistead may desire to transport, and to transport the same on said boat up Loggy bayou, and through Lake Bisteneau, as high up as Port Bolivar, *in the event a sufficient depth of water can be found on said route to permit the passage of said boat.*" The clause italicized here is italicized also in the instrument of compromise. It was inserted in view of the fact that the water in Loggy bayou and Lake Bisteneau might at any time fall below the navigation stage. In the event of such fall, plaintiff would have to take defendant's will to make the trip, in place of the deed of having made it. Under these circumstances, plaintiff was justified in treating a two-days delay in the tendering of the boat as having vacated the compromise. There is also evidence to the effect that this and the previous delay had caused the orders for the cotton seed meal to be countermanded. Time, here, was of the essence of the contract. Davidson v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885. Moreover, plaintiff was under no obligation to

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furnish a cargo, and therefore his refusal to deliver his meal for transportation did not excuse the boat from proceeding in its voyage in fulfillment of the compromise. The boat was "to receive a cargo, or such part thereof as the said Armistead may desire to transport." If Armistead desired to transport no cargo, all the boat had to do was to proceed on its voyage to transport the seed. The defendant violated the compromise, and then voluntarily canceled it, and is therefore not in a position to plead it in bar of plaintiff's action.

We proceed to take up the items of damage in regular order: The seed were left to rot, and to be appropriated by who might choose to take them. The responsibility for this the plaintiff and the defendant cast each upon the other. The evidence shows that there was reasonable certainty of the navigation holding out for one trip of the boat, and we think defendant should have made this trip. It is idle to say that plaintiff might have saved the seed by means of sheds, fences, or land transportation, or what not. The business way of going at saving the seed was to go and get them in a boat; and, after barring plaintiff from doing this, defendant should itself have done it, since this boat was to hand for the purpose. 1 Suth. Dam. pp. 150, 151; Id. (2d Ed.) p. 187, § 88. The boat could have carried and saved 86 to 90 tons, worth \$7 per ton. Defendant is responsible for this, less \$1.80 per ton, which plaintiff might have realized on the seed by transporting them by land to Shreveport. For the remainder of the seed we do not hold the defendant responsible, as it does not appear that the boat could have counted with reasonable certainty on having navigation for a second trip. As to this remainder of the seed we hold plaintiff to the obligation under which he was to use every reasonable endeavor to save the seed, with the right to charge defendant with the expense of the salvage. So holding him, we can allow no more than the probable expense of the salvage. Adopting, for want of a better, the lower court's estimate of this expense, we fix this salvage at 50 cents per ton, or \$7 in all. We can allow nothing for the sacks. They could have been saved at an insignificant expense, and plaintiff was clearly under the obligation thus to save them, and they are probably included in the estimated value of the seed. As to the "fruits and liquors" and "inconvenience and trouble," we adopt the estimate of the judge a quo, and fix the damage at \$100. By the act of the defendant the plaintiff was deprived of an opportunity to utilize his revenue license, which had cost \$9.50. We think this amount should be allowed. We disallow the item, "Loss of profits on same, \$200." These profits are not proved with sufficient certainty. For the same reason, we disallow the item, "Miscellaneous freight, \$100," and the item, "Damages by failure to get other seed, \$500." We do not agree with the learned district judge in his denial to plaintiff of the profits expected to be made on the milling of the seed. The defendant cannot

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deny that, but for the obstructing bridge, plaintiff would have had the milling of the seed, and that this operation would have yielded profit. The seed had been procured for the purpose of realizing this profit; and this profit, thus cut off by its wrong, defendant must make good. *Suth. Dam. (2d Ed.)* p. 132, § 59; *Id.* p. 157, note 1, § 70. We fix this profit at \$2.75 per ton, or \$275. We adopt the estimate of the judge a quo on the two last items, "Loss of profits on 100 tons of meal, \$75," and "Loss of profits on hulls, \$6."

## Recapitulation.

86 tons of seed at \$5.20.....	\$447 20
Salvage of 14 tons of seed at 50 cents . . .	7 00
Fruit and liquors, inconvenience and trouble.....	100 00
Revenue license.....	9 50
Profit on manufacture of seed.....	275 00
Loss on cotton seed meal.....	75 00
Loss on hulls.....	6 00
	<hr/>
	\$919 70

It is therefore ordered, adjudged, and decreed that the judgment appealed from be increased to the amount of \$919.70, and that as thus amended it be affirmed, with costs in both courts.

## On Rehearing.

(June 21, 1902.)

MONROE, J. It is suggested in the application for rehearing that there is error in the opinion handed down, in the matter of the amount allowed for seed, and for profit on the manufacture of seed, and a re-examination and reconsideration of the evidence and of the law of the case have led us to conclude that the suggestion is well founded. The defendant was at fault in obstructing Loggy Bayou with its bridge, but the fault was entirely without malicious intent and at once acknowledged, and the most earnest and honest efforts were made to repair it. The captain of the boat which the plaintiff had chartered was paid \$100 (an amount fixed by himself) to compensate him for the use of his boat, and the defendant agreed to furnish the plaintiff with another boat on or before March 27th that would go through the bridge. In order to comply with this agreement, it chartered the Lillie Barlow at \$25 a day, and wired to Vicksburg for a pilot, to whom it agreed to pay \$4 a day, and boat and pilot were at hand before the time appointed. But unfortunately one of the boat's cylinder heads was blown out, a Sunday intervened, which delayed the repairs, and the boat was not ready to start until the morning of March 29th. We have held in the original opinion that the plaintiff was within his legal rights in declining to accept it at that time. It is nevertheless a fact that he might have accepted it with but little inconvenience or loss, and that his refusal to furnish the meal for the outgoing cargo, or to accept the offer that was made to him, through the attorney who had represented and who assumed to be then

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representing him, to pay \$150 and to bring out his cotton seed from Lake Bisteneau, was an extreme, and, as we think, rather inequitable, assertion of those rights. The defendant, through its representative, was told that it could bring out the seed, but that the plaintiff's claim could not be settled unless it also paid \$400; and, this demand being considered unreasonable, the plaintiff paid the boat and the pilot which it had employed something over \$100, and discharged them, with the expectation that it would be called on to answer in an action in damages. Such an action was brought at once in the parish of Red River; the plaintiff claiming then, as he claims now, \$2,650, and including in his claim the alleged value of the cotton seed, then lying on the shore of Lake Bisteneau, within three miles of his plantation and of the store conducted by his son and son-in-law with capital furnished by him, which seed he assumed to abandon as in a case of total loss; and, the action thus brought having been dismissed, he brought the present suit in the parish of Caddo. We think that the plaintiff's demand was unreasonable, and that whilst it was perhaps the duty of the defendant, having the boat at hand, to have brought out the seed, yet that its failure to do so gave to the plaintiff no right to abandon the seed as in case of total loss. The evidence shows that it was rather late to have made it available as a fertilizer during the planting season of 1899, and that it could not profitably have been shipped elsewhere for milling purposes; but it also shows that it could have been protected where it was at a cost not exceeding \$50, or stored in a vacant house not more than a half mile distant, and that it could have been preserved, and would have been quite as valuable, if not more valuable, the next season. The plaintiff, however, having adopted the theory of abandonment, persisted in it to the end, and not only did neither he nor his representatives, who were on the spot, pay any attention to the seed, of which they were in possession, but they seem to have allowed it to be understood that it belonged to nobody; and plaintiff's son testifies that he actually saw the wagons of his neighbors going to haul it away without making any comment or objection. The names of some of those neighbors are given, and in view of the testimony referred to, and of the fact that it is not suggested that they were dishonest people, we think the presumption a fair one that the plaintiff or his representatives practically gave the seed away, which they certainly had no right to do at the expense of the defendant. Beyond this, there is considerable conflict in the testimony as to the quantity of seed. Plaintiff's son testifies that he weighed four or five of the sacks, and that their average weight was 140 pounds; and there is further testimony, in support of this statement as to the manner in which the sacks were filled, showing that they were suspended and the seed rammed in with pestles; and we must accept this evidence as conclusive upon the question of

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weight, though disinterested witnesses, engaged in the business of handling seed, testify that the average weight of seed, in commerce, is 100 pounds to the sack. The more serious conflict is as to the number of sacks. The same witness for plaintiff states that he counted them when they were hauled to the landing, and that there were 1,500 sacks, whilst two witnesses for the defendant, who were sent to Port Bolivar for the purpose immediately after the refusal of the plaintiff to accept the Lillie Barlow, testified that they counted them and found only 750 sacks; and one of these witnesses further testifies that about that time he met the witness for the plaintiff, above referred to, and that the latter told him that there were about 800 sacks at Port Bolivar, and from 150 to 200 at Vicker's landing. This statement is, however, denied by the witness to whom it is attributed. Upon the other hand, a witness who lives in the neighborhood, and who, it appears, had ordered a half ton of meal from the plaintiff, being examined under commission, as a witness for the plaintiff, is asked, "Do you know of any seed accumulated in March or thereafter, 1898 [1899], on the bank of Lake Bisteneau? If so, how much seed was there, and what became of those cotton seed?" To which he replied: "I do. I do not know how much, but suppose that there were somewhere between five hundred and a thousand sacks." And he further testifies that the seed was hauled away by persons whom he names,—being the neighbors to whom we have already referred. The plaintiff claims, and so testifies, that the seed was worth \$7 a ton on Lake Bisteneau, and \$9 at his mill, at Cabin Point, and that the freight by the boat was to have been \$1.25 a ton. Other witnesses, doing a much larger milling business, at Shreveport, testify that they bought seed at \$5.50 and \$6 a ton f. o. b. throughout the country, but would not have bought it at all on Lake Bisteneau, because of the difficulty of getting it out, and that it was worth about \$8 at their mills. The plaintiff claims that his sacks were worth 10 cents each. The witnesses mentioned testify that seed sacks were worth about half that amount. The plaintiff, who had about one year's experience in milling, whose mill was operated for 11½ hours during the day, working up a ton of seed an hour, and was shut down at night, testifies that his profits from the manufacture of seed amounted to \$4 a ton, though the seed itself was worth \$9. Another witness, who has been in the business for many years, who manages a mill that runs day and night, and consumes about 14 times as much seed in 24 hours as that of the plaintiff, and who gets his seed at 75 cents less a ton than the seed in question would have cost the plaintiff according to his own statements, testifies that the profits in the milling amount to about \$1.50 a ton, that there is great advantage and economy in running a mill continuously, and that for that reason the practice is universal in all large mills.

To these facts we are of opinion that the legal principles



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which should be applied are those which have been recognized by the courts and text-writers as follows, to wit: "The authorities agree that after a wrong has been committed the damaged party shall not increase it, and that, if he does, he shall have no right to complain of loss or injury sustained by his willful acts of commission or omission." *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Judice v. Railroad Co.*, 47 La. Ann. 255, 16 South. 816, 2 Am. & Eng. R. Cas. 185; *Airey v. Car Co.*, 50 La. Ann. 653, 23 South. 512; *Bader v. Railroad Co.*, 52 La. Ann. 1060, 27 South. 584; *Carr v. Land Co.*, 105 La. 239, 29 South. 715. "Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent." *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117. "The duty is not arbitrarily imposed upon the injured party to do or amend the work of the other, or to finish it, but only when it is a reasonable duty that he ought to do, instead of passively allowing a greater damage." 1 *South. Dam.* pp. 150, 151. And so applying them, we conclude that in allowing 75 cents per ton on 100 tons of seed, as the difference between the value at Lake Bisteneau and at Cabin Point, after deducting cost of transportation, and adding thereto \$50 as the probable cost of preserving the seed at Lake Bisteneau, the judge a quo has given the plaintiff all that he is entitled to upon that item of his claim. As to the claim for loss of profits which might have been made upon the manufacture of the seed, the defendant is not liable therefor in any aspect of the case, since, in the first place, there was nothing, so far as we are informed, to have prevented the plaintiff from buying and manufacturing other seed, nor does it appear that he did not run his mill to its full capacity during the entire season; and, in the next place, unless there are unusual conditions, which are not established in this case, the limit of a carrier's liability for the nondelivery of goods is the value of the goods at the place of destination at the time at which they should have been delivered, and this the plaintiff has been allowed, less the loss occasioned by his failure to take care of the goods in question at the place from which they were to have been shipped. The computation contained in the opinion handed down should therefore be amended by reducing the item of \$447.20, relating to the value of the seed, to \$75, by adding \$50 as the probable cost of preserving the seed, and by striking out the item, "Profit on the manufacture of seed, \$275," which would reduce the judgment as rendered by us to \$322.50.

It is therefore ordered and adjudged that the decree heretofore rendered be amended by reducing the amount thereof to \$322.50, and, as thus amended, that it be now made the final judgment and decree of this court.

KING *et al.* v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit, May 6, 1902.)

[114 Fed. Rep. 855.]

**Railroads—Backing Train—Statutory Requirements—Passenger Depot.\***

Under Code Miss. 1892, § 3549, providing that it shall be unlawful to back a train of cars into or along a passenger depot at a greater rate of speed than three miles an hour, and a train backed along such depot within 50 feet thereof shall, for 300 feet before it comes opposite such depot, be preceded by a servant of the railroad company on foot, not exceeding 40 or under 20 feet in advance, to give warning, and that, for every injury inflicted by a railroad company while violating such section, full damages may be recovered, without regard to contributory negligence, the 300-foot limit does not exceed 300 feet from the building, some part of which is used as a passenger depot, notwithstanding there may be a graveled walk extending along the track beyond the building, on which passengers alight from long trains.

**Same—Negligence—Plea of Contributory Negligence—When Available.**

Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence.

**Same—Contributory Negligence—Evidence.**

Where a man in vigorous bodily and mental health, with good hearing and sight, with nothing to obstruct the vision, stepped on and walked along a railroad track on which part of a freight train was backing at a rate of eight miles an hour, and was overtaken and killed, he was guilty of contributory negligence.

**Same—License to Walk on Tracks—Duty of Licensee.†**

The fact that persons were accustomed to walk along the railroad tracks at the place where an accident occurred, with the knowledge of, and without objection from, the railroad company and its servants, did not relieve such persons from the exercise of ordinary care while on the tracks.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On or about the 16th day of June, 1900, Calvin J. King was killed by a train of the defendant in error in the town of Durant, Miss. Between 11 and 12 o'clock noon, Mr. King was walking up the tracks of the railroad, approaching the depot building, and at a point 430 feet from the nearest part of the depot building was struck and killed by a part of a train of cars, consisting of a freight

\*See *Western & A. R. Co. v. Stafford* (Ga.), 5 Am. & Eng. R. Cas., N. S., 172; *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580. See also, note, 20 Am. & Eng. R. Cas., N. S., 224.

†See note, 20 Am. & Eng. R. Cas., N. S., 396; 9 Am. & Eng. R. Cas., N. S., 210. See also, *Davis v. Boston & M. R. R.* (N. H.), 21 Am. & Eng. R. Cas., N. S., 821.

engine with three or four cars attached thereto, backing up a side track designated as the "passing track." Durant is an incorporated town of 2,000 inhabitants. The depot building and its connected platform run north and south. The main line of the railroad lies east of the depot, and next east of the main line lies the track called the "passing track," on which the accident occurred. This is a very long side track, extending a mile or more south of the depot building, as well as far north of it. It is perfectly straight, and located on substantially level ground, with no natural object to obstruct the view throughout its length. East of the passing track, and south of the depot, was a coal chute. East of the coal chute there was a switch line called the "loop," which connected with the passing track both north and south of the coal chute. West of the main line, and below or south of the depot building, was a switch line called the "scales track," and still west of the scales track was another switch line, called the "platform track," both located south of the freight depot building. Both of these lines of track are three or four hundred yards long, extending across Cedar street, and across another street further south. They run parallel with the main line. The east rail of the scales track is 9 feet from the west rail of the main line, and the east rail of the platform track is 23 feet from the west rail of the main line. The space between these tracks is clear throughout their whole length, and the gravel walk referred to later occupies all the space between the east rail of the scales track and the west rail of the main line to the engine room south of the coal bin, which is 90 feet south of the place where Mr. King was killed. The business part of the town of Durant, west of the railroad, extends to the north and south of the depot building, and Cedar street crosses the railroad at right angles five or six hundred feet south of the depot building. Along the line of the railroad, and on each side of its right of way, there are settlements south of Cedar street, and on the east side of the right of way is a fairly good sidewalk. The proof shows that persons settled in that locality and others were in the habit of passing up north along the railroad tracks to a public crossing just north of the depot building, and of going thence to the business portion or other part of the town lying west of the railroad. The engine which was propelling the cars described as backing northward on the passing track belonged to a freight train which had arrived at Durant a short time before 11 o'clock, and had stopped on the passing track north of the depot building, where the engine was disconnected from the train, and proceeded south on the same track to the coal chute, where it coaled, and then proceeded south to a connecting-link track between the passing track and the main line, on which it passed to the main line, and then, in due course, backed off the main line onto a track west of the main line, and took up three or four freight cars, at least one of

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which was a box car, and pulled them onto the main line, and thence, by the connecting link, backed them onto the passing track, and was proceeding to back along the same to the part of the train which had been left on that track north of the depot building. There was no evidence tending to show that the engine or the cars it was pushing had been on the loop track, or on any track east of the passing track. The evidence is ample, clear, and uncontradicted that the engine and cars which ran over the deceased had not been on any of the tracks east of the passing track. Mr. King was seen by one witness approaching the railroad from the west on Cedar street at the point where it crosses the railroad. He turned to the north, walking for a few steps on the main line, then proceeding a few steps more between the main line and the passing track, then stepping onto the passing track, and proceeding north on it until he was struck and killed by the backing cars and engine. At this same time another south-bound freight train was coming down the main track, and the engine pulling it was within four or five car lengths of Mr. King, when he stepped off the main track onto the space between it and the passing track, and stepped onto the passing track about the time the engine of this south-bound train got opposite him. A witness called by the plaintiff, named Cal Turner, testified that he lived in Durant, south of the depot; that on the day the accident occurred he had started home, and was walking slowly along the east side of the main line of the railroad, having crossed over to that side because he did not want any one to see him get on the freight train, which was then moving southward, and on which he wished to ride to his home, which was the fourth house south of Cedar street; that when the engine of the south-bound freight train was about even with him, at a point about 100 feet south of the public crossing north of the depot building, he saw Mr. King coming toward him from the south; that at the time he first saw Mr. King there was no train south of witness on the track on which Mr. King was killed; that witness did not get on the train, because before the caboose reached him the train was going too fast for him to get on with safety. He continued walking south along the track, and had, at the time of the collision, proceeded to a point about 200 feet north of where it occurred. By this time nearly all of the south-bound train had passed him. He thinks there were four cars attached to the engine which ran over Mr. King, but does not remember whether they were all box cars or not. He did not see the backing train before it struck Mr. King. His attention was attracted by hearing some one hollo, and then he saw Mr. King under the front part of the box car. When witness first saw Mr. King, he was walking north on the main line. Mr. King got in between the main line and the other track when the engine was about four or five lengths from him. This witness did not see or hear any signals given by

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the backing train, did not hear any bell ring or whistle blow on that train, but did hear signals from the train that was on the main line, going south. Says the backing train was moving at the rate of six or eight miles an hour. Other uncontradicted evidence shows that the backing train, or part of the train, had on it an engineer, a fireman, a brakeman, and the conductor of the train to which the engine belonged. They all testify that the engineer, the fireman, and the conductor were keeping the customary lookout; that the required signals were being given; that the most northern one of the cars in the backing train was a coal car; that the conductor was seated on the southeastern corner of this car, looking north. The conductor testified that just at that instant he was noticing to see if the switch connecting the link track, over which they had passed from the main track, was properly thrown, so that the south-bound train could pass on safely; that he did not see Mr. King. The engineer and the fireman both testified that they did not see him; did not know that he was on the track until they had passed over him, and their attention was challenged by the holloing, which at first they could not locate; that, at the instant they did ascertain what had been done, they stopped the backing train; that it was going at a rate not exceeding four or five miles an hour, and they did not know there was any occasion for stopping until after they had passed over the man.

The plaintiffs are the surviving wife and children of the deceased. Their action is for damages, in the usual form, charging that the death was occasioned by the negligence of the defendant's servants. The defense is a general denial of liability; that the company and its servants were not negligent; and, further, the company pleads negligence on the part of the deceased, which caused him to receive the fatal injury. To meet the plea of contributory negligence, the plaintiffs rely on section 3549 of the Mississippi Code of 1892, which is as follows:

"It shall be unlawful to back a train of cars, or part of a train, or an engine into or along a passenger depot at a greater rate of speed than three miles an hour; and every such train, part of a train, or engine backed into or along a passenger depot and within fifty feet thereof, shall for at least 300 feet before it reaches or comes opposite to such depot be preceded by a servant of the railroad company on foot, not exceeding forty nor under twenty feet in advance, to give warning. For every injury inflicted by a railroad company while violating this section, the party injured may recover full damages without regard to mere contributory negligence."

When evidence on behalf of the plaintiffs and on behalf of the defendant had been fully heard, and the hearing of evidence closed, the defendant, by written motion, requested the court to instruct the jury peremptorily to find for the defendant, which the court did, and there was a verdict and judg-

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ment in accordance therewith. The only error assigned which we deem it proper to notice is stated as follows: The court erred in granting the peremptory charge asked by the defendant below wherein the jury was instructed to return a verdict in favor of the defendant below."

Considering the case without reference to the provisions of section 3549 of the Mississippi Code of 1892, it seems to us to be too clear for controversy that, while there is proof tending to show some degree of negligence upon the part of the defendant company, there is manifestly no proof tending to show such wanton recklessness or gross negligence as would render unavailable a plea of mere contributory negligence on the part of the deceased. It seems also to us to be beyond controversy, and manifest from the proof, that the deceased was negligent in a manner that contributed directly to the receiving of the fatal injury. Deceased was not yet 50 years of age. Had been up to that time a man in vigorous bodily and mental health. His hearing and sight were good. It was midday. The track was straight and level, with no obstruction thereon. The backing train was more than 100 feet long, and, at the most, its rate of speed did not exceed eight miles an hour. It therefore became necessary for the trial court to decide whether the statute referred to applied to the conduct of the parties at the point where this injury was inflicted. The trial court was not charged with the impossible duty of giving the term "passenger depot" an abstract definition, that would mean the same thing wherever that term would be used or sought to be applied, or the almost equally difficult duty and useless labor of giving it a relative definition adjusted to all possible hypothetical cases. It was the duty of that court to determine by its construction of this section of the statute whether at the time and place when and where King was killed the defendant was backing a train of cars, or part of a train, or an engine, into or along a passenger depot. Some other provisions of the same Mississippi Code may be profitably considered in construing the language of section 3549:

"Sec. 4302. Necessary Depots to be Maintained. Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger-trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly stop the trains thereat, without the consent of the commission.

"Sec. 4303. Regulations for Passenger-Depots. The commission shall establish such rules and regulations for the

arrangement and management of passenger-depots as will secure the comfort of passengers, and it shall cause a copy thereof to be posted in each passenger depot or reception-room.

"Sec. 4304. Bulletin-Boards. It is the duty of every railroad to keep conspicuously placed, as the commission shall direct, and of the form and size prescribed by it, at each reception-room or depot, a bulletin-board," etc.

"Sec. 4305. Commission to Visit Stations, etc. The commission shall from time to time, as far as practicable, visit all stations on the various lines of railroad, and investigate the manner in which bulletin-boards are posted and kept, how reception-rooms are arranged and kept," etc.

"Sec. 4309. Location of Station-Houses. The commission may designate the site or location of any new building or station-house which may be ordered erected in cases where the site selected by the railroad's officials is inconvenient or inaccessible; but every depot must be located with due regard to the interest of the railroad and the public convenience.

"Sec. 4310. Union Passenger-Depots. The commission, whenever the public convenience may require it, shall cause union passenger-depots and transfer-stations to be erected, and may designate the dimensions and sites thereof," etc.

"Sec. 4312. To Inspect Depots; Reception-Rooms. It is the duty of the commissioners to inspect the depots of all railroads from time to time, and of the commission to require comfortable and suitable reception-rooms for passengers, separate for the races, and, if it deem proper, for the sexes; and it may require such additions to or alterations in passenger-depots or station-houses as may be necessary, in its judgment, to secure ample, comfortable, and suitable accommodations for all passengers. \* \* \*"

The supreme court of Mississippi has decided that section 3549 was designed to afford protection to all persons within the prescribed limits. *Railroad Co. v. McCalip*, 76 Miss. 360, 25 South. 166. The case just cited is the only one reported in which the supreme court of Mississippi has had occasion to consider and construe section 3549; and that case did not involve the question which now engages us, because in that case the injury was received by the plaintiff while attempting to cross the railroad track on a public street at the north end of the depot building, and was manifestly within the space limitations of the statute, whether or not the words "passenger depot" should be held to relate to the building alone. We note in the reporter's statement of the case: "The depots are situated opposite each other. The freight depot is on the east side of the tracks and the passenger depot is on the west side." In that case, as in this, the passenger depot seems to have fronted on a public crossing just to the north of the depot building. Here, in the case we are considering, both of the waiting rooms of the passenger depot

are at the extreme north end of the structure, and the two rooms take in the width of the building. They open to the north. There is a rock deposit all around that end of the building on the north end of it. Immediately behind or south of the sitting rooms is the agent's office, and immediately behind or south of the agent's office is the baggage room, and immediately south of the baggage room is the freight warehouse. On the east and west sides, and immediately south of the freight warehouse, is a platform. The platform immediately south of the freight warehouse is as wide as the whole building, or any part of it. Then there is a cut-off down east, and a narrow transfer platform running south some distance, with a shed over it. This is used to transfer cars. The other platform is used for depositing parcels, such as boxes, lumber, or anything. It is not used for passenger purposes, and is about 3 feet off the ground,—too high for a man to get on, except he go to the end, and come up by the steps. The part of the building used as a freight warehouse, not including its platforms, extends north and south along the main-line track for a distance of 100 feet; and the part used for sitting rooms, agent's office, and baggage room extends about 60 feet along the line; making the whole length of the depot building, excluding from consideration the platforms, 160 feet. The point at which Mr. King was struck is 425 feet from the south east corner (its nearest part) of the freight-depot building, is 395 feet from the southeast corner of the main platform around the freight warehouse, and is 525 feet from the extreme south end of that part of the building used in connection with passengers, and is only 237 feet from Cedar street crossing. As already mentioned, between the west rail of the main-line track and the east rail of the scales track a 9-foot space, uniform in width, was covered with a good gravel walk, extending more than 600 feet south from the most southern point of that part of the depot building used for passengers, and extends 90 feet beyond the point at which the collision occurred. A like gravel walk extends north from the depot building about 600 feet; making, including the length of the building itself, a stretch of more than 1,350 feet covered by the southern and northern extensions of this gravel walk. It was put down for the convenience of receiving and discharging passengers on or from cars, in connection with any of the long through trains while standing on the main line, and was given the length it has in order to accommodate the longest trains going north or south on the main line. At the point where the collision occurred, passengers may have been received or discharged, and certainly were often received or discharged on such cars at points not many feet north of the place where the injury was received.

The contention of the plaintiffs is that, within the meaning of the terms of section 3549, every point on this extended gravel walk, throughout its whole length, is a part of the pas-



senger depot, and that the language of the statute required that for a distance of 300 feet further south, and of 300 feet further north, from the respective extremities of this gravel walk (that is, for a distance of 1,950 feet), the railroad company, in backing a train of cars, or part of a train, or an engine, along any of its tracks located and running within 50 feet of this gravel walk, should not run at a greater rate of speed than three miles an hour, and that it should have every such train, part of train, or engine preceded by a servant of the railroad company, on foot, not exceeding 40 or under 20 feet in advance, to give warning. On the other hand, it is contended by the railroad company that the plain meaning of the language of the section in question requires that the words "a passenger depot," as used in that section, should be construed to apply to the building used for such depot in cases where there is a building to locate the depot.

We have noticed, in section 4302, that the railroad commission of the state of Mississippi "may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public." It is not necessary to hold that there could not be a passenger depot on a railroad without having in connection with it, and as its most conspicuous feature, some character of a house or building. But it seems to be very certain, from the comprehensive provisions of the Code of Mississippi defining the powers and duties of the railroad commission of that state, that no railroad in that state would be permitted to use such a passenger depot. While, in a certain sense, the term "passenger depot" embraces more than the mere building, in undertaking to survey and fix the limits of the space reservation made by this statute it is necessary that we should look for a reasonably definite point as a place of beginning. The limits are that the line of track must run within 50 feet of the passenger depot, and that a train, or part of a train, or engine, backing on this track into or along a passenger depot, shall, for at least 300 feet before it reaches or comes opposite to such depot, be preceded by a servant of the railroad company, etc., and be run at a rate of speed not greater than three miles an hour. Counsel for the plaintiffs calls to our attention section 3551 of the Code, which concludes with this sentence: "A failure to observe this and the four last preceding sections shall cause a railroad company to be liable to a fine of fifty dollars for each offense;" and counsel say truly that "this penalty is therefore imposed for the violation of sections 3547, 3548, 3549 [the section we are construing], 3550, and 3551." The last sentence of section 3549 is also highly penal in its character: "For every injury inflicted by a railroad company while violating this section the party injured may recover full damages without regard to mere contributory negligence." Following the recognized canons for the construction of such statutes, and keeping well

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in mind that the purpose of this statute is to provide for the preservation of human life, we are unable to give the words "a passenger depot," as used in the section, the construction contended for by the plaintiffs' counsel, and are fully persuaded that in this particular case the language "a passenger depot" must be limited at least so as to include, at most, only the whole of the building, a part of which is used in connection with the passenger service, and therefore that the restrictions and limitations of the section were not laid upon the defendant at the time and place when and where the collision occurred which occasioned the death of Mr. King. We think the contention of the plaintiffs' counsel that Mr. King was a licensee on the defendant's tracks at the point where he was struck in no way favorably affects the plaintiffs' case. It is only claimed that he and others were in the habit of passing north along these tracks, between the rails of the different tracks, or between the different tracks, indifferently, without confining themselves to the gravel walk, and that this was known to the defendant and its servants, who are not shown to have made any effort to prevent it. The fact that such use of the tracks was permitted, either passively or expressly, would not relieve persons availing of it from the exercise of ordinary caution, and, so far from charging the servants of the company with any additional degree of care in operating its trains at midday, would have a reasonable and natural tendency to dull their attention in taking notice of people passing about or along the tracks at such a time, on account of its being a common occurrence, and the persons usually there being those who were accustomed to the place, and having knowledge of its dangers, and trusting in their own capacity to avoid injury in such use by timely stepping off a track on which a train, or part of a train, or engine was approaching.

From the most careful consideration of the whole proof, and of the language of section 3549, and of the other parts of the statutory law of Mississippi to which we have been referred, we are satisfied that the plea of contributory negligence was well taken, and was established by uncontradicted testimony, and that the trial judge did not err in directing a verdict for the defendant.

The judgment of the circuit court is affirmed.

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HALTIWANGER v. COLUMBIA, N. & L. R. Co.

(*Supreme Court of South Carolina, Feb. 27, 1902.*)

[41 S. E. Rep. 810.]

Accident to Trespasser on Track—Evidence.\*

Where the evidence showed that plaintiff's decedent was killed on a

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\*See note appended to *Cottrell v. Southern Ry. Co. (Miss.)*, 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

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railroad track at a place other than a public crossing or a traveled place, and that the engineer saw the deceased on the track before his engine struck him, a nonsuit is improper.

**Same—Liability.**

Where a person walking on the track which people are accustomed to use as a footpath, but where no legal right to use the same had been acquired, is injured, the company is only liable for injuries to him in case of willful or wanton injury, or such gross negligence as shows a reckless disregard of human life.

Appeal from common pleas circuit court of Lexington; Aldrich, Judge.

Action by Elizabeth Haltiwanger against the Columbia, Newberry & Laurens Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The charge is as follows:

“Mr. Foreman and Gentlemen of the Jury: The plaintiff, by her complaint, which has been read in your presence, seeks to recover, for the reason therein stated, the sum of \$7,000 damages from the defendant railroad company. I need not read over this complaint to you again. The defendant in its answer denies—First, that the plaintiff is administratrix, as alleged; and, second, denies each and every allegation in the complaint. The defendant is a railway corporation. A corporation is created by law, and in this state a corporation is such by reason of the laws of South Carolina passed for the purpose of creating such corporations; and if that be so, as it is, a corporation is a legal body, has all the rights, privileges, and immunities given to it by its charter, and has the right to exercise the same. Among other rights given to it or permitted to it is the construction of a track, and the operation of engines and cars along that railroad track. Ordinarily speaking, that track is set apart by the laws of this state for the exclusive use of the railway company, for the passage of its engines and cars; and the exceptions, where others have the right to the use of that track, must arise under the law, and, where they have a right to the use of any part of the track, they must derive that right from some legal source. In passing upon the cause of litigation between the railroad company and the individual, you would give each the benefit of the law, according to which each, respectively, has its right under the law, and deprive neither of its rights.

“I shall endeavor to give you the law of this case as I think the law is applicable to it. I am responsible for that. It is your duty to take the law from the court, to weigh the testimony, pass upon the testimony, and to find a verdict according to that testimony which you have heard from the witnesses, and the law as the court shall give it to you. There are a great many requests to charge in this case, and I will save time if, in connection with these requests to charge, I state my views as to the law of the case:

“That if plaintiff was guilty of negligence to such a degree that it was the proximate and immediate cause of the injury,

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he could not recover, even if defendant was negligent; that, on the other hand, if defendant was guilty of such negligence as was the proximate and immediate cause of the injury, plaintiff is entitled to recover, though he was guilty of negligence, provided his negligence was not a proximate and immediate cause of the injury; and that if plaintiff was guilty of negligence which was not the proximate cause, and such cause was the failure of defendant to exercise reasonable care and prudence to avoid the injury, plaintiff would be entitled to recover.' That is correct, and I so charge you. Now, this word 'proximate' means the primary cause, or that which produces the injury.

"Where persons have long been accustomed to use a railroad track, at a certain place, and the company knew that persons were likely to be on the track at such place, it is the duty of the company, in operating its trains, to use more care at such place than at other places along its road, where it had no reason to believe that persons were likely to be on its track.' Gentlemen, there are several requests along that line, which I will take up in connection with that, to prevent repetition. 'The duty of a railroad company is governed by the general principles of law that every one is obliged, upon consideration of humanity and justice, to conform his conduct to the rights of others, and in the prosecution of his lawful business to use every reasonable precaution to avoid their injury.' That is correct, and I so charge you. 'That railroad engineers should observe more caution in running trains at places where they know that persons are likely to be on the track than elsewhere, even if those persons are trespassers, and a trespasser upon the track of a railroad is entitled to be protected from gross negligence.' That is correct. They have a right to be protected from gross negligence. 'That a wrongdoer is not necessarily an outlaw as to his property, still less as to his person, and a railroad company has no right to inflict wanton injury on persons who are unlawfully upon its track.' That is correct, and I so charge you.

"When, in action to recover damages for personal injuries, the defense of contributory negligence is relied on, the defendant is liable, although the plaintiff's negligence essentially co-operated to produce the injury, when it could have been averted by the exercise of reasonable care and ordinary prudence on the part of the defendant or his servants after discovering, or after time when they ought to have discovered, the danger in which the party injured stood.' That is correct. It seems to be taken from the text-books.

"Where a person on a railroad track is killed by defendant's train, defendant is liable if the injury could have been avoided by the use of ordinary means at command by those in charge of the train after deceased was seen by them to be in danger from the train.' That is correct, and I so charge you. The fourth request is stricken out.

“‘Where an engineer, by keeping a reasonable and careful lookout, could have discovered a man who was apparently on or so near the rail of the track as to expose him to danger from the engine as it passed, and could by the use of the appliances at his command, and without peril to those on the train, have stopped the train in time to have avoided such injury to such man, and failed to do so, the railway company was guilty of negligence, and liable for the death of such man, notwithstanding his contributory negligence.’ That, gentlemen, is correct, with certain limitations and explanations that I will give you later on, in which I will speak further as to the duties of an engineer.

“‘That if the jury find that the plaintiff was killed at a place on the track of the defendant company where persons were in the habit of walking, that the deceased was on said track, and that the trainmen either saw, or by the exercise of ordinary care could have seen, him in time to avert the danger, and failed to exercise that care, then the defendant is liable.’ That, also, with the explanation I will give you further on, I charge you.

“‘The defendant’s second request is as follows: ‘That gross negligence is the doing of something to another person, or the failure to do something for him, in a manner that indicates utter indifference to his rights.’ That is correct. I so charge you.

“‘That wantonness is the intentional doing of something or failure to do something to suit one’s own whim or will, regardless of the rights of others, when the party knows, or is under legal obligation to know, that the doing or failing to do such act might cause injury to other persons.’ That is correct. I so charge you. And I further charge you that negligence is the want of ordinary care, and that the absence of ordinary care means negligence. This plaintiff alleges in her complaint that her intestate is dead, and was killed by the railroad train or the engine. That allegation alone would not support a cause of action. Therefore it becomes essential to see what is the real cause she bases her action upon, and we turn to the complaint. It is based upon this allegation by the plaintiff: ‘That the defendant negligently, recklessly, unlawfully, and wantonly caused said locomotive and train of cars to rapidly approach said intestate, J. H. Haltiwanger, and strike him, injure him, kill him,’ and so on. Therefore plaintiff, to recover, must sustain these allegations by proper proof. Having alleged that her intestate is dead, and that his death was occasioned by negligence, recklessness, unlawfulness, and wantonness of the defendant company, it is incumbent upon her to prove that; and, if she fails to prove it by the preponderance of the testimony, then her cause of action fails.

“‘The fourth request is: ‘That this action being based upon an allegation of gross negligence and wantonness, which

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is denied in the answer, it can only be maintained by proof that the alleged injury to the deceased was caused by the grossly negligent or wanton conduct of the engineer or other agent of the company in the running of the train, after he knew, or was under legal obligations to know, that deceased was on defendant's track, and in a position of danger.' That I have to modify in this particular: That this action is based upon an allegation of gross negligence and wantonness, because, as I have charged you, in the allegation it is based also upon negligence. And just here I may as well say that, for plaintiff to make out her case, she must, by the preponderance of the testimony, show that her intestate was killed; that the death was occasioned by the negligence, recklessness, unlawfulness, and wanton conduct of the defendant. A railroad engineer is presumed to exercise ordinary care, and, in the absence of ordinary care, he is expected to do that which engineers who are properly suited to their employment usually exercise in the discharge of the duties of their offices as engineers. And I have defined to you what gross negligence is, and they, in discharging their duties, must not be guilty of gross negligence or wantonness.

"The defendant's fifth request is: 'That the complaint in this action does not allege a legal right in the public to use the track of defendant's road between Hilton and Chapin.' That is correct, and I so charge you. It does not state in the complaint that the intestate, Mr. Haltiwanger, had a legal right to be upon a railroad track; and, even at the places where they have a legal right to be upon the track, they, while passing over the track, or upon the track, must exercise the ordinary care and diligence to which I shall refer a little later.

"That at ordinary places on the track, not at a public crossing or traveled place, a railroad engineer does not owe any duty to the public to be on the lookout along the track for persons who may be on the track; that a public crossing is where a public highway crosses the track of a railway; that a "traveled place" means a place, as used in our statutes on the subject, where the public not only travel, but where they have a right to travel.' Those three requests I charge you as law, with this further statement: That at a public place the statute law requires certain signals to be given to warn the public, and the same at a traveled place, as I have described to you. When the railroad company complies with the statutory provisions in giving those signals (that is, blowing the whistle or ringing the bell as provided by statute) they have done their duty in that respect; and at places other than that the railroad company, the engineers and officers in charge of its engines, are expected to use only that ordinary care which engineers commonly use and are expected to use in traveling over such places.

"Ninth request: That a railroad company is under no

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obligations to the public, or the trespasser himself, to be on the lookout for a trespasser on its tracks, or to take any steps before discovering such a one on the track to prevent injury to him by the ordinary running of its trains.' That is correct, and I so charge you. The meaning of that, or one of the meanings, is this: Though the railroad company, having exclusive right to its roadway (having the prior right to use its roadway), has a reasonable right to expect that the public, strangers to it, and trespassers upon its track, will not be there (will not interfere with their rights), and having a right to suppose so, the law puts no duty upon them to assume that the public or a trespasser is getting upon its track, and placing himself or themselves in a position of danger.

"Tenth: That an action for killing a man by the running of an engine, pulling a railroad train, which is based upon an allegation of, and depending upon, gross negligence or wantonness, denied in the answer can only be maintained by proof which would make out a prima facie case against the engineer or other person running the engine in a criminal proceeding for the killing of the man.' That is correct, and I so charge you, in connection with what I have told you as to the liability of the railroad company for want of ordinary care,—the engineer's want of ordinary care.

"Eleventh request: That an engineer running an engine on a railroad track in an ordinary manner, who sees a man walking along the track in front of him, has the right to assume that the man is possessed of the ordinary faculties of sight and hearing, and that the instincts of self-preservation will cause him to use his sight and hearing to warn him of an approaching train, and that he will get off the track, unless such a man is known, or appears to the engineer, to be lacking in sight, hearing, or the instinct of self-preservation, or is seen to be in a position of special danger.' The railroad company has the right to suppose, as the request here says, that the man on the track will leave the track to avoid the danger, unless it knows that the man is deaf or has impaired hearing or sight, or it sees something which would cause a reasonable engineer to suspect the man was in special danger.

"Twelfth: That a man who uses a railroad track as a foot-path is bound to be on the lookout for the approach of trains, and to use both his sight and hearing to warn him of their approach, especially when he knows or has been informed that a train is about to approach.' Well, gentlemen, I charge you that is correct. He is bound to use his senses at all times when walking on a railroad track; that is, if he has senses, and is an ordinary, reasonable being. What I mean by 'senses' is, if he is an ordinary being, who has not been deprived of the ordinary faculties given by God to the average man, or for some reason is deprived of acting as a man in his senses would act under those circumstances.

"Thirteenth: That the measure of damages in such a case

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as this is such a sum as the jury think proportionate to the injury sustained by the parties for whose benefit the action is brought, as proven by the evidence, and that the jury cannot give punitive damages.' That is correct. I so charge you.

"The fourteenth request is about the same request: 'That in such a case as this a jury cannot give speculative damages, or damages for any injury that has not been established to their satisfaction by the evidence.' That is correct, and I so charge you. The meaning of that is this: Damages are divided generally into two kinds,—compensatory damages and punitive damages. 'Compensatory damages' means such damages as will compensate a person for a loss or injury actually sustained,—such damages as will make him whole, if such expression can be permitted. While, on the other hand, 'punitive damages' means punishment and reward, not in the spirit of compensation, but a punishment to a wrongdoer for the wrongful act he has committed. Now, under the act of the legislature of this state (an act under which this suit was brought), you can only give compensatory damages, and in no event can you exceed \$7,000; that is, the amount asked for. You can give any lesser amount which, in your judgment, you think (if you think plaintiff is entitled to any damages at all), as low down as the nominal sum,—from one cent to \$7,000.

"I had overlooked one thing which I had meant to say in regard to the limitation upon the requests as to the use of a road. I have told you, you know, what a highway is. The public have a right to pass over a railway at a highway crossing the track. They have also the right to pass at a traveled place, where the public not only are accustomed to travel, but have the right to travel there. Now, to acquire a permissive right, or to acquire the right to pass over the lands of another, it must be because one has used it for twenty consecutive years, and by long usage; continuous usage, in which the public, by their conduct, assert that they have the right; in which they deny the right of plaintiff, the owner of the soil, to prevent their going over,—then, by long lapse of time, by acquiescing on the part of the owner of the soil, the right of user (the easement, as it is termed, to cross over the soil) may ripen into a legal right; but use short of twenty years would not do it. Further, one may use the land of another, or the track of a railway, for any number of years, and, if that usage is by permission or by the acquiescence of the owner of the soil or the railroad track, it would not amount to a legal right; it would not amount to an easement; would amount merely to a permission. So when one may have the right to pass over the soil of another, or across the railroad track, or along the railroad track, it may be suffered to be done, permitted to be done, by the owner of the soil, or the owner of the railroad track; but the permission does not vest in the person so using the soil a right to that soil,—that is, a legal right.

"Now, I think I have gone through the main features of



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this case, and it is for you, gentlemen, to pass upon them. I am not allowed to charge upon the facts. I have given you the law as I understand it, and it is now for you gentlemen, under the law and the testimony as you have heard it, as understood by your intellects and as passed upon by your consciences, to render a verdict in accordance with the law and the testimony. \* \* \*

From judgment for plaintiff, defendant appeals on following exceptions:

"(1) Because his honor, on the motion for a nonsuit, should have held that there was no evidence to show any breach of duty owed by the railroad company to the deceased, or any negligence on its part or the part of its servants in the acts causing his death.

"(2) Because, upon said motion, his honor should have held that the plaintiff's evidence showing beyond question that the accident causing the death of the deceased occurred while he was walking on the track of the defendant company at a place which was neither a public crossing nor a traveled place, and there being no evidence tending to show that he was seen by defendant's servants operating the train which killed him, the nonsuit should have been granted.

"(3) Because upon said motion, the evidence showing that the accident which caused the death of the deceased occurred while he was walking on the track of the defendant company at a place which was neither a public crossing nor a traveled place, and there being no evidence to show that he was apparently deprived of the use of his senses or in any position of special danger, his honor should have held that there was no evidence tending to prove negligence on the part of defendant, and the motion should have been granted.

"(4) Because, upon the request of the plaintiff, his honor charged the jury as follows, to wit: 'Where an engineer, by keeping a reasonable and careful lookout, could have discovered a man who was apparently on or so near the rail of the track as to expose him to danger from the engine as it passed, and could, by the use of the appliances at his command, and without peril to those on the train, have stopped the train in time to have avoided such injury to such man, and failed to do so, the railway company was guilty of negligence, and liable for the death of such man, notwithstanding his contributory negligence;' thereby indicating (a) that it is the duty of a railroad company to have its engineers to keep a lookout along its track, even at places other than a public crossing or traveled place, for trespassers or other persons who may be on the track; (b) that if the engineer sees a person walking on the track of the company, even at a place other than a public crossing or traveled place, he has no right to presume that the person will get off the track, but is bound to stop his train, if it can be done by the use of the appliances at his command, and without peril to those on the train; (c) and

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that even if the plaintiff was guilty of contributory negligence, under such circumstances, the defendant would be liable for his death; and (d) because said request was a charge on the facts, as it embodied a statement that under such circumstances 'the railway company was guilty of negligence, and liable for the death of such man, notwithstanding his contributory negligence.'

"(5) Because, at the request of the plaintiff, his honor charged the jury as follows, to wit: 'That if the jury find that the plaintiff was killed at a place on the track of the defendant company where persons were in the habit of walking, that the deceased was on said track, and that the trainmen either saw, or by the exercise of ordinary care could have seen him, in time to avert the danger, and failed to exercise that care, then the defendant is liable;' thereby indicating (a) that the defendant company owed a duty to have its engineer looking out for persons on the track at the point where plaintiff was killed; (b) that, if the engineer saw deceased on the track at such point, he had no right to assume that deceased was in the exercise of the ordinary senses, and would, from a desire of self-preservation, step off the track, so as to allow train to pass, but was under the obligation to stop his train; (c) that the mere presence of a person on a railroad track in front of a train, not apparently devoid of any of his senses, is in such position of danger as would require the railroad company to stop its train so as to avert danger to such person; (d) because said charge was a charge upon the facts of the case, embodying a statement that 'if, under the circumstances stated, the defendant failed to exercise the care there stated, then the defendant is liable.'

"(6) Because his honor the presiding judge refused defendant's first request to charge: 'This action is not based on the violation of any duty owed by defendant company to a passenger or employee, but upon the alleged grossly negligent or wanton injury to plaintiff's intestate while he was walking, for his own convenience, on the track of defendant company;' thereby failing to give to the jury a correct understanding of the issues arising under the pleadings in said cause.

"(7) Because his honor modified defendant's fourth request to charge by instructing the jury as follows, to wit: 'That I have to modify in this particular: That this action is based upon an allegation of gross negligence and wantonness, because, as I have charged you, in the allegation it is based also upon negligence;' thereby indicating that, in the absence of the exercise of the high degree of care at the time and place testified to, the defendant would be liable.

"(8) Because his honor modified defendant's tenth request to charge by saying: 'That is correct; and I so charge you, in connection with what I have told you as to the liability of the railroad company for the want of ordinary care,—the engineers' want of ordinary care;' thereby indicating that the

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railroad company would be liable if there was an absence of ordinary care on the part of the engineer in the killing of a man on its track at a place other than a public crossing or traveled place.

"(9) Because his honor should have held, on the motion for a new trial, that the verdict was against the clear preponderance of the testimony,—there being no testimony whatever to establish negligence on the part of the defendant,—and should have granted the motion for a new trial."

George Johnstone and W. H. Lyles, for appellant.

G. T. Graham and P. H. Nelson, for appellee.

McIVER, C. J. (after stating the facts). The plaintiff, who is the administratrix of her deceased husband, John H. Haltiwanger, brought this action for damages against the Columbia, Newberry & Laurens Railroad Company to recover damages occasioned by the killing of her said intestate by the alleged negligence of the defendant company. The undisputed facts are that said intestate, while walking along the track of defendant's railroad at a point which was neither a railroad crossing nor a traveled place, was struck by an engine drawing a passenger train of defendant company, and instantly killed. At the close of the testimony on behalf of the plaintiff a motion for a nonsuit was made, based upon two grounds: "(1) That the testimony had tended to prove only that the deceased had been killed by defendant's train while he was walking along defendant's track at a place that was neither a public crossing nor traveled place. (2) That there was no evidence tending to show that he was seen by the engineer running the train by which he was killed, or that he was in a position of apparent danger; consequently there was no testimony tending to show negligence on the part of the defendant company or its servants." This motion was refused, and the trial proceeded, and at the close of the testimony and argument of counsel the circuit judge charged the jury as set forth in the "case." The jury rendered a verdict for the plaintiff, and, a motion for a new trial having been made and refused, judgment was entered, and from such judgment defendant appeals upon the several exceptions set out in the record. For a proper understanding of the points made by this appeal, the reporter will set out in his report of the case the charge of the circuit judge and the exceptions.

It will be observed that the exceptions raise three general questions: (1) Whether there was error in refusing the motion for a nonsuit (exceptions 1, 2, and 3); (2) whether there was error in the charge of the circuit judge (exceptions 4, 5, 6, 7, and 8); (3) whether there was error in refusing the motion for a new trial (exception 9). We will proceed to consider these three general questions in their order.

First, as to the motion for a nonsuit. It will be noticed

that the grounds upon which the motion was based were reduced to writing, and, as set out above, make only the questions whether there was any testimony tending to show that the place where the intestate was killed was neither a public crossing nor a traveled place, and whether there was any testimony tending to show that the deceased was seen by the engineer running the train by which he was killed, or that he was in a position of apparent danger, and consequently whether there was any testimony tending to show negligence on the part of the defendant; but they do not make what we regard as the controlling question in this case, to wit, whether there was any testimony tending to show such negligence as would make the defendant liable for killing a trespasser on its track, inasmuch as the undisputed fact was that the intestate was killed while walking along the defendant's track where there was no crossing, and where it was not a traveled place. Nor is such question made by either of the three exceptions (1, 2, and 3) imputing error in refusing the motion for a nonsuit. On the contrary, the grounds of the motion for a nonsuit, as reduced to writing, as required by the eighteenth rule of the circuit court (33 S. E. viii), as well as the exceptions just referred to, raise but two questions: (1) Whether there was any testimony tending to show that the place where the intestate was killed was either a public crossing or a traveled place; (2) whether there was any testimony tending to show that the deceased "was seen by the engineer running the train by which he was killed, or that he was in a position of danger." As to the first of these questions, while it is quite true that there was no testimony tending to show that the place where the intestate was killed was either a public crossing or a traveled place, yet that alone would not justify a nonsuit, for that would be to assume that a railroad company would not be held liable for injuring or killing a person at any point on its track, except at a public crossing or on a traveled place,—a proposition which certainly cannot be sustained; for, as we shall presently see, a railroad company may be held liable for killing or injuring even a bald trespasser at any point on its track, under certain circumstances, which will hereinafter be adverted to. As to the second of these questions, an examination of the "case" shows that there was some testimony tending to show that the engineer did see the deceased on the track, and, as a person walking on a railroad track in front of an approaching train is always "in a position of apparent danger," we think there was at least some evidence tending to show that the engineer running the train saw that the deceased was in a position of apparent danger; and, therefore, we are of opinion that there was no error in refusing the motion for a nonsuit upon either of the grounds upon which such motion was based. These exceptions are therefore overruled.

The second general exception—whether there was error in

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the charge of the circuit judge, as imputed thereto by exceptions 4, 5, 6, 7, and 8—will next be considered. For a proper appreciation of the points made by these exceptions it will be necessary to recall some of the undisputed facts of this case. It is not, and, indeed, cannot be, pretended that the place where the plaintiff's intestate was struck and killed was either a public crossing or a traveled place, or that either the public or the intestate has ever acquired the legal right to use the track of the defendant company, even as a footpath, at the point where the disaster occurred. The most that could be or was said was that persons were in the habit of using the track at that point as a footpath, and that defendant company had taken no steps to manifest its objection to such use of its track. But that is not and cannot be claimed to have been sufficient to confer upon any person the legal right to use the track at pleasure as a footpath. It only amounts to this: that while the defendant company was legally entitled to the exclusive use of its track for the purpose of transporting the mail, passengers, and freight, it did not churlishly forbid persons from walking along its track at such times as would not interfere with the running of its trains. In this case there was no testimony tending to show that either the public or the intestate had ever acquired the legal right to use the defendant's track at the point where the disaster occurred. Indeed, there is no allegation to that effect in the complaint, and the jury were so instructed by the circuit judge. So that the case presented by the pleadings and evidence is one in which the intestate was killed at a point on defendant's track where he had no legal right to be, though he and others in that neighborhood had been in the habit of using the track at that point as a footpath, and had never been forbidden to do so by the defendant company; and the first inquiry is what, if any, duty did defendant company owe to the intestate under these circumstances, and what are the rules of law applicable to such a case? If one voluntarily goes upon the track of a railroad company, which is in daily and sometimes hourly use for the transportation of its trains, without legal authority, he becomes a trespasser; and the inquiry is narrowed down to the question what duty, if any, does a railroad company owe to a trespasser on its track? This matter has been considered in the case of *Smalley v. Railroad Co.*, 57 S. C. 243, 35 S. E. 489, and the authorities cited. In *Darwin v. Railroad Co.*, 23 S. C., at page 535, 55 Am. Rep. 32, it was said: "It must be manifest that a railroad company does not owe the same duty to a trespasser that it does to a passenger or one of its employees, though we do not go to the extent of holding, as some of the cases [citing the cases] seem to do, that a railroad company owes no duty to one who trespasses on its tracks, or unlawfully intrudes himself upon its engines or cars. No one can safely disregard the ordinary instincts of humanity, and shield himself from responsibility for an injury

done, even to a trespasser, by its wanton or reckless disregard of such instincts." So, also, in the case of *Hale v. Railroad Co.*, 34 S. C. 292, 13 S. E. 537,—a case which in one respect, at least, is very much like the case under consideration, for there, as here, the disaster occurred at a point where there was neither a public crossing nor a traveled place, but at a point where persons were accustomed to pass for their own convenience, and there was no evidence that they had even been forbidden or warned by the railroad company against so doing,—the same doctrine was applied. In a note to *Railroad Co. v. Vaughan* (Ala.) 30 Am. St. Rep., at page 54 (s. c. 9 South. 468), Mr. Freeman, the learned editor, discusses the question as to what duty a railroad company owes to a trespasser on its track, and after saying, "That the company is responsible only for willful or wanton injuries, or for injuries resulting from a degree of negligence equivalent thereto, is a principle regarding which there seems to be no disagreement [citing cases]," states the true doctrine as follows: "The true principle, it is conceived, is that the engineer should see that the track is clear; but that, when an obstruction is perceived, the proper course to adopt will depend upon whether it is a living or inanimate object, whether it is an intelligent human being, under ordinary circumstances, of discerning the means of securing safety, or a brute, which has no guide but mere instinct. If the object seen is an intelligent human being, it seems to be generally agreed that the engineer has a right to presume that he will get out of harm's way before the engine reaches him, and that it is not negligence to act upon that presumption,"—citing the cases. To the same effect, see 19 Am. & Eng. Enc. Law, 935-937, and also 3 Elliott, R. R. § 1253. All these authorities are cited with approval in *Smalley v. Railroad Co.*, supra. Looking at the charge of the circuit judge in the light of these well-settled doctrines, it seems to us that he has failed to discriminate between the measure of the duty which a railroad company owes to a passenger or to one rightfully upon its track, and that which it owes to one who is on its main track without any legal authority; in the former case a much higher degree of care being required than in the latter. That this distinction was ignored by the circuit judge is clearly pointed out in those portions of the charge quoted in the several exceptions to the charge mentioned above, and this is emphasized by the language used by the circuit judge in his order refusing the motion for a new trial, where, in speaking of the proposition contended for by counsel for the defendant, "that the action can be maintained only by proof that the alleged injury to the deceased was caused by the grossly negligent or wanton conduct of the engineer, or other agent of the company, in the running of the train," he said, "That is not my conception of the law;" showing very clearly that the circuit judge was of

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opinion (which he impressed upon the jury, especially in his comments upon and modifications of defendant's requests to charge, as set forth in exceptions 6, 7, and 8, as well as in charging plaintiff's requests to charge, as set forth in exceptions 4 and 5) that, to entitle the plaintiff to recover, it was not necessary to prove that the killing of the intestate was willful or wanton, or was the result of such gross negligence as would amount to a reckless disregard of human life, which was in direct conflict with the well-settled rule, as shown by the authorities above cited. These exceptions are sustained.

The ninth exception must be overruled, as it has been held in a number of cases that, in an appeal from a motion either granting or refusing a new trial, this court has no jurisdiction to pass upon the weight or the effect of the evidence.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

On Petition for Rehearing.

(April 18, 1902.)

On examination of this petition, it fails to satisfy us that any material facts or principle of law has either been overlooked or disregarded. Hence there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and the stay of remittitur heretofore granted be revoked.

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CHASE v. SPARTANBURG RY., GAS & ELECTRIC CO.

(*Supreme Court of South Carolina, April 21, 1902.*)

[41 S. E. Rep. 899.]

Negligence—Pleading—Instructions.

In an action for personal injuries the complaint charged that the injury was caused—First, by a defective belt furnished by the master; and, second, through carelessness of a servant in fastening the belt: *held* error to charge that the jury could not find against the master unless they also found against the servant for negligently fastening the belt, as the master might have been negligent in furnishing a defective appliance or notifying the servant of danger.

McIver, C. J., dissenting.

Appeal from common pleas circuit court, Spartanburg county; Townsend, Judge.

Action by C. C. Chase against the Spartanburg Railway, Gas & Electric Company. Judgment for defendant, and plaintiff appeals. Reversed.

O. L. Schumpert, McCravy & Hunt Bros., and Stanyarne Wilson, for appellant.

Duncan & Sanders, for appellee.

GARY, A. J. This is an action for damages on account of

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injuries received by the appellant, who was struck by a servant of the defendant falling from one of its poles on the streets of Spartanburg. The complaint alleges two separate and distinct acts of negligence or causes of action: (1) It charges that the defendant furnished its servant a defective, insecure, and insufficient belt and tackle to sustain him while suspended over the street and sidewalk, by reason of which the belt broke, precipitating its servant to the ground, a distance of 20 feet, striking plaintiff and injuring him severely. (2) That the servant carelessly failed to buckle or fasten the ends of the belt while he was at work on this pole, by reason of which he fell from the pole, striking the plaintiff and injuring him severely. F. D. Marshall, foreman of the defendant, and examined as a witness in its behalf, testified as follows:

"Q. Can you account at all for this accident,—for his falling? A. Only in one way: It comes unsnapped. There is a certain way, if you give it a little wrench, it will come undone. If you fasten it this way, it will be all right [the hook being fastened on each side, with the spring inward]. If you snap one on the outside and one on the inside around the pole, it will be in a crook, and this thing will turn over like that. Q. How will that unsnap it? A. I don't know how it does it, but it will come undone there. Q. That ring sometimes presses against that and throws it out? A. Very seldom. I have seen it do it once or twice with one in and one out."

The jury rendered a verdict in favor of the defendant, and the plaintiff has appealed upon the single exception assigning error on the part of his honor the presiding judge in charging: "If, under all the facts of this case, the jury would not render a verdict against M. Clark if he were being sued on the grounds of negligently fastening the belt, then they should not find a verdict against the defendant on this account;" thereby erroneously declaring that the liability of the employee is the correct standard by which to measure the liability of the employer; and also thereby charging upon the facts, to wit, limiting the cause of the insufficient or insecure fastening of the belt to the personal negligence of the employee, Clark, whereas the nature of the construction of the belt, for which the employee was not responsible, may have conducted to the accident in spite of the exercise of ordinary care by said employee."

Mr. Jaggard, in his work on Torts (section 98), says: "According to Judge Story: 'The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not in general (for there are exceptions) liable to third persons for his own nonfeasances or omissions of duty in course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal.' The rule comes from



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the famous saying of Lord Holt in *Lane v. Sir R. Colton*: 'A servant or deputy cannot be charged with neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not as a servant or deputy, but as a wrongdoer.' Blackstone furnishes a favorite illustration: 'If a servant \* \* \* by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master, not the servant.' But the rule as there laid down has been seriously questioned. \* \* \* In commenting on the foregoing doctrine, the author continues as follows: "The futility of such reasoning on the word 'nonfeasance' appears fully from the lack of definiteness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear 'if the nature of the duty incumbent on the servant be considered.' If the servant owe a duty to third persons, derived from instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission. A driver who injures a third person by his negligence is liable." We are satisfied that the rule is correctly stated in this last quotation, and that a servant as well as the master is liable in all cases when his negligent act is the direct and proximate cause of the injury sustained by a third person. The negligence of the servant must be determined with reference to the duty imposed upon him, while the negligence of the master must be founded upon his failure to discharge the duty resting upon him. In 14 Am. & Eng. Enc. Law, 842, 843, it is said: "In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes, and, if he fails to do so, he cannot charge the consequences upon the master. And this rule applies to minor servants. But a servant does not, of course, assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof." See, also, *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213; *Hightower v. Cotton Mills*, 48 S. C. 190, 26 S. E. 222; and *Tedford v. Electric Co. (Cal.)* 66 Pac. 76, 54 L. R. A. 85. It is thus shown that the negligence of a servant in handling the instrumentalities incident to his employment depends upon whether they are apparently likely to produce injury, and, if the danger is only latent, whether he has knowledge of the danger attendant upon the use of them. These are questions of fact ordinarily to be

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determined by the jury. If in this case the jury should reach the conclusion that the fastening of the belt was attended with latent danger, of which the servant had no knowledge, they could not say from these facts that he was negligent, as he had the right to assume that the master would advise him of such danger. But as the law imputes to the master the knowledge of the danger, even though latent, in the use of the instrumentalities with which he provides his servant, he cannot escape liability by showing he was ignorant of this fact, unless he should further show that by the use of due diligence he could not have discovered the danger. The jury will, therefore, in deciding whether the master was negligent, take into consideration the fact that he had knowledge of the danger, in the eyes of the law; and it is incumbent on the master, by way of defense, to show that he could not, by the use of due diligence, have had knowledge of the danger. It will thus be seen that different elements enter into the question of negligence on the part of the master and on the part of the servant. We do not mean to say that there are not cases in which the liability of the master and servant might depend upon the same state of facts, but that in the case under consideration this court cannot say, as matter of law, that, if the jury would not render a verdict against the servant if he were being sued on the ground of negligently fastening the belt, then they should not find a verdict against the defendant on this account.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded for a new trial.

McIVER, C. J., dissents.

On Rehearing.

(May 30, 1902.)

PER CURIAM. On examination of this petition, it fails to satisfy us that any material fact or principle of law has either been overlooked or disregarded; hence there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of remittitur heretofore granted be revoked.

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HEMINGWAY v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit, April 22, 1902.)

[114 Fed. Rep. 843.]

Contributory Negligence—Burden of Proof—Rule in Federal Courts.

Where, in an action to recover for negligence resulting in death, the defendant claims contributory negligence, it is the rule of the United States courts, irrespective of the decisions in the courts of the state where the federal courts are held, that the burden is on defendant to show that the deceased was negligent and that his negligence contributed to the injury which resulted in his death.

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**Same—When Question of Law.\***

Where, in an action to recover for personal injury, all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes matter of law only, and the court should direct a verdict.

**Same—When Question for Jury.\***

Where, in an action to recover for personal injury, the negligence of defendant is shown, and there is conflict in the material evidence as to whether the person injured observed ordinary care, or, where there is no such conflict, the facts are such that reasonable men might fairly draw different conclusions from them, the question of contributory negligence is for the jury.

**Railroads—Negligence—Personal Injury—Contributory Negligence—Evidence—Question for Jury.\***

Plaintiff sued to recover for the death of his minor son, caused by the negligence of a railroad company. The accident occurred about dark at a street crossing in a village. The street approaching the crossing was for 100 yards in a cut 4 or 5 feet deep, and the railroad for 300 yards was on a curve, and in a cut 8 or 10 feet deep, with shrubs, a fence, and house between the street and track. The train was running 35 or 40 miles an hour, in violation of Laws Miss. 1896, p. 76, which prohibited a greater speed than 6 miles an hour through a city, town or village. The evidence was conflicting as to whether the whistle was blown or bell rung continuously for 300 yards before reaching the crossing, as required by Ann. Code Miss. § 3547. Deceased, who was driving a team attached to a loaded wagon, in which were two other men, slowed to a walk as he approached the track. One of those men testified that he looked and listened all the way along for a train, and was facing the direction from which it came; that he was the first to see it, and as soon as he saw it he called out, and jumped from the wagon, and just as he struck the ground the engine struck the wagon. There was testimony that one approaching the track could not see a locomotive headlight coming from that direction until he was within 6 feet of the track and the engine was within 150 yards. The negligence of defendant was conceded, but the court directed a verdict for defendant on the ground of contributory negligence of deceased: *held*, that the question should have been submitted to the jury.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Wm. C. McLean, for plaintiff in error.

Edward Mayes (J. B. Harris and J. M. Dickenson, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action for \$11,100 damages, brought by Prince Hemingway, a citizen of the state

\*See notes, 7 Am. & Eng. R. Cas., N. S., 306, 533; 10 Am. & Eng. R. Cas., N. S., 856; 11 Am. & Eng. R. Cas., N. S., 859. See also, *Haines v. Lake Shore & M. S. Ry. Co.* (Mich.), 1 R. R. R. 627, 24 Am. & Eng. R. Cas., N. S., 627; *Hamilton v. Consolidated Trac. Co.* (Pa.), 1 R. R. R. 233, 24 Am. & Eng. R. Cas., N. S., 233; *Lorenz v. Burlington, etc., Ry. Co.* (Iowa), 1 R. R. R. 216, 24 Am. & Eng. R. Cas., N. S., 216; *Ayres v. Pittsburg, etc., Ry. Co.* (Pa.), 1 R. R. R. 206, 24 Am. & Eng. R. Cas., N. S., 206; *Nosler v. Coos Bay, etc., Nav. Co.* (Ore.), 22 Am. & Eng. R. Cas., N. S., 719; *Bard v. Philadelphia, etc., Ry. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 782.

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of Mississippi, against the Illinois Central Railroad Company, a corporation chartered under the laws of the state of Illinois. The action is based on the alleged wrongful and negligent act of the defendant in causing the death of Frank Hemingway, the infant son of the plaintiff. Such right of action is given to parents for the death of the minor child, caused by the wrongful or negligent act of another, by the law of the state of Mississippi, where it is alleged that the wrong was committed. Laws Miss. 1898, p. 82, c. 65. By a law of that state approved March 18, 1896, all railroad companies having the right of way are allowed to run locomotives and cars through cities, towns, and villages at the rate of six miles an hour, and no more; and it is provided that "the company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than six miles an hour through any city, town or village." Laws Miss. 1896, p. 76. By another statute each locomotive engine is required to be provided with a bell and a steam whistle, which can be heard distinctly at a distance of 300 yards; and it is provided that the company "shall cause the bell to be rung or the whistle to be blown at the distance of at least three hundred yards from the place where the railroad crosses over any highway or street; and the bell shall be kept ringing, or the whistle shall be kept blowing, until the engine have (has) stopped or crosses the highway or street." Ann. Code Miss. § 3547. The declaration charges that the defendant was running the engine and train in violation of these statutes, and that Frank Hemingway was killed by its train at a public crossing in the town of Como, Miss. The defendant pleaded: (1) That it was not guilty of the supposed wrongs and injuries charged; and (2) that Frank Hemingway was guilty of contributory negligence, in that he failed to exercise ordinary care and prudence in going upon the railroad track without stopping the wagon, and without looking or listening for the approaching train, which he could have seen and heard, and that he thereby contributed to his own injury and death. Issue was joined, and the case tried on these pleas. After evidence had been offered by both the plaintiff and defendant, counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant. The trial court granted this motion, instructing the jury to return a verdict for the defendant, to which action of the court the plaintiff duly excepted. A verdict was returned for the defendant, and a judgment entered thereon, and the case is brought to this court by the plaintiff on a writ of error. It is assigned here that the circuit court erred in directing a verdict for the defendant.

The facts may be briefly stated: On the 31st of March, 1900, Frank Hemingway, 18 years of age, while attempting to cross defendant's railway track, was run over and killed by a train controlled by defendant's servants. The accident

occurred about dark, at a public crossing in the corporate limits of the town of Como, Miss. The highway or street on which the deceased was driving a wagon runs east and west, and crosses the railway which runs north and south. The train which killed deceased came from the south. Beginning south of the crossing, the railway curves eastwardly. For about 300 yards south of the crossing the track runs through a cut 8 or 10 feet deep. The street east of the crossing, for about 100 yards, is in a cut four or five feet deep. A traveler on the highway from the east, as he approached the crossing, would have between him and a train coming from the south some shrubs, a fence, and a house, and the train would be in the cut on the track when within 300 feet of the crossing, and the traveler in the cut in the highway. Such were the natural features of the place where the accident occurred. Frank Hemingway was standing up in the wagon, and driving. Heywood Robinson and John Davis were sitting in the wagon, one facing the rear of the wagon and one facing south. The wagon approached the crossing, the mules going in a trot. It had in it two "iron-toothed harrows, two baskets of clothes, a barrel of flour, and some meat, sugar, and coffee." As the wagon neared the crossing, "it slowed up to a walk," but did not stop. One of the occupants of the wagon, before nearing the crossing, said, "I reckon it is about train time," and deceased said "he didn't reckon it was, but didn't know exactly what time the train came." John Davis, who was sitting with his face towards the south, testified that his face was in the direction the train was coming from; that, as the wagon approached the crossing, he looked and listened for the train "all the way along," and also "just before he got there." The train approached the crossing through the cut at the rate of "35 or 40 miles an hour." As to whether the whistle was blown and the bell rung as the crossing was approached there is conflict in the evidence. Travis Taylor, who examined the crossing before testifying, said that a traveler must get within "about 6 feet" of the railroad before he could see an approaching train; that, after getting within 6 feet of the track, he could see the headlight of an approaching engine "about 150 yards." John Davis was the first to see the train. "I was the first to see it. I said, 'Lord, there comes the train!' and about the time I said that I jumped out. \* \* \* About the time I hit the ground the train struck the wagon." Heywood Robinson also jumped out, and was not hurt. The wagon was smashed, the mules killed, and Frank Hemingway so injured that he died in a few hours. It is conceded that the defendant was guilty of negligence in running its trains through an incorporated town at a speed forbidden by the statute. *Railroad Co. v. Toulme*, 59 Miss. 284; *Nelson v. Railroad Co.*, 40 C. C. A. 673, 100 Fed. 731.

The controlling question in the case is: Does the evidence show such contributory negligence on the part of the deceased

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as left nothing to be passed on by the jury, but required the court to instruct them as matter of law that the plaintiff could not recover? The burden of proof is on the defendant to show that the deceased was negligent, and that his negligence contributed to the injury which resulted in his death. *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Railroad Co. v. Volk*, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78; *Hough v. Railroad Co.*, 100 U. S. 213, 225, 25 L. Ed. 612; *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 581, 13 Sup. Ct. 557, 37 L. Ed. 284. This rule governs in the United States courts, irrespective of the decisions in courts of the state where the federal courts are held. 2 *Fost. Fed. Prac.* (3d Ed.) p. 880, § 375. In the absence of all evidence on the subject, it would not be presumed that the deceased did not exercise proper care, for he had the greatest incentive to caution to protect his own life. *Improvement Co. v. Stead*, 95 U. S. 161 (4), 24 L. Ed. 403. But the defendant can, of course, avail itself of the evidence offered by the plaintiff as tending to show the contributory negligence of the deceased. *Railroad Co. v. Horst*, 93 U. S. 291 (9), 23 L. Ed. 898. But on all the evidence the rule of the federal courts is that the burden of proof is on the defendant to sustain by a preponderance of evidence its defensive plea of contributory negligence. *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Beach, Contrib. Neg.* § 426. In judging the deceased's conduct and considering whether it was prudent or negligent, it must be estimated in the light of all the circumstances surrounding him, and in view of what he had the right to expect of others. He is not blamable if the injury has resulted from the act of another, which he could not reasonably have anticipated. *Railroad Co. v. Van Steinburg*, 17 Mich. 99, 119. It would not be negligence in the deceased to act on the assumption that the defendant would not run its trains in violation of the state law. *Hsie v. Railway Co.*, 78 Miss. 413, 414, 28 South. 941. A railroad crossing a highway or street on the same level imposes duties both on the railroad company and the traveler on the highway. The train necessarily has the preference and right of way. It is required to give reasonable notice or warning of its approach, so that a wagon in the road near the crossing may wait for it to pass. What is reasonable and timely notice, if not fixed by statute, may depend on the speed of the train and other circumstances of the particular case. One who is crossing the track must exercise diligence and ordinary care to ascertain whether a train is approaching and to avoid a collision. The track itself is a notice and warning to exercise such care. He is not required to exercise the greatest diligence or care, but only such as a prudent man would exercise under the circumstances of the case. He is not required, as matter of law, to stop before crossing the track, but his omission to do so is a fact to be submitted with the other facts to the jury.

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He is required to exercise such diligence and care as an ordinarily prudent man would exercise under the circumstances. *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Judson v. Railroad Co.*, 158 N. Y. 597, 15 Am. & Eng. R. Cas., N. S., 7, 53 N. E. 514. In *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, the court held that the peremptory instruction for the defendant should have been given. There the train that caused the injury was going at a rate not exceeding 20 miles an hour. At a distance of 40 feet from the crossing the approaching train could be seen 300 feet away. The deceased drove onto the railroad track in a slow trot, without changing gait. His eyesight and hearing were good, and there was nothing to impede his sight. He drove onto the track looking straight ahead. As he approached the crossing "the train was in full view." The court was of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. But the court referred to a class of cases readily distinguishable "either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions, or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track." In *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274, the court held that the question of the plaintiff's contributory negligence was properly left to the jury. An important fact leading to that decision was that the highway on which she was driving proceeding towards the crossing passed into "a cut, and then there was no view of the railroad whatever to the south on account of the highway being cut down and the growing corn on that side." In *Nelson v. Railroad Co.*, 40 C. C. A. 673, 100 Fed. 731, Nelson was killed while crossing the track to carry mortar to a depot that was building. The court held that the question of Nelson's negligence was for the jury, it having been proved that a car on the side track obstructed the view of the approaching train, and that there was noise of escaping steam from a nearby engine, so that the sound of the train probably could not be heard. In that case the court laid stress on the fact that Nelson could not see the train because of a curve in the track, till it was within 330 feet of him; saying that, "if it was going at the rate of 40 miles an hour, it would go 330 feet in less than 6 seconds." In *Jones v. Railroad Co.*, 128 U. S. 443, 2 Am. & Eng. R. Cas., N. S., 389, 9 Sup. Ct. 118, 32 L. Ed. 478, the plaintiff walked out of the depot by the usual way, and was struck by a passing train between the wall of the depot and the platform. The circuit court directed a verdict for the defendant. The case was reversed on error, because the evidence tended to show that a

car on the side track obstructed the plaintiff's view of the approaching train, and, although he had listened, there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished.

To review the many cases on this subject would serve no useful purpose. They make it clear that, if all the material facts touching the alleged negligence of the person injured be undisputed, and admit of no rational inference but that of negligence, the question of contributory negligence becomes matter of law only, and the court should direct the verdict. Such is the case when one possessed of hearing and sight walks or rides on a railroad track before a rapidly approaching train, when there is nothing to impede his sight or hearing. In such case it may be assumed that he did not look, or, if he looked, he did not heed the warning, but recklessly took his chance of crossing before the train could reach him. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. But when there is conflict in the material evidence relating to the alleged negligence of the person injured, or when there is no conflict, but the facts are such that reasonable men might fairly draw different conclusions from them, the question is one for the jury. Such is the case when one walks or drives along the highway and across a railroad and is injured, and, the negligence of the railroad company being shown, there is conflict in the material evidence as to whether the person injured observed ordinary care in crossing; or, where there is no conflict in the evidence, the facts are such that different conclusions might be fairly drawn from them as to whether the person injured showed a want of ordinary care, or did what a reasonably prudent man ought to have done under the circumstances. *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. The difficulty in cases of negligent injuries is that it seldom happens the injuries are inflicted under the same circumstances, and therefore no common standard of conduct by prudent men under all circumstances can become fixed and known. And no rule of law can be formulated to apply to all cases. Said Mr. Justice Lamar, speaking for the court, in *Railroad Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 36 L. Ed. 485:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under the different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the



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court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

When a judge decides as a matter of law that a plaintiff has been guilty of contributory negligence, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon what is his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. If the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the question of ordinary care, he might find them differing with him as to the ordinary standard. The question of negligence is usually one of fact for the jury, but, unquestionably, cases do occur in which it is the duty of the judge to direct the verdict. It is not possible to lay down a rule that will designate all such cases. While the principles are well settled, the application of them to particular cases causes much difference of judicial opinion.

There is evidence in the record which tends to show that the accident occurred after dark, and at a public crossing; that there were obstructions between the deceased and the approaching train; that the train was running at from 35 to 40 miles an hour in a town where the statute forbade it to be run faster than 6 miles an hour; that the whistle was not blown nor the bell rung as required by statute; and that the occupants of the wagon looked and listened, not stopping, but that they approached the crossing slowly. On this state of facts we must hold that the court erred in directing a verdict for the defendant.

Other questions were discussed at the bar and in the briefs, upon which we express no opinion, as they may not arise on the next trial on the same or similar pleadings and evidence.

The judgment of the circuit court is reversed and the cause remanded for a new trial. Judgment reversed.

PARDEE, Circuit Judge, dissents.

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TEXAS & P. RY. CO. v. PARKER. SAME v. COPE.

(*Court of Civil Appeals of Texas, March 22, 1902.*)

[68 S. W. Rep. 831.]

**False Imprisonment of Persons Using Car as Refuge from Weather.**

Plaintiff and another arrived on a freight train at a station about 4 o'clock a. m. The depot was closed, and, as it was raining, and they

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had musical instruments which they did not want to get wet, they entered an empty box car and closed the door. The dispatcher found them there asleep, fastened the door, and sent for the sheriff: *held*, that the detention and imprisonment was unlawful.

**Same—Scope of Employment.\***

An employee of a railroad company found plaintiff asleep in a car, and locked him in, and sent for the sheriff. In an action against the company the station agent testified that its property and cars were in his charge, that it was his duty to protect them from trespassers, and that he told the employees under him to lock the door on any one found in empty cars: *held*, that the employee's act was within the scope of his authority, and the company was liable therefor, and hence an instruction that it would be liable if its servants acted within the apparent scope of their authority in detaining plaintiff in the car, and having him arrested, whether correct or not, was without prejudice.

**Same—Effect of Plaintiff's Unlawful Acts.**

Plaintiff and another traveled on a freight train, paying a small fare to the brakeman. On arriving at their station at 4 a. m., as the depot was closed, and it was raining, they entered an empty box car, and fell asleep. A railroad employee discovered and locked them in, and sent for the sheriff, who, without a warrant, arrested and confined them in jail until the next day: *held*, that in an action against the railroad company for damages, no punitive damages being claimed, it was proper to direct the jury not to consider evidence as to "whether or not plaintiff rightfully or wrongfully entered said box car, or whether or not plaintiff had been guilty of unlawfully riding upon a train."

**Same—Effect of Act of Police Officer in Changing the Charge.**

Defendant's agent telephoned to the officer, that he had "two hobos," and to come and get them, and, when he came, pointed out plaintiff and his companion, without specifying any charge. The agent testified that he had them arrested because he thought they were trespassers. The officer charged them with unlawfully boarding a freight train: *held* proper to refuse to charge that, if the jury found that the agent requested the officers to arrest plaintiff as a vagrant, and afterwards the officer changed the charge to that of unlawfully riding on a freight car, without the agent's knowledge, and held and imprisoned them on said last-named charge, they will find in favor of the defendant as to any damage caused by such last-named detention and imprisonment.

**Same—Effect of Plaintiff's Being Found Guilty on Another Charge.**

After the prisoners had been in jail one day and night, the county attorney informed them that the justice was away, and they could not be tried for three days, but proposed that if one would plead guilty, and pay a fine of \$5, he would dismiss the charge as to the other, and let them go, and would loan them the money to pay the fine. To avoid remaining in jail, they consented, borrowed the money of him, and paid it to the sheriff, and were discharged. The justice's docket shows that plaintiff pleaded guilty to the charge of unlawfully boarding a freight train, was fined \$5, and paid the fine. There was no evidence that complaint was made or warrant issued: *held*, that the judgment of conviction did not bar plaintiff's recovery for damages for false imprisonment prior to the time the judgment was entered.

Appeal from district court, Red River county; Ben. H. Denton, Judge.

Two actions by W. A. Parker and by W. A. Cope against the Texas & Pacific Railway Company. From judgments for plaintiffs, defendant appeals. Affirmed.

T. J. Freeman and Head & Dillard, for appellant.

W. S. Thomas and Doak & Kennedy, for appellees.

\*See note appended to Missouri, K. & T. Ry. Co. v. Edwards, ante, 430.

RAINEY, C. J. These are companion cases, and the facts and principles of law hereinafter stated are applicable to both. The appeals are from judgments rendered in favor of appellees against appellant for false imprisonment.

On the night of May 21, 1900, appellee and one W. F. Parker boarded a freight train of appellant at Texarkana desiring to go to their home in Detroit, Tex., and with the permission of the brakeman (paying him 50 cents each) they rode to Clarksville, arriving there about 4 o'clock a. m. next morning,—22d. They alighted from the train, and, the depot being closed, they entered a box car standing on appellant's track, as it was raining, and they had some musical instruments they did not want to get wet. When they entered the car they closed the door. About half past 7 o'clock, Miller, the dispatcher, opened the door, and saw them in the car asleep. Supposing them to be vagrants or "hobos," he closed the door and fastened it; and when Wilkinson, the station agent, came to the depot, Miller told him what he had done. Wilkinson had previously instructed him, if he found any hobos in the cars, to fasten the door. Wilkinson then telephoned to the sheriff to come down and get them. The sheriff and deputy came. Wilkinson went with them to the car, unlocked it, and said, "There they are," and then immediately returned to the depot. The sheriff and deputy took appellees in charge, and placed them in jail, where they remained until next morning, Wednesday, when the county attorney went to the jail, and told them that the justice of the peace was out of town, and that no trial could be had before Saturday, but if they would pay a fine in one case he would dismiss the other, and that he would lend them the money to pay the fine. To prevent lying in jail until Saturday, they accepted his proposition, got the money from him, and gave it to the deputy sheriff to pay the fine. The justice's docket shows that on May 23, 1900, appellee Cope pleaded guilty to the offense of unlawfully boarding a freight train, and was adjudged to pay a fine of \$5 and costs, and that a similar charge against Parker was on the same day dismissed by the county attorney. The arrests were made without warrants, and they told the officers they had money, and were not vagrants, and that the officers had no right to arrest them for vagrants or hobos. After starting with them to jail, the deputy asked them how they got to Clarksville. Upon being told they came on a freight train, he said he would hold them for unlawfully riding on a freight train. They were musicians, and made a living by playing around at different places. They were not vagrants.

It was not error for the court to instruct the jury that the detention and imprisonment of plaintiffs in the box car by defendant's agent was unlawful. They being in the car, though wrongful, did not justify force in restraining them of their liberty.

Error is assigned to that portion of the court's charge

which instructed the jury, in effect, that the defendant would be liable if its servants acted within the apparent scope of their authority in detaining plaintiffs in the box car, or in having them arrested and imprisoned. The contention is that, in order to make defendant liable, the agents must have acted within the real scope of their authority. The general rule of agency is that the principal is liable for all acts done by the agent or servant in the apparent scope of the agent's authority, or within the course of his employment. Whether this case is an exception to the general rule, we deem it unnecessary to determine, as, under our version of the evidence, defendant's servants were acting within the scope of their authority. It is not shown that the agents had definite instructions to have arrests made, but this was not necessarily essential where they acted within the general scope of their employment. Wilkinson testified: "That he was the station agent for defendant at Clarksville in May, 1900, and as such the property and cars of the defendant were in his charge, and he looked after them, for it was his duty as agent to protect defendant's property in Clarksville, including the cars upon the side track, from trespassers. 'Under the terms of my employment this is required of me, and I had plaintiff arrested because I thought he was a trespasser upon the defendant, and to protect the defendant from trespassers, as by my said employment I was required to do. Yes, I did have plaintiff arrested. I did it because I found him in the empty car, and thought him a trespasser. I had told the men who worked under me to lock the door on any one they found in empty cars.' " This testimony is uncontradicted, and it shows they acted within the scope of their employment. That, in exercising such authority, they committed a tort, does not relieve appellant of liability for the wrongful act. *Railroad Co. v. Warner* (Tex. Civ. App.) 49 S. W. 254; *Railway Co. v. Anderson* (Tex. Sup.) 17 S. W. 1039, 27 Am. St. Rep. 902, 12 Am. & Eng. Enc. Law (2d Ed.) p. 771, and note.

It was not error in the court directing the jury not to consider evidence as to "whether or not plaintiffs rightfully or wrongfully entered said box car, or whether or not plaintiffs had been guilty of unlawfully riding upon a train of defendant prior to their arrest and imprisonment." It is insisted that such evidence was relevant for all purposes, and especially as bearing upon the extent of plaintiff's damages, if any, and the amount of mental suffering caused them by said arrest and imprisonment. This contention is not tenable in view of the fact that no punitive damages were sought or recovered. The arrest and imprisonment being unlawful, plaintiffs were entitled to recover all actual damages sustained by them.

Appellant complains of the refusal of the trial court to give the following requested instruction, viz.: "If, under the charges given, you find from the evidence that the defendant T. & P. Ry. Co. is liable for whatever its station agent, A. L. Wilkinson, may have done toward procuring the imprison-

ment of the plaintiff, and that said A. L. Wilkinson only requested the officers to take him in charge for the offense of being a vagrant, and after he was so taken in custody on said charge the officer changed the charge against plaintiff to that of unlawfully riding on a freight car, without the knowledge of the said Wilkinson, and thereafter held and imprisoned him on said last-named charge, you will find in favor of the T. & P. Ry. Co. as to any damages that may have been caused by such last-named detention and imprisonment." It is urged that defendant's agent only requested that plaintiff be arrested as a vagrant, and that the officers prosecuted them for unlawfully riding on a freight car, and that defendant is not liable for the detention of plaintiffs to answer the charge of unlawfully riding on a freight car. The evidence fails to show on what charges the plaintiffs were arrested. The station agent said he had them arrested because he thought they were trespassers. When he telephoned to the officers, he stated that he had two "hobos," and to come and get them; but when the officers came he merely pointed out the plaintiffs, and no charge was specified. The riding on a freight train was as much a trespass upon defendant's property as getting into a box car, and, as riding on a freight train was the only offense against the law of which the parties were guilty, the officers doubtless assumed the arrest as for that offense. In any event, the imprisonment resulted from the act of the defendant's agent in having the unlawful arrest made, and the defendant is liable therefor.

The court refused a special charge to the effect that the judgment of conviction against W. A. Cope is conclusive against him in this case. Error is assigned upon this action of the court. We think the court, under the circumstances of the case, ruled properly. This action is for damages for illegally confining plaintiff in a car, for illegally causing him to be arrested without a warrant, and confining him in jail without carrying him before a magistrate. There is no evidence tending to show that any complaint or information was ever filed against him for any offense, nor that any warrant was ever issued for his arrest. None had been issued at the time of the illegal arrest. No presumption arises that any was ever issued, and, giving to the judgment all the effect to which it is entitled, it does not relieve the defendant from the consequence of the illegal acts prior to its rendition. Upon the plea of guilty being entered, plaintiff was discharged, and no damages accrued thereafter, nor were any awarded to plaintiff subsequent thereto. Plaintiff was entitled to recover the damages that accrued up to the time the plea of guilty was entered, and the judgment was no bar to such recovery. *Cabell v. Arnold* (Tex. Civ. App.) 22 S. W. 62.

Other assignments of error are presented, but we are of the opinion that they are not well founded. The evidence is sufficient to support the verdict, and the judgment is affirmed. Affirmed.

BAIER *v.* CAMDEN & S. RY. CO.*(Supreme Court of New Jersey, June 9, 1902.)*

[52 Atl. Rep. 215.]

**Street Railroad—Injury to Pedestrian—Negligence.\***

A motorman is not chargeable with negligence because he fails to apprehend that a boy who is riding on the back of a wagon will jump from the wagon and run under his car while he is engaged in looking at the wagon in order to pass it without a collision.

(Syllabus by the Court.)

Action by George Baier, by his next friend, against the Camden & Suburban Railway Company. Verdict for plaintiff. Rule to show cause why a new trial should be granted made absolute.

Argued February term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, GARRISON, and GARRETSON, JJ.

J. W. Wescott, for plaintiff.

D. J. Pancoast and J. H. Gaskill, for defendant.

VAN SYCKEL, J. This is a suit for damages caused by the alleged negligence of the defendant in October, 1896. The plaintiff was then about seven years old. The plaintiff, with other boys, jumped on the hind part of a wagon loaded with barrels. The allegation of the plaintiff is that the car of the defendant company, traveling in the same direction as the wagon, came up so close behind the wagon, and at such a rate of speed, as to cause the plaintiff to fear that he would be struck by it, whereupon he jumped from his position on the wagon, and fell under the car. There was some conflict in the evidence as to the speed of the car, but there was no denial that the wagon had the ordinary height of wheel; that the body was built something like a hay shelving. The barrels were put in the body of the wagon at the bottom, having a width of about four feet, but were ranked up and packed in over the top to a width of eight or ten feet, so that the barrels projected on each side two or three feet beyond the wheels. There were about 100 sugar and flour barrels on the wagon, giving it the appearance, as to dimensions, like that of a wagon loaded with hay or straw. The car did not collide with the wagon, but passed without striking it. The motorman, as he approached the barrel wagon, saw the boys on the hind part of it; and, as the wagon was near the car track, in order to avoid a collision he necessarily looked up to see whether he could pass without striking the overhanging barrels. The car slowed up as it approached the wagon. The motorman was under no duty to stop the car. He had a right

\*See *Fleishman v. Neversink Mt. R. Co.* (Pa. St.), 4 Am. & Eng. R. Cas., N. S., 261; *Galbraith v. West End St. R. Co.* (Mass.), 3 Am. & Eng. R. Cas., N. S., 628; *Thompson v. Salt Lake Rapid Transit Co.* (Utah), 10 Am. & Eng. R. Cas., N. S., 563; *Parkinson v. Concord St. Ry. Co.* (N. H.), 1 R. R. R. 575, 24 Am. & Eng. R. Cas., N. S., 575.

to pass the wagon, using due care to do so without striking it. When the car was about to pass the wagon, the plaintiff, frightened by a third party, dropped off the wagon, and must have moved several feet before he could have reached the wheels of the car, which passed over his legs. The burden is upon the plaintiff to prove negligence on the part of the defendant, and, under the circumstances of this case, there is an entire absence of anything from which negligence can be imputed to the defendant company. The motorman saw the plaintiff, who was in a place of safety, and he had no reason to suppose that he would leave that position and run into a place of danger. The duty of the motorman was to avoid collision with the barrel wagon, which might have resulted in injury to all who were upon the wagon; and, to accomplish that, his attention was necessarily drawn from the position which the plaintiff occupied. No want of due care appears on the part of those in charge of the car.

There was a suit brought by the plaintiff for this injury, which was tried in 1898, and resulted in a nonsuit. That case was not reviewed, but a new suit was brought, which resulted in the verdict for the plaintiff now contested. On the first trial there was nothing in the testimony of the plaintiff's witnesses which showed that the boy jumped from the wagon as the result of a threatened collision with the car, or that he was forced to jump from the wagon by any mismanagement of the trolley car by the motorman. The evidence of the same witnesses on the last trial is substantially different from what it was on the first trial. Such testimony is not entitled to any favorable consideration. The witnesses have either forgotten the circumstances, or have intentionally perverted the facts. There would have been no error in granting the motion to nonsuit.

The rule to show cause should be made absolute.

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BOROUGH OF WEST CHESTER v. WEST CHESTER ST. RY. CO.

(*Supreme Court of Pennsylvania, June 4, 1902.*)

[52 Atl. Rep. 252.]

**Street Railway Companies—Paving Streets—Contracts.\***

An ordinance, accepted by a street railway company, providing that it shall keep the space between its tracks in repair, and to conform to the macadamizing or paving in the borough, and that whenever the borough shall hereafter pave or macadamize any street with asphalt blocks, asphalt sheeting, or broken stone, the company shall pave or macadamize the part of the street between its tracks with the same kind of material, requires the company, when a macadamized street is repaved with asphalt, to likewise pave between its tracks, notwithstanding an ordinance relieving it from repairs till it earns a dividend.

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\*See *City of Philadelphia v. Hestonville, M. & F. R. Co.*, 5 Am. & Eng. R. Cas., N. S., 659, and note at end of case.

Borough of West Chester *v.* West Chester St. Ry. Co

Appeal from court of common pleas, Chester county.

Action by the borough of West Chester against the West Chester Street Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The opinion of the court below is as follows (HEMPHILL, J.):

"This action was brought to recover from the defendant money expended by the borough for paving portions of Market and High streets with asphalt blocks between the rails of defendant's road, and eighteen inches outside each rail. Upon the trial the amount claimed was not questioned, nor was there any denial that the paving had been done in a proper and economical manner; but the defendant denied liability under its contract with the plaintiff, which being in writing, and construed favorably to the plaintiff, binding instructions were given to find for the plaintiff for the amount claimed. The question, therefore, is, did the court err in its construction of the contract between the parties?

"The contract is evidenced by an ordinance and resolution of relief adopted by the plaintiff August 30, 1890, and accepted in writing by the defendant September 29, 1890. The portions of the ordinance bearing upon the question under consideration are a part of section 2 and section 7. Section 2, after directing the manner in which the tracks shall be laid, and the kind of rail to be used, provides that said company 'shall at all times keep the space between their tracks and eighteen inches outside thereof in good repair and to conform to the macadamizing or paving in the borough.' Section 7 reads as follows: 'That whenever the borough shall hereafter pave or macadamize any street or streets along the line of said railway, with asphalt blocks, asphalt sheeting or broken stone, the said street railway company, their successors or assigns, shall at the same time pave and macadamize the street occupied by the railway, that is to say, between the tracks of said railway and eighteen inches outside thereof, on each side of said railway, with the same kind of blocks or material with which the borough paves and macadamizes the said street or streets, and if the said railway company, their successors or assigns, shall neglect or refuse to do the said work, or shall neglect or refuse to keep said streets within the tracks of said company, and eighteen inches outside thereof, in good and perfect repair, then the borough shall do the same, after having given said company ten days' notice, and recover the cost and expense thereof from the said street railway company, with 20 per cent. of the cost of the same added thereto, to be recovered as all debts are recoverable before any justice of the peace having jurisdiction of the amount of said expense and percentage, or in any court of common pleas in this commonwealth.' What has been called the 'Relief Resolution' provides 'that by way of encouraging



the construction of an efficient street railway in the borough of West Chester, the West Chester Street Railway Company be relieved from the obligations of keeping in repair the street, streets or parts of streets, occupied by their tracks, until such time as said company shall either earn or pay a dividend to its stockholders on the capital stock of the company, which shall be paid up to the time of said earning or payment, or until such time as either or both of these contingencies shall happen. \* \* \*

"The better to understand what was probably in the mind or contemplation of the parties, it would be well to state the situation when the contract was made. At that time, by the ordinance referred to, the company had been authorized to lay its tracks on portions of Market, High and New streets, and Ashbridge and Rosedale avenues; and none of the streets or avenues of the borough were paved with either asphalt blocks, belgian blocks, or asphalt sheeting. The two avenues, upon which tracks have never been laid, were upon the outskirts of the borough, and were the ordinary dirt roads or streets, while so much of the streets as were afterwards occupied by the railway company were macadamized; for the leading American and English lexicographers, Webster and Stormouth, agree in their definitions of what constitutes macadamizing, differing only in phraseology. To macadamize, Webster defines, 'To cover as a roadway surface;' and Stormouth, 'To cover a road or path with small, broken stones, which, uniting by pressure, form a smooth, hard surface.' Subsequently a pavement of asphalt was laid upon a few squares of both Market and High streets, in the central and business portion of the borough, after the removal of the macadam pavement. The defendant contends that it cannot be held liable under section 2 of the ordinance, because that refers only to repairs, while the asphalt-block paving was a repaving or reconstruction of the streets anew, and that, even could such a repaving or reconstruction be construed as but repairs, it would be relieved from payment by the terms of the relief resolution. The soundness of this position is virtually conceded by the plaintiff, its position being and its statement alleging that defendant's liability arises under section 7 of the ordinance. But the defendant claims that section 7 applies only to the streets and avenues then unpaved with anything,—in other words, to those outlying streets upon which the company has never laid its tracks,—presumably because there was not sufficient population residing along them to warrant the necessary expenditure. There would be considerable force in this argument, had the words 'asphalt blocks, belgian blocks, asphalt sheeting,' been omitted; for the section would then have read 'that whenever the borough shall hereafter pave or macadamize any street or streets along the line of said railway, with broken stone,' said company shall, etc.; and both High and Market streets being already macadamized,

the word 'hereafter' could very naturally and properly be construed as indicating that it had reference only to the dirt streets that it might be deemed advisable to macadamize in the future. Those words, however, being in the ordinance, we must consider and treat them as having been put there for a purpose; and it is more consistent with reason and common sense to hold that the borough authorities desiring that the borough should be able to keep abreast with the progress of the age, and contemplating that the future, perhaps the near future, would require that its streets in the central, business, and much-traveled parts of the town should be paved with a more modern and better material, inserted them with that in view, rather than that they had in anticipation the paving of the dirt streets on the borders of the borough with any such expensive materials. Again, the very language of the ordinance shows that it could not have been in contemplation to confine these improvements to the outlying dirt streets,—the contrary is indicated; for it says 'any street or streets along the line of said railway,' and, whilst it might have been problematical whether the railway would ever be laid in the remote parts of the town, there could have been no doubt that, if any was constructed, it would certainly be through the built-up and business portions of the borough. Had the borough seen fit to pave its streets with materials other than these specified, the railway company could not have been compelled to contribute, because not according to the contract, as was held in *Shamokin Borough v. Shamokin St. Ry. Co.*, 178 Pa. 129, 35 Atl. 862. On the other hand, had the ordinance, instead of specifying the materials to be used, required the railway company to conform to whatever improvements the borough might make on its streets, it would have been compelled to lay or pay for whatever kind of pavement the borough saw fit to put down, as was the case in *McKeesport Borough v. McKeesport Pass. Ry.*, 158 Pa. 448, 27 Atl. 1006, 1 Am. & Eng. R. Cas. 171, where the word 'improvement' was used, and the company was held liable for a paving with belgian blocks.

"The defendant further urges that the relief resolution refutes the idea that it was ever contemplated that the railway company should be liable to contribute for paving such as is here claimed for; that to relieve it from the comparatively light expense of repairs, and require it to bear the heavier one of a new pavement of expensive materials, would be the discouraging, instead of 'encouraging, of the construction of an efficient street railway.' But the answer is that the borough, with its horses, carts, and corps of employees, daily making repairs upon its streets, and with its own crushed stone, could with but little additional inconvenience or expense make those required upon the railway, while the company, to make the same, would have to purchase or hire horses or carts, hire men, and buy its materials, at very considerable expense

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to itself. Moreover, considering that in this progressive age the probabilities were that better and more satisfactory paving would in the future be required upon the streets, it was but right and prudent in the borough authorities to provide that a company to which they had granted a valuable license to occupy the streets should bear its share of the burdens the improvements might entail. As was said by Mr. Justice Sterrett in *City of Philadelphia v. Ridge Ave. Ry. Co.*, 143 Pa. 472, 22 Atl. 699, 'The city authorities have just as much right to require it [the railway company] to repave at its own expense with a new, better, and more expensive pavement, as they have to cause other streets to be repaved in like manner at the public expense.'

"After a careful reconsideration of this case, we have reached the conclusion that the construction of the contract between the parties and the instructions given at the trial were right, and we must therefore refuse a new trial and dismiss the rule."

J. Carroll Hayes, Wm. M. Hayes, and R. T. Cornwell, for appellant.

William S. Windle and Alfred P. Reid, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas.

## OATES v. METROPOLITAN ST. RY. CO.

(*Supreme Court of Missouri, Division No. 1, May 21, 1902.*)

[68 S. W. Rep. 906.]

**Runaway Team—Negligence of Motorman—Ringing Gong.\***

Where a runaway horse enters a street on which a street car line is operated, and the driver and horse both know of the approach of a car, it is useless and negligent for the motorman to violently ring his bell, and his act cannot be justified as being to assist the driver in keeping the horse from the car.

**Same—Same—Question for the Jury.**

The question whether a street car motorman used ordinary care in the management of his car when a horse in front of the car became frightened at it is for the jury.

**Same—Same—Ringing Gong—Contributory Negligence.**

Negligence of a street car motorman in violently ringing his bell as his car approached a frightened horse, thus causing the horse to run away, was not justified, though the driver had knowledge, when he drove on the street, that the horse was liable to become frightened at the car and run away.

**Accident near Street Railway Track—Negligence and Contributory Negligence.**

The contributory negligence of a person on the street, injured through negligence in the management of a street car, does not preclude a

\*See notes, 5 Am. & Eng. R. Cas., N. S., 285; 9 Am. & Eng. R. Cas., N. S., 724; Central of Ga. Ry. Co. v. Black (Ga.), 23 Am. & Eng. R. Cas., N. S., 864.

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recovery unless it enters directly into and forms a part of the efficient cause of the accident.

**Frightening Horses—Contributory Negligence.**

In an action against a street railroad for frightening a horse, evidence that the horse was frightened a week before by a dummy engine does not authorize an instruction that plaintiff cannot recover if the real cause of the accident was the disposition of the horse to frighten at cars.

Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Action by J. A. Oates against the Metropolitan Street Railway Company. Judgment was rendered for defendant, and from an order granting a new trial defendant appeals. Affirmed.

The plaintiff sues the defendant for personal injuries caused by the alleged negligence of the defendant's servant in violently and needlessly ringing the gong on its cable car, thereby frightening the plaintiff's horse, causing him to run away and throw plaintiff out of his buggy. There was a verdict for the defendant. The motion for new trial contained seven grounds,—among them, that the verdict was against the weight of the evidence; but the court based its action in granting the new trial upon its error in giving instructions asked by the defendant. From that order the defendant appealed.

John H. Lucas and Frank Hagerman, for appellant.

Elliott & Burnham and Wash Adams, for respondent.

MARSHALL, J. The negligence set out in the petition is that while the plaintiff was driving east on Twelfth street, between Bales and Askew avenues, in Kansas City, about 7:15 a. m., on July 12, 1897, his horse became frightened at the defendant's approaching car, and backed upon the track, thereby placing plaintiff in a position of imminent peril; that the agents of the defendant saw such position and peril of the plaintiff, and could have prevented the accident by the exercise of ordinary care, but that, instead of so doing, the defendant's agents "carelessly and negligently caused the gong or bell on the car to be violently and continuously rung and jangled as said train continued to approach plaintiff's horse," causing the horse to suddenly whirl around in front of the car, almost overturn the buggy, and to run away, and throw plaintiff out of the buggy and injure him. The answer is a general denial, and a plea that the plaintiff's injuries "were caused and directly contributed to by plaintiff's own fault and negligence." The evidence developed this state of facts: In consequence of his injuries, the plaintiff was rendered unconscious, and so remained several hours. Hence he says he does not remember very distinctly what took place before his horse became frightened at the car, and that he can only remember seeing the approaching car and hearing the ringing of the gong. He does not remember anything else connected

with the accident. The plaintiff produced two witnesses,—J. B. Hall and Albert Krueser, Hall occupied the second seat from the front on the grip car. His attention was attracted to the plaintiff and his horse by the ringing of the bell. At that time the car was within 30 or 40 feet of the plaintiff's horse. The horse was very much frightened. The horse commenced to back. The car slowed up, but continued to approach the horse, and all the while the gripman rang the gong "very violently." The plaintiff was unable to manage the horse. The gripman continued to ring the gong. The horse finally turned around in front of the car, ran away, and the plaintiff was thrown out and injured. Krueser was seated in the first single seat on the north side of the grip car, and his testimony is substantially the same as Hall's. On the other hand, defendant's counsel makes the following summary of the defendant's showing: "Defendant's evidence consisted of the testimony of Harry L. Mitchell, conductor of the car, Green Allen, its gripman, S. H. Bales, R. N. Middleton, and Harry Hornbrook. (a) Harry L. Mitchell, conductor of the train, said that the horse was plunging and rearing on Bales avenue before it got to Twelfth street, and he could not tell then which way it was going. When it got to Twelfth street, plaintiff pulled first on one line and then on another, when the horse turned suddenly, running to the west for some distance, where plaintiff was thrown out. The bell was rung to warn plaintiff, whose horse was running away towards the east while the car was going west at its usual rate of 10 or 12 miles an hour, and it stopped 75 to 100 feet from the horse, the train running about 25 feet towards the horse before it turned. (b) Green Allen was gripman on the train, and he saw the horse plunging and rearing on Bales avenue. When it reached Twelfth street it turned east, and he rang the bell of the train to warn the driver, and shut down his appliances as soon as it appeared that the horse was coming towards him. The horse came within 50 to 75 feet of the car, when it turned and ran west. (c) S. H. Bales was sitting on his front porch at his home at Twelfth and Askew avenue, reading his paper; saw the horse running west down Bales avenue, but he neither noticed nor saw any car nor heard any ringing of the bell. (d) R. N. Middleton was at the engine house, and saw the horse running away, it looked to him as if 'he was coming down from the north onto Twelfth street, or had just struck Twelfth street from Bales avenue.' He did not notice the horse turn east, nor see nor hear any car, nor any noise such as is complained of in the petition. (e) Harry Hornbrook lived on the south side of Twelfth street, between Bales and Indiana avenues. He was in the front room of the house. Saw the horse run by going west, but neither saw the train nor heard any noise therefrom." The instructions given for the defendant which the court afterwards held to be erroneous were as follows: "(3) The mere fact, if true, that the horse which

plaintiff was driving frightened at the cable train, and plaintiff was thereby thrown from his vehicle and injured, gives him no right to sue defendant and recover damages. Before, in any event, plaintiff can recover, you must find from the greater weight of all the testimony in the case: First, that defendant was negligent in some particular respect submitted to your consideration; and, second, that the negligence so found was the direct cause of frightening the horse, so that it ran away and injured plaintiff. If you do not find both these facts to be true, then defendant is entitled to the verdict; or, if the plaintiff was negligent, and thereby contributed to his own injuries, then defendant is entitled to the verdict, and this is so even if you find that the defendant was also negligent. The act of negligence charged in the petition, and to which your attention must be confined in considering whether defendant was negligent, is this: The trainmen saw, or by the exercise of ordinary care would have seen, plaintiff in a dangerous position, and were negligent in permitting the train to approach plaintiff and causing the gong to be rung so as to frighten the horse and cause it to run away." "(5) But, even if you should find that the gripman did not exercise reasonable prudence, yet, if the act of the gripman was not the direct cause of the injury, then your verdict must be for defendant; or if the real cause of the accident was the disposition of the horse to frighten at cars, or because the horse was running away, and beyond plaintiff's control, before it got to Twelfth street, then your verdict will be for defendant." "(7) The difference between negligence on the part of defendant and on the part of the plaintiff is this: Defendant's negligence, if any, must be found by the jury to have been the direct cause of the injury, whereas plaintiff's negligence, if any, defeats a recovery if it but contributes to the injury; and this is so even though defendant was also negligent. If negligence of defendant and negligence on the part of plaintiff combine to cause the injury, then the plaintiff cannot recover." The error ascribed to instructions 3 and 7 is that it requires the jury to find that the defendant's negligence was the direct cause of the injury, while it debars the plaintiff from recovering if his negligence contributed in any manner or degree to the injury. The error ascribed to instruction 5 is that there is no substantial evidence in the case upon which to base the portion of that instruction which directed a verdict for the defendant "if the real cause of the accident was the disposition of the horse to frighten at cars."

1. Both parties concede that a bell or gong on a street car is intended to be rung, and that the purpose of ringing it is to give notice of the approach of the car, and that under some circumstances it would be negligence not to ring it. But the parties are disagreed as to whether it was negligence to ring the bell violently under the circumstances of this case, or, as the defendant contends is necessary to the plaintiff's right to

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recover, whether the bell was wantonly, maliciously, and needlessly rung. Starting with the conceded proposition that a bell is placed on a car to be rung so as to give notice of the approach of a car, and that a failure to ring it may be negligence, and that wantonly and needlessly ringing it may also create a liability, the conclusion applicable to this case easily deduces itself. There was no necessity or sense in ringing the bell in this instance if the testimony adduced by the plaintiff is true, for both the plaintiff and the horse knew of the approach of the car, and hence no further notice thereof was necessary. So, too, if the testimony adduced by the defendant be true that the horse began to run away on Bales avenue, and continued so to do after it got into Twelfth street, there was likewise no sense or necessity for ringing the bell or of giving notice to the plaintiff or the horse of the approach of the car. Even a court may indulge the information that is possessed by every man that ringing a bell will not stop a runaway horse, or cause him to deflect his course so as to avoid a collision with a street car. The defendant admits the ringing of the bell, but seeks to justify it on the ground that it was thereby trying to assist the plaintiff in keeping the horse away from the car. Such an explanation did satisfy the jury, but it fails to satisfy the court. There was ample evidence to sustain the plaintiff's contention that the horse became frightened at the approaching car, and began backing until the buggy was forced onto the track, and that the defendant's agents slowed up the car, but continued to approach the horse, all the while ringing the bell violently, until, when the car was within a few feet of the horse, he suddenly wheeled around, nearly turned over the buggy, ran away in the direction he originally came from, and threw the plaintiff out and injured him. This being true, the demurrer to the evidence was properly overruled, and the point here principally relied on by the defendant, that in no event would the plaintiff be entitled to recover, and therefore the verdict was for the right party, and the verdict should not be set aside, becomes untenable. The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car; but when the operator of the car sees that a horse is frightened at the car it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may or may not lead to the necessity for bringing a car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the high-

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way and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age makes unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is any more exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly. *Benjamin v. Railway Co.*, 160 Mass., loc. cit. 5, 35 N. E. 95, 39 Am. St. Rep. 446, citing and following *Com. v. Temple*, 14 Gray, 69, and *Driscoll v. Railway Co.*, 159 Mass. 142, 34 N. E. 171; *Ellis v. Railroad Co.*, 160 Mass. 341, 35 N. E. 1127. These cases are strikingly similar to the case at bar. In the *Ellis Case* the court defined the respective rights and duties of the car company and the citizen as follows: "Although there was some conflict of evidence in this case, the jury may have found that the plaintiff, having no reason to think it unsafe to do so, drove down a street in the city of Lynn on which was an electric railway, and there met one of the defendant's open electric cars, filled with passengers, on which the motorman was continually sounding the gong; that his horse was frightened at the car and at the noise of the motor and of the gong, and manifested its fear in such a way as to show the motorman that the plaintiff and his daughter, who was riding with him, were in great peril; and that the motorman, instead of stopping the car, or ceasing to sound the gong, kept on with the car, and continued to make a loud clangor with the gong, so that the horse became unmanageable, broke the carriage, threw the plaintiff out, and thereby inflicted serious injuries upon him. The defendant's requests for rulings go upon the theory that the manager of an electric railway car upon a street is never called upon to stop the car or to change his method of managing it to avoid any danger from the fright of horses other than the danger of collision with the car. These requests were founded on an erroneous view of the law. It is a well-known fact that most horses are frightened at their first view of a moving electric car, especially if they encounter it in a quiet place, away from the distracting noises of a busy city street. It is only by careful training, and a frequent repetition of the experience, that they acquire courage to meet and pass such a car on a narrow street without excitement. The rights of the driver of a horse and the manager of an electric car under such circumstances are equal. Each may use the street, and each must use it, with a reasonable regard for the safety and convenience of the other. The motorman is supposed to know



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that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody. Of course, the owners and drivers of horses are required at the same time to use care in proportion to the danger to which they are exposed. *Benjamin v. Railway Co.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446." To the same effect are *Lightcap v. Traction Co. (C. C.)* 60 Fed. 212, cited with approval in *McDonald v. Railway Co.*, 20 C. C. A. 322, 74 Fed., loc. cit. 106; *Power Co. v. Manville*, 61 Ill. App., loc. cit. 492. The true rule is, while the bell must ordinarily be sounded to give notice of the approach of the car, still if the operator of the car sees that a horse is already frightened by the approach of the car, and that the citizen is in danger, it is his duty to cease sounding the bell, and to even stop, if necessary; and if, instead of doing so, he continues to sound the gong or ring the bell, and further frighten the horse, and cause him to run away, the company is liable for injuries inflicted in consequence thereof. This horse did no more than any self-respecting horse who was imbued with a sense of self-preservation would have done under the same circumstances; that is, when the car got within a foot or two of the horse, and was still approaching, and the bell was being violently rung, and the horse could not go forward any further, he turned around, and ran out of the way of the car. Of course, if the driver of the horse knows that the horse is liable to become frightened at street cars, and to run away, and with such knowledge drives him on a street with a car line on it, he does so at his own risk. But this does not authorize or justify the operator of a street car to needlessly sound the gong or ring the bell, nor to continue to do so when it is apparent that the only effect thereof is to further frighten the horse. There could be no possible excuse for the conduct of the operator of the car in this case continuing to sound the gong if the testimony for the plaintiff is true, and this is as far as it is necessary to go to reach the conclusion that the demurrer to the evidence was properly overruled.

2. Instructions 3 and 7 given for the defendant sharply drew a distinction between the negligence of the defendant and the contributory negligence of the plaintiff. Those instructions declared the law to be that the defendant was not liable unless its negligence was the direct cause of the injury, while the

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plaintiff was not entitled to recover if his negligence "but contributes to the injury"; that is, that the defendant was liable only for direct negligence, while the plaintiff was cut off from recovery if he was guilty of any negligence, however slight or remote or indirect it may have been. The law is that a defendant is liable if his negligence was the direct and proximate cause of the injury, unless the plaintiff has also been guilty of such negligence as directly contributed to the happening of the injury; and the defendant is not liable, no matter how negligent he may have been, if the plaintiff's negligence has thus contributed to the injury, for the doctrine of comparative negligence has never obtained in this state. *Hurt v. Railway Co.*, 94 Mo., loc. cit. 264, 7 S. W. 1, 34 Am. & Eng. R. Cas. 422, 4 Am. St. Rep. 374. In each instance the negligence and the contributory negligence must be direct; that is, must have entered into and formed a part of the efficient cause of the accident. *Hoepper v. Hotel Co.*, 142 Mo., loc. cit. 388, 44 S. W. 257; *Beach*, *Contrib. Neg.* (2d Ed.) § 24; *Matthews v. City of Toledo*, 21 Ohio Cir. Ct. R. 69; *Dunkman v. Railway Co.*, 16 Mo. App. 548; *Corcoran v. Railway Co.*, 105 Mo. 399, 16 S. W. 411, 24 Am. St. Rep. 394; *Murray v. Railway Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601; *Kellny v. Same*, 101 Mo. 67, 13 S. W. 806, 43 Am. & Eng. R. Cas. 186, 8 L. R. A. 783; *Hicks v. Same*, 46 Mo. App. 304; *Pinnell v. Railway Co.*, 49 Mo. App. 170; *Meyers v. Railroad Co.*, 59 Mo. 223. Mere negligence, without any resulting damage, no more bars a plaintiff's recovery than it creates a liability against a defendant. *Dickson v. Railroad Co.*, 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429. Remote negligence, which does not become an efficient cause, neither creates nor bars a liability. *Kennedy v. Railroad Co.*, 36 Mo. 351; *Meyers v. Railroad Co.*, 59 Mo. 223. It is only where the plaintiff's negligence contributes directly to his injury that it precludes his recovery therefor. *Moore v. Railroad*, 126 Mo. 265, 29 S. W. 9. And the plaintiff's contributory negligence must mingle with the defendant's negligence as a direct and proximate cause in order to bar a recovery. *Nolan v. Shickle*, 69 Mo. 336; *Frick v. Railway Co.*, 75 Mo. 542. These instructions were, therefore, erroneous, and the jury was misdirected; and, as the plaintiff had made out a prima facie case, he was entitled to have the law properly declared to the jury, the trial court did right in granting a new trial. As the case must be tried anew, it is proper to add that the mere fact that the horse had scared once, about a week before, at a dummy engine, was not a sufficient foundation to authorize that portion of the fifth instruction which precluded the plaintiff's recovery "if the real cause of the accident was the disposition of the horse to frighten at cars."

For these reasons the judgment of the circuit court is affirmed. All concur.

## KREJCI v. CHICAGO &amp; N. W. RY. CO.

*(Supreme Court of Iowa, May 28, 1902.)*

[90 N. W. Rep. 708.]

**Fires Set by Locomotives\*—Damages.**

Where an orchard was destroyed by fire, it was proper, in fixing the damages, to show the market value of the apples produced by the trees.

**Same—Same—Pleading and Proof.**

In an action to recover for injuries by fire, the allegations of the petition that apple trees were destroyed, that they were of value, "and that great damage was done to his [plaintiff's] farm by the loss of said apple trees," was sufficient to permit evidence of the value of the farm before and after the orchard was burned.

**Same—Same—Same.**

Where a petition alleged the destruction of apple trees by fire, and also great damage to the land, as the measure of damages was the difference in the value of the land before and after the fire, it was not necessary to prove the value of the trees; Code, § 3639, providing that a party need not prove more than is necessary to entitle him to the relief asked for.

**Same—Same.**

Where grass land or meadow was destroyed by fire, the measure of damages was the cost of restoring it to its former condition, its rental value as such until restored, and also the value of growing grass.

**Same—Same.**

It was harmless error, as to the defendant, to instruct that the plaintiff was entitled to recover the difference between the market value of the grass before and after the fire, since this was less than he was entitled to.

**Same—Presumption of Negligence.**

In an action against a railroad to recover for injuries by fire, it was not prejudicial to the defendant to instruct that "the law presumes that the defendant was negligent," when it had requested an instruction that the fact that a fire started from sparks from a railway engine created a mere presumption of negligence on the part of the company, which might be overcome by proof.

Appeal from district court, Linn county; W. N. Treichler, Judge.

Action at law to recover damages resulting from a fire set out by defendant's locomotive. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Hubbard, Dawley & Wheeler, for appellant.

Bingham & Mekota, for appellee.

DEEMER, J. The petition is in two counts. In the first it is alleged that in October, 1899, defendant negligently allowed a fire to be set out by an engine, which destroyed apple trees, fence posts, meadow, and manure belonging to plaintiff; that the apple trees were of value; "and that great

\*See *Shields v. Norfolk & C. R. Co.* (N. Car.), 22 Am. & Eng. R. Cas., N. S., 635, and foot-note; 13 Am. & Eng. Enc. Law (2d Ed.) 466 et seq.

As to the admissibility of evidence of other fires originating in combustibles on the right of way, see *Wabash R. Co. v. Miller* (Ind.), 23 Am. & Eng. R. Cas., N. S., 843, and foot-note, 844. See also, *Abrams v. Seattle & M. Ry. Co.*, ante, 465.

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damage was done to his [plaintiff's] farm by the loss of said apple trees." In the second it is alleged that on March 30, 1898, defendant negligently allowed fire to escape from an engine, which destroyed four acres of valuable meadow, the reasonable value of which was \$5 per acre, and "that said meadow was totally destroyed, and worthless for next year's crop." The answer was, in effect, a general denial.

On the trial the plaintiff was permitted to prove, without objection, the destruction of apple trees, fence posts, grass, manure, and meadow land; that the apple trees bore fruit every year, after large enough to bear; that the fence posts destroyed were worth 15 to 20 cents apiece; that the manure was worth 75 cents to \$1 per load; that the two acres of grass burned was worth \$6; and, without objection, by one witness, that the farm was worth \$75 per acre just before the October fire, and \$70 per acre just after. Defendant objected to evidence offered by plaintiff tending to show the market value of the apples produced by the trees, the difference in the market value of the grass land before and after the March fire, and the difference in the market value of the land just before and just after the October fire, not taking into account the manure, fences, and grass that were destroyed. These objections were each and all overruled, and complaint is made of the rulings.

1. That it was competent and material to show the income from the orchard prior to the fire is expressly held in *Rowe v. Railway Co.*, 102 Iowa, 290, 71 N. W. 409. The same case also holds that, when trees and shrubs are destroyed, the measure of damages is the difference in value "between the real estate before the injury and after it," and that a question similar to the one propounded to the witnesses in this case was proper. We are not to be understood as holding that this is the only rule to be applied when ornamental shrubs and trees, hedge fences, and the like, are destroyed; for tastes differ in these matters, and what is thought of benefit by one may be regarded as a positive injury by another, and yet the party whose property is destroyed may suffer a substantial injury. It is enough to say that the complaints so far considered in the instant case are without merit. But it is argued that there is no claim for damages to the land; hence the evidence was inadmissible. The quotation we have made from the petition sufficiently answers this contention. True it is that plaintiff pleaded more specifically than was necessary the damages done to trees, etc., but he also alleged that damage was done his farm by the loss of apple trees. He was not required to prove all that he alleged. It was enough to show sufficient facts entitling him to recover. Code, § 3639, and cases cited. When grass land or meadow, as distinguished from hay or grass, is destroyed, the rule of damage, as adopted by this court, is the cost of restoring it to its former condition, and its rental value as such until restored; and,

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if growing grass is destroyed, plaintiff may have, in addition, the value of this grass. *Bradley v. Railway Co.*, 111 Iowa, 562, 82 N. W. 996. The reason given for this rule is that it is always possible to find witnesses who value a farm just as high without a meadow as with it. Another reason is that value of the use of the meadow during the time lost is an important element. *Vide Bradley's Case*, *supra*. It may be conceded that the proper rule was not applied in this case with reference to the meadow, either in the introduction of evidence, or in the charge as given by the court, which was to the effect that plaintiff was entitled to recover the difference between the fair market value of the grass immediately before and the fair market value just after the fire. But the broader question remains, was defendant in any manner prejudiced thereby? This interrogatory, it seems to us, admits of but one answer. Plaintiff was permitted to prove that the meadow land just prior to the March fire was worth in the market \$5 per acre, and just after was worth nothing. Manifestly this had reference simply to the destruction of the meadow, without reference to anything for its use until restored. This was less than plaintiff was entitled to, and, as defendant introduced no evidence whatever regarding the damages done by the March fire, it is in no position to complain. In *Greenfield v. Railway Co.*, 83 Iowa, 277, 49 N. W. 95, where a similar question was involved, we said, "It is manifest that the plaintiff suffered no less damages than the difference in the timber land before and after the fire." See, also, *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392; *Hamilton v. Railway Co.*, 84 Iowa, 132, 50 N. W. 567.

2. Instructions to the effect that, if the jury found defendant was not guilty of negligence, its verdict should be for defendant, were asked and refused, and error is assigned on the refusal. As the substance of these instructions was given by the court in its charge, there was no error. The same may be said of the court's refusal to give request No. 8, relating to the showing made by defendant to rebut the presumption of negligence.

3. The third instruction given by the court reads as follows: "(3) You are instructed that if you find from the evidence that the defendant railway company set out a fire by sparks escaping from its engines, and that the said fire damaged plaintiff, then in that event the law presumes that the defendant was negligent in operating the said trains, and the company will be held liable, unless it satisfies you by evidence rebutting this presumption that the company was not negligent in operating its said trains." This is objected to because of the use of the phrase "the law presumes that the defendant was negligent." Part of instruction No. 3 asked by defendant reads as follows: "(3) Under the law in this state, the fact that a railway company sets out a fire by sparks escaping from one of its engines, and the same does damage, creates a mere

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presumption of negligence on the part of the railway company whose engine set out the fire, which may be overcome by proof that it was not guilty of negligence in so doing." As the instruction given expressed practically the same thought as that embodied in the request, there was no error.

Other matters complained of are answered by what we have already said, and, finding no prejudicial error in the record, the judgment is affirmed.

FT. WORTH & R. G. RY. CO. v. SIVELLS *et al.**(Court of Civil Appeals of Texas, March 12, 1902.)*

[67 S. W. Rep. 517.]

**Death by Wrongful Act—Measure of Damages.\***

In an action for the negligent killing of plaintiff's husband and father, plaintiffs are not entitled to recover a sum equal to all the pecuniary benefits they would have received from the decedent in the future had he not been killed.

**Same—Same—Instructions.†**

An instruction permitting plaintiffs to recover such sum was not modified and corrected by a following charge that "you will find for plaintiffs such damages, under the instructions herein given you, as you think will compensate them for the loss sustained by the killing."

Appeal from district court, Brown county; John W. Goodwin, Judge.

Action by Mrs. M. L. Sivells and others against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

N. H. Lassiter, T. C. Wilkinson, and Robert Harrison, for appellant.

Jenkins & McCartney and Coffee & Scott, for appellees.

KEY, J. This is a statutory action by the surviving wife and children of W. B. Sivells to recover damages on account of his death, alleged to have been caused by the negligence of appellant railway company. From a judgment in favor of the plaintiffs, the company has appealed, and assigned numerous errors.

As to the measure of damages the trial court gave the following instruction: "If you find for plaintiffs, you will award them such sum as you may, under the evidence, reasonably believe plaintiffs would have received from the assistance of W. B. Sivells, had he not been killed; and you may, in estimating such damages, consider, under the evidence before

\*See *Chesapeake, etc., Ry. Co. v. Lang* (Ky.), 6 Am. & Eng. R. Cas., N. S., 779; *Walker v. Lake Shore, etc., R. Co.* (Mich.), 6 Am. & Eng. R. Cas., N. S., 779; *Louisville & N. R. Co. v. Kelly* (Ky.), 7 Am. & Eng. R. Cas., N. S., 165; *Louisville & N. R. Co. v. Tucker* (Ky.), 23 Am. & Eng. R. Cas., N. S., 876; *Louisville & N. R. Co. v. Jones*, 23 Am. & Eng. R. Cas., N. S., 224.

†*Rouse v. Detroit Elec. Ry.* (Mich.), 22 Am. & Eng. R. Cas., N. S., 650.

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you, the age of W. B. Sivells at the time of his death, the time he might live, and other evidence tending to show what damage, if any, plaintiffs may have received by reason of the killing of W. B. Sivells. You will find for plaintiffs such damages, under the instructions herein given you, as you think will compensate them for the loss sustained by the killing of said Sivells." This instruction is assigned as error, and the assignment must be sustained. *Railway Co. v. Carstens* (Tex. Civ. App.) 47 S. W. 36; *Railway Co. v. Loeffler* (Tex. Civ. App.) 51 S. W. 536; *Railway Co. v. Morrison* (Tex. Sup.) 56 S. W. 745. The first part of this charge specifically and distinctly directed the jury, if they found for the plaintiffs, to award them a sum of money equal to the aggregate of all the pecuniary benefits that the plaintiffs would have received from W. B. Sivells if he had not been killed. In other words, the jury were told that, if the defendant was liable for the death of Sivells, it must pay in advance a sum of money equal to all of the pecuniary benefits the plaintiffs would have obtained from Sivells in the future. A charge similar to this was condemned by our supreme court in *Railway Co. v. Morrison*, *supra*.

But it is contended on behalf of appellant that the last sentence in the charge under consideration modifies and corrects the preceding sentence, and leaves the charge free from just ground of complaint. This position is untenable. The sentence referred to does not attempt to change, explain, or restrict the former; but, on the contrary, seems to refer the jury thereto for the correct rule as to the measure of damages, because it directs the jury to proceed "under the instructions herein given you." But, if it could be held that the last sentence states the law correctly, then it would follow that it is in conflict with the sentence immediately preceding it; and, as it does not attempt to withdraw or modify the objectionable sentence, it would leave the jury without any proper guide on the subject referred to, and would constitute reversible error. *Railway Co. v. Lehman*, 66 S. W. 214, 3 Tex. Ct. Rep. 866.

Counsel for appellees object to this court's considering the assignment of error addressed to the charge in question, because it was not complained of in appellant's motion for a new trial in the court below; the contention being that all questions, including questions of law, not presented in a motion for new trial are to be considered as waived on appeal. As to questions of law, this contention is untenable. *Telegraph Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4.

We also sustain the eighth assignment of error. The evidence given by the witness Howard, and complained of in that assignment, does not fall within the scope of expert testimony, and should have been excluded.

We also suggest upon another trial the charge to the jury be so framed as to submit more distinctly and clearly the ques-

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tion of proper care and contributory negligence on the part of the deceased in the manner of attempting to stop his team.

On all the other assignments presenting questions of law, we rule against appellant. We express no opinion upon the merits of the case, as developed by the testimony.

For the errors pointed out, the judgment will be reversed and the cause remanded. Reversed and remanded.

DORAN v. CEDAR RAPIDS & M. C. RY. CO.

(*Supreme Court of Iowa, June 3, 1902.*)

[90 N. W. Rep. 815.]

**Frightening Horses—Duty of Motorman to Exercise Care to Discover Plaintiff's Peril.\***

In an action against an electric railway, an instruction that it was not the duty of the motorman to stop the car or check its speed unless he saw plaintiff's horses showing signs of fright, but that it was only his duty to stop the car, as quickly as he could in the exercise of ordinary care, as soon as he saw plaintiff's peril, was properly refused, as it was the further duty of the motorman to exercise reasonable care in discovering plaintiff's peril.

**Duty of Driver of Shy Team to Avoid Street upon Which Is an Electric Railway.**

An instruction that if there was another and reasonably convenient street which plaintiff could have taken, and he did not know how his horses would act at the approach of an electric car from behind, it was negligence for him to take his horses along a street where defendant's cars ran, was properly refused, as the correct rule was stated in an instruction that, if plaintiff knew it would be dangerous to take his horses along this street, it was his duty to go on another street if he could do so without serious inconvenience.

**Appeal—Review—Excessive Verdict—Passion and Prejudice.†**

Where the only evidence of passion and prejudice in a verdict against an electric railway company for personal injuries and the loss of a horse was the fact that the trial court cut it down as being excessive, it will not be set aside on appeal on this account.

**Privileged Communications.**

Under Code, § 4608, which prohibits a physician from disclosing any confidential communication, where an injured party consults a physician, and discloses to him his physical condition, he is prohibited from testifying as to such knowledge, except with the consent of the injured party, although he was consulted solely for the purpose of securing his testimony as a witness.

Ladd, C. J., dissenting.

\*See notes, Atchison, etc., R. Co. v. Morrow, 5 Am. & Eng. R. Cas., N. S., 286; Kelsey v. New York, N. H. & H. R. Co. (Mass.), 1 R. R. 880, 24 Am. & Eng. R. Cas., N. S., 880; Texas Midland R. R. v. Cardwell (Tex.), 1 R. R. 892, 24 Am. & Eng. R. Cas., N. S., 892; Lake Shore & M. S. Ry. Co. v. Butts (Ind.), 1 R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898; Coleman v. Wrightsville & T. R. Co. (Ga.), 23 Am. & Eng. R. Cas., N. S., 863; Central of Ga. Ry. Co. v. Black (Ga.), 23 Am. & Eng. R. Cas., N. S., 864. See also, McCann v. Consolidated Traction Co. (N. J.), 7 Am. & Eng. R. Cas., N. S., 280.

†See Texas & P. Ry. Co. v. Hamilton (Tex.), 1 R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884; Proctor v. So. Ry. Co. (S. Car.), 22 Am. & Eng. R. Cas., N. S., 426.



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Appeal from district court, Linn county; Wm. G. Thompson, Judge.

Action to recover damages for personal injuries and the loss of a horse, alleged to have been due to the negligence of defendant's motorman in operating a street car. Verdict for plaintiff for \$8,300. On motion for new trial, the court gave the plaintiff the option of accepting a judgment for \$4,500 or a new trial, and, plaintiff having elected to accept the reduction, judgment was rendered for that amount, from which defendant appeals. Affirmed.

W. E. Steele and Powell, Harman & Powell, for appellant. Jamison & Smyth and John N. Hughes, for appellee.

McCLAIN, J. The injury complained of by plaintiff was received while he was riding on horseback along the boulevard connecting Cedar Rapids and Marion, leading a stallion. It was caused by a car of defendant, which was running along the street in the same direction in which plaintiff was going, coming in collision with him and the horse which he was riding. The horse was killed by the collision. Plaintiff's injuries are alleged to be serious and permanent, and he seeks to recover therefor, and in a separate count to recover the value of the horse, which belonged to one Bryant, the claim against defendant having been assigned by said Bryant to the plaintiff.

The grounds of negligence stated in the petition are that defendant's employee operating the car could, in the exercise of ordinary care, have discovered plaintiff's peril in time to have stopped the car and prevented the injury; that after he discovered the plaintiff's peril he failed to use ordinary care and diligence to stop the car and avoid the injury; that he failed to give warning of the approach of the car; and that he was running at a high and dangerous rate of speed, and negligently and carelessly failed to have said car under control when approaching plaintiff; and these allegations of negligence are all predicated with reference to the fact that plaintiff's horse, without any fault or negligence on his part, had become fractious and unmanageable and beyond his control, and got upon defendant's track, and that plaintiff was without negligence in connection with the injury. Each of these allegations of negligence is denied. They were all submitted to the jury, and, except with reference to the allegation of failure to give warning, there is no contention but that there is some evidence to support a finding against the defendant. The errors assigned relate to the giving and refusal of instructions, the overruling of a motion for a new trial on the ground that the verdict of the jury was the result of passion and prejudice, and the exclusion of certain evidence.

Counsel for defendant asked an instruction in which the duty of the jury to confine themselves to a consideration of the particular acts of negligence set out in the petition was

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stated, negligence was defined, and the rule as to preponderance of the evidence was given in the ordinary form, except that the phrase employed was "preponderance of the testimony." So far as we see, there is no good reason why this instruction should not have been given, the misuse of "preponderance of testimony" for "preponderance of evidence" being probably not very material. But we do not see in this case any particular reason for elaboration on this point. Jurors are presumed, as ordinarily intelligent men, to know how to compare conflicting statements and determine which of these statements they shall believe. The court told the jury, in an instruction given, that before "the plaintiff can recover in this action, if at all, he must satisfy you by a fair preponderance of the evidence that the material allegations of his petition are true, and that defendant's negligence caused the injury complained of, and that he himself was not guilty of any negligence which directly contributed to such injury." This instruction is in general correct, as far as it goes; it confines the jury to the consideration of the allegations of plaintiff's petition, and it leaves the jury to determine by a fair preponderance of the evidence the truth of such allegations. It might be material in some cases to explain in detail what is meant by "fair preponderance," but we can hardly think that in a simple case such as this was, where there is nothing but the usual conflict between the accounts given by the various witnesses, it was error not to go further into that matter. Counsel for appellant urge that the attention of the jury should have been called to the opportunity of the several witnesses to see and understand the things about which they testified, and their interest or lack of interest in the event of the suit, but there seems to be no doubt that all the witnesses who did testify had opportunity to know what they were testifying about, and the nature of the interests of the different witnesses in the result was so obvious that we can hardly assume that the jurors would not take this into account. We think the refusal to give the instruction asked was not prejudicial.

In connection with the instruction we have just been considering we should note a criticism of the use of language by the court, in this and other instructions, indicating that the jury should be "satisfied" with reference to matters which it was the duty of plaintiff to prove. Undoubtedly, some expressions to this effect were erroneous, and could have been complained of on behalf of the plaintiff, but they require a greater amount of proof than was necessary to sustain the verdict, and we see no reason for objection on the part of defendant in this respect. We can hardly think that the expressions used could have been construed by the jury, as counsel for defendant suggests, as authorizing a finding for plaintiff, if the jury was satisfied in some other way than by the evidence.

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In another instruction asked it is stated as a matter of law that it was not the duty of the motorman to stop the car or check its speed unless he saw plaintiff's horses showing signs of uneasiness or fright, but that it was only his duty to stop the car as quickly as he could, in the exercise of ordinary care, as soon as he saw plaintiff's peril. This we think is not a correct proposition of law. Much must depend on the rate of speed at which the car is going, the extent to which the person in charge of the animals appears to have lost control thereof, and the imminence of the danger that they will get upon the track, in the way of the car, so as to imperil their own safety and that of the person in control of them. In other words, we do not understand it to be the rule that the motorman of a street car may run his car at a high rate of speed, even though such speed would not in itself be unlawful, notwithstanding he sees that a person on the street is liable to be dragged or taken upon the track, and is under no obligation to check his car or prepare to avoid a collision until it becomes certain that a collision will take place unless the car is stopped. According to the instruction asked, there is no duty on the part of the motorman to do anything until the animals in such a case actually obstruct the passage of the car. The whole subject is elaborately discussed in 2 Thomp. Neg. §§ 1374-1422, inclusive. But the rule requiring the motorman of an electric car to do what he reasonably can to avoid a danger which is reasonably apparent seems to us too elementary to require elaborate citation of authorities. It would certainly not be necessary in all cases that the car be stopped as soon as it becomes evident that animals on the highway have become uneasy and even frightened, but it certainly is his duty to take reasonable steps by way of reducing the speed of the car to avoid an injury which he may anticipate as likely to result from the frightened condition of animals on the street. Another objection to the instruction, and one which applies to other instructions asked, is that it limits the duty of the motorman to cases where he sees the peril of persons on the street. This question is quite elaborately argued, and counsel for appellant contend that the motorman owes no duty to any one on the street until he becomes aware that such person is in a perilous position. In support of this proposition they cite many cases, but they are cases relating to the management of railway engines and trains on a right of way where the public has no right to be, and where there is no duty to anticipate danger of collision with persons on the track. Such cases are not in point. The question discussed in them is the duty of the railway employees to avoid injury to one who is negligently upon the track after the peril resulting from his negligence has become apparent. But persons who are using the public streets on which a car line is operated have a right to the use of the whole of such street, and are not negligent per se in being on or near to the street car track, and it plainly is

the duty of the motorman to be on the lookout for the purpose of avoiding collision with and injury to persons using the street. This rule was stated by the trial court in instructions of which no reasonable complaint can be made, and we think that it was not error in the lower court to refuse to give the instruction asked.

Complaint is made of refusal to give instructions embodying the proposition that if there was another and reasonably convenient street which plaintiff could have taken in going from Cedar Rapids to Marion, and he had no knowledge as to how the horses, or either of them, would act at the approach of an electric car from behind, it was negligent for him to take his horses along the street on which defendant's line was operated. And complaint is also made of an instruction given in which the jury was told that if plaintiff knew that the horses in his charge, or either of them, might become frightened and unmanageable on the approach of a car, and he might have taken another road easily accessible, and thereby avoided the cars, and failed to do so, "this will be for your consideration," and left it to the jury "whether such neglect on the part of plaintiff contributed to the injury." The court had already told the jury in another instruction that before plaintiff could recover he must show that "he was not guilty of any negligence which directly contributed to said injury." We do not think that it constitutes negligence per se to take horses along a street on which a street car line is operated, without knowledge as to what will be the probable conduct of the horses on the approach of a car. It certainly cannot be true as a matter of law that one taking animals upon a street along which an electric car will pass should have first tested or made inquiry as to the probable conduct of the animals on the approach of such a car. These are considerations for the jury. There is no reasonable controversy as to the duty of one going upon a street to avoid a known danger, and the court correctly said that, if the plaintiff knew that it would be dangerous to take the horses along this street, then, if he could without serious inconvenience have taken another street, it was his duty to do so. But that, we think, is as far as the rule goes. It was not for the court to say as a matter of law, in the absence of proof of knowledge on the part of plaintiff that the horses would probably be frightened by an electric car, that it was his duty to know whether they were likely to be frightened, and to take another street if he did not have that knowledge. *Sylvester v. Town of Casey*, 110 Iowa, 256, 81 N. W. 455. The views we have expressed dispose of the objections to refusal to give instructions, and also of the objections to the instructions given. The general objection that the jury were not confined to a consideration of the grounds of negligence set out in the petition is not well taken, for the court specified these grounds in stating the issues, and the jury could not, in

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the light of what was said in the instructions taken together, have failed to understand that the findings of negligence referred to were limited to such grounds of negligence as were thus stated.

As to the complaint that the verdict was the result of passion and prejudice, it is enough to say that the only evidence of passion and prejudice relied on is the amount of damages named in the verdict. It is not contended but that there was some evidence to support a verdict, and therefore the mere fact that a verdict was found for the plaintiff would certainly not indicate passion and prejudice. It is true that the trial court found the amount of the verdict to be excessive, and refused a new trial only on condition that a considerable amount should be remitted. But an excessive verdict is not necessarily a verdict which results from passion and prejudice. We could not assent to a proposition that wherever the trial court finds that the verdict was for too large an amount in cases of personal injury, we should conclude that it ought to have been entirely set aside on the other ground. The amount for which the verdict was allowed to stand is large, but there was a considerable conflict in the evidence as to the nature of plaintiff's injuries. They appear to involve permanent partial disability; a tilting of the frame of the body, as it is described, by which one leg remains permanently higher than the other, causing plaintiff to limp, and disqualifying him from some kinds of labor. We would not feel justified in requiring a further reduction of the amount of plaintiff's recovery.

One assignment of error relates to the exclusion of testimony of a physician who was consulted by plaintiff, but, not being called for plaintiff as a witness, was called for defendant. The objection was made for plaintiff that the physician could not testify, under Code, § 4608, which prohibits a physician or surgeon from disclosing any confidential communication intrusted to him in his professional capacity. Counsel for appellant urge that this witness was not consulted as a physician with reference to the treatment of plaintiff, but only for the purpose of securing his testimony as a witness, and that therefore the statute does not apply to him. We are not referred to any authorities which make this distinction. It seems to us that whenever an injured party consults a physician as physician, and discloses to him his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party.

Affirmed.

LADD, C. J., dissents.

## LITTLE ROCK &amp; FT. S. RY. CO. v. JAMISON.

*(Supreme Court of Arkansas, April 19, 1902.)*

[68 S. W. Rep. 28.]

**Railroads—Killing Stock—Venue—Judgment.**

Where an action was brought in a justice court against a railroad for the killing of stock under Sand. & H. Dig. § 6352, requiring the action to be in the county where the killing occurs, and on removal to the circuit court there were no written pleadings, and the place where the killing occurred was not proven, a judgment for plaintiff could not stand.

Appeal from circuit court, Conway county; Wm. L. Morse, Judge.

Action by J. R. Jamison against the Little Rock & Ft. Smith Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dodge & Johnson, for appellant.

Chas. C. Reid, for appellee.

WOOD, J. Appellee sued the appellant in justice court for \$50, the value of a certain mule alleged to have been killed by appellant. Judgment by default was rendered against appellant, and on appeal to the circuit court there was a trial by jury and a verdict and judgment against the railway. There were no written pleadings. The trial before the circuit court was de novo. Therefore, to give the court jurisdiction, it was necessary for the plaintiff to show that the animal was killed in the county where the court was sitting. The failure to show the venue was fatal to the judgment. Sand. & H. Dig. § 6352; *Railway Co. v. Clifton*, 38 Ark. 205; *Railway Co. v. Lindsay*, 55 Ark. 282, 18 S. W. 59. *Railway Co. v. Lindsay*, supra, was a similar case before the justice court; no venue was alleged. But in the circuit court, on appeal, the venue was proved. Thus the jurisdiction was shown. But here there was no statement or proof of jurisdiction anywhere. Our statute (Sand. & H. Dig. § 6352) localizes the action to the county where the injury occurred. The court had no jurisdiction of the subject-matter unless the suit was brought in the county where the killing was done. Consent cannot confer jurisdiction of the subject-matter. 1 Black, Judgm. § 217. "A defendant cannot, by any act or omission, confer an authority which the law has withheld; but he may well exonerate the plaintiff from adducing evidence that the case is a proper one for the exercise of authority which the law has conferred." *Feild v. Dortch*, 34 Ark. 399; *Jacks v. Moore*, 33 Ark. 31; *Smith v. Clark*, 1 Ark. 63; 1 *Smith*, Lead. Cas. pt. 2 (8th Ed.) pp. 1122, 1123, and authorities cited.

2. Appellant contends that the proof shows that the St. Louis Iron Mountain & Southern Railway Company was operating the train which caused the injury, and not the appellant company. Inasmuch as the cause must be remanded for a new trial for the error indicated supra, we deem it unnec-

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essary to pass upon appellant's second proposition. The proof upon a new trial on this question may be entirely different from the proof here. It is not conceded in this case that the St. Louis, Iron Mountain & Southern Railway Company operated appellants' road, as was the case in *Railway Co. v. Daniels*, 68 Ark. 17, 56 S. W. 874.

For the error mentioned, reverse the judgment and remand the cause for new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* WOOD *et ux.*

(*Court of Civil Appeals of Texas, March 22, 1902.*)

[68 S. W. Rep. 802.]

**Communication of Contagious Disease—Escape of Patient in Railroad's Custody—Liability.**

A railroad company took charge of an employee afflicted with smallpox, and hired one to guard and nurse him. While the patient was delirious with fever, the nurse fell asleep, and the patient escaped, and, wandering on plaintiff's premises, communicated the disease to his child: *held*, in an action against the company that the evidence showed liability for the injuries due to the communication of the disease.

**Contributory Negligence—Failure to Have Child Vaccinated.**

Plaintiff was not guilty of contributory negligence in not having the child vaccinated.

Appeal from district court, Hunt county; L. A. Clark, Judge.

Action by H. D. Wood and wife against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. S. Miller, W. C. Jones, Head & Dillard, and Craddock & Looney, for appellant.

Evans & Elder, for appellees.

**Statement.**

RAINEY, C. J. H. D. Wood and his wife brought suit against the defendant company, alleging that said company had established a pest house or smallpox camp near plaintiff's residence for the purpose of having treated there two of its employees. That one of these employees, while delirious, escaped from the camp, and communicated the smallpox to the plaintiff and his wife and child. The child died, and suit was brought for damages done to plaintiff and his wife on account of the communication of the disease to them and of the death of the child. A trial resulted in a judgment against the railway company, from which this appeal is prosecuted.

**Conclusions of Fact.**

The appellant, the Missouri, Kansas & Texas Railway Company of Texas, enters into agreements with its employees, whereby, in consideration of deducting a stipulated sum from their wages each month, that in case any one of them should

become sick or injured while in its service it would furnish them surgical and medical attention. Appellant entered into a contract with Alonzo Dickson, an employee, whereby it was agreed that in consideration of deducting 25 cents from his wages each month, if he should become injured or sick it would take charge of him, and treat him for such injury or sickness. On August 1, 1899, and for many years prior thereto, the appellant was operating and controlling a hospital department for the purpose of treating its sick and injured employees. The Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company constitute what is known as the Missouri, Kansas & Texas Railway System. Said companies operate in connection with and as a part of their legal and claim departments their hospital department under one general management for the mutual benefit and interest of the companies and their respective employees. The Kansas Company owns a hospital at Sedalia, Mo., that is used by the two companies, where some of the employees of appellant are sent for treatment when sick or injured. During the latter part of July, 1899, Alonzo Dickson, who was then in the employment of appellant as a section hand, and had been in such employment for four years in Hunt county, received a slight injury in such service, and was sent to the Sedalia hospital, arriving there on August 1, 1899. At the time he was placed in the hospital he was placed in a ward with some colored patients who were broken out with the smallpox, smallpox having existed in the hospital from the 10th day of July previous. He complained to the surgeon in charge, and told him that those negroes had smallpox and that he desired to leave the hospital. He was told by the surgeon that it was only chicken pox, but to come around the next morning and he would give him a pass back to Greenville. On the next morning—August 2, 1899—he was discharged from the hospital, sent back to Hunt county, and placed at work for appellant under James Ewing, section foreman. George McNeil was the house surgeon of said hospital. It was his duty to examine, admit, treat, and discharge patients sent to the hospital, and to keep a register showing the names and addresses and the dates of admission and discharge of all patients sent to the hospital for treatment. This surgeon was inexperienced in the treatment of smallpox, never having treated a case prior to this time, there never having been a case of smallpox in the hospital since he had been in charge; he being put in charge in 1890, the same year he graduated from college. It was not determined that there was smallpox in the hospital until August 2, 1899, the day that Dickson was discharged from, and after he left, the hospital. On that day the city of Sedalia quarantined the hospital on account of the prevalence of smallpox in the hospital, and it remained under quarantine until September 11, 1899. Prior to the 2d day of August appellant did not know that smallpox



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existed in the hospital, but learned it on that day, and that Dickson had been exposed thereto, and was liable to break out with the disease in about 15 days. No precautions were taken to protect him, or the public against him, until the 19th day of August, when he broke out with the disease. On August 3, 1899, the division superintendent of appellant, A. D. Bethard, at Denison, Tex., sent to A. W. Baxley, at Greenville, Tex., the road master of the Mineola Division of appellant's lines, the following telegram: "During quarantine at Sedalia hospital, local surgeon will look after sick or injured employees except those who desire to go to hospital, who may be sent to Dallas, Ft. Worth, or Houston infirmary." When Dickson broke out with smallpox, and this fact was made known to the company's local surgeon, Dr. Garnett, he wired Dr. Yancey, the chief surgeon, to know what to do with him, and the chief surgeon wired him: "Isolate and quarantine him, secure a nurse at reasonable wages, and give him such attention there as he will need. Write me particulars and daily expenses. Attend to vaccination, and watch any one who may have been exposed by him." When R. M. Chapman, who was then the mayor of Greenville, learned that Dickson had smallpox, and before he learned that he was an employee of appellant, and had been exposed to the disease at its hospital, he purchased a tent and arranged with the owner of some lands preparatory to taking charge of Dickson. This was Sunday afternoon, August 20, 1899. But before taking charge of Dickson, Dr. Garnett showed Chapman his instructions from Dr. Yancey, at which time Dr. Garnett, acting under the said instructions from Dr. Yancey, took charge of Dickson, and undertook to isolate and quarantine him. He placed him in the tent and on the land that had already been secured, and designated by Chapman as a quarantine camp, and Chapman took no further steps until after Dickson had escaped, which was on Tuesday morning, August 22d. On that afternoon the mayor, acting on the understanding that the railway company would defray the expenses, hired one additional guard for the pest camp, and established a detention camp near the pest camp, and confined in it all who had been exposed by Dickson. Dr. Garnett, having taken charge of Dickson, undertook to isolate and quarantine him on behalf of the railway company, neglected to employ a sufficient number of attendants or guards to restrain him, but negligently employed an incompetent Mexican, and placed him in charge of Dickson to guard and nurse him for the first two days. At the time the Mexican was put in charge of Dickson he (Dickson) was delirious with fever, and it was known that persons thus suffering would likely escape. While Dickson was in a delirious condition, the Mexican went to sleep, and negligently permitted him to escape from the camp, and to wander upon the premises of appellees, and communicate to them and their little child the disease, inflicting the

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injuries complained of by the appellees. Appellant exercised due care in the selection of its surgeons and physicians.

#### Conclusions of Law.

1. The controlling issue raised by the various assignments of error presented by appellant is the liability of the railway company for the injuries inflicted by Dickson communicating the smallpox to appellees and their child. This issue was certified to the supreme court, and it was there held that the appellant was liable. *Railroad Co. v. Wood*, 66 S. W. 449. The legal phase of the issue was there discussed, which renders a discussion here unnecessary.

2. The evidence does not show contributory negligence on the part of appellees in failing to have themselves or their child vaccinated. Therefore there was no error in the court refusing the charge requested on the question of vaccination.

The evidence is sufficient to show liability of the appellant, and, there being no error in the rulings of the trial court, the judgment is affirmed. Affirmed.

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BALTIMORE & O. S. W. RY. CO. v. COX.

(*Supreme Court of Ohio, May 13, 1902.*)

[64 N. E. Rep. 119.]

#### Actionable Negligence—Elements.

An action to recover for an injury occasioned by negligence, the element of willfulness being absent, will not lie unless there exists between the defendant and the person injured a relation out of which there arises a duty of the former to exercise care toward the latter.

#### Injury to Licensee on Freight Train with Consent of Conductor.\*

A conductor in charge of a train designed exclusively for the carriage of freight, and operating under rules which forbid the carriage of passengers thereon, cannot, by consenting that a person may ride on such train, impose upon the company the duty of exercising toward him the care which it owes to a passenger.

(Syllabus by the Court.)

Error to circuit court, Ross county.

Action by Mrs. Cox, administratrix, against the Baltimore & Ohio Southwestern Railway Company. Judgment for defendant was reversed in the circuit court, and the defendant brings error. Judgment of the circuit court reversed, and that of the common pleas affirmed.

Mrs. Cox, as administratrix, brought suit in the court of common pleas to recover from the railway company damages for the death of her intestate, which was alleged to have been caused by the negligence of the company. In her petition she alleged that on January 4, 1896, her intestate was employed by the company as a locomotive fireman, and was riding by its order on one of its freight trains from Mineral City, where

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\*See note, 20 Am. & Eng. R. Cas., N. S., 130.

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he had been employed prior to that time, to Chillicothe; that the train, having reached Schooley's station, stopped on the siding to permit the passage in the opposite direction of a passenger train, when he left the caboose in which he had been riding, and went forward to the engine to talk to the engineer about the employment of the decedent, and, at the request of the engineer, climbed upon the engine; that while he was so upon the engine, engaged in conversation with the engineer, the said passenger train, approaching at a high rate of speed, was, by the negligence of the company, run upon said siding, colliding with said engine, and causing the instant death of said John H. Cox. The petition also set out the names of the next of kin of said Cox for whose benefit the recovery was sought. In its answer the company admitted that the deceased was killed while upon its locomotive which was standing upon a side track at Schooley's, by a collision with a passenger train which was run upon the siding in consequence of the fact that one of its employees, a brakeman who was acting as a switchman, had failed to disconnect the side track on which said freight train stood from the main track on which said passenger train was approaching, of which neglect the company had no knowledge. It denied all other allegations of the petition, and alleged that decedent was upon said freight train and the locomotive connected therewith without the knowledge or permission of the company, and was not there upon any business of or connected with it, and was wholly without right to be there. Upon the trial the plaintiff, while introducing a mass of evidence having no relation to any issue in the case, also introduced evidence tending to establish the following facts: The accident was due to the negligence of a brakeman who opened the switch to permit an engine to pass from the siding onto the main track, and did not close it. The decedent had been occasionally employed by the company as a fireman for several years, but had not been in its service after the 27th day of the month preceding the accident. In the meantime he had been visiting friends at Mineral City, and on the day of the accident he boarded the freight train, whose conductor was his friend, his purpose being to ride to Chillicothe to look for further employment with the company; and that was the purpose of his interview with the engineer. He had no pass, did not pay fare, and did not intend to. The rules of the company were introduced, showing that freight trains, unless running as accommodation trains, were not permitted to carry passengers except upon special order. This train was not running as an accommodation train, and there was no special order. Another rule forbade engineers to permit any but employees to ride on their locomotives. The train on which the decedent was riding was composed wholly of freight cars, with a caboose attached. At the conclusion of the plaintiff's evidence the trial judge directed a verdict for the company.

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In the circuit court a judgment which had been rendered in the common pleas upon the verdict so directed was reversed, and the cause was remanded to the court of common pleas for a new trial.

Robert E. Hamill, Edward Barton, and Willis H. Wiggins, for plaintiff in error.

John C. Entrekin, for defendant in error.

SHAUCK, J. (after stating the facts). It is elementary that actionable negligence exists only when one negligently injures another to whom he owes the duty, created by contract or operation of law, of exercising care. *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Railway Co. v. Bingham*, 29 Ohio St. 364; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274. There being in the present case neither allegation nor evidence that the fatal injuries were inflicted willfully or intentionally, there can be no recovery unless there existed between the decedent and the company a relation which imposed upon it the duty of exercising care toward him. Although it was alleged in the petition that he was at the time of the accident in the service of the company, and traveling on a freight train in obedience to its orders, the allegation was denied in the answer, and refuted by the testimony of the plaintiff herself. The view of counsel for defendant in error appears to be that the duty of the company to exercise care toward the decedent arose out of the fact that he was riding on the freight train with the express or implied assent of the conductor, and this view is said to have been taken in the circuit court. It invokes the doctrine of the law of agency, and, since the company did not authorize the transportation of passengers on its freight trains, it relies upon the implied or apparent authority of the conductor to bind the company to a relation which its rules forbade. It assumes that the company had given to the conductor an apparent authority with its operating rules had expressly denied him. But the apparent authority of the conductor was to represent the company in the conduct of that portion of its business to which the train in his charge was appropriate. It did not, therefore, exceed his actual authority. The differences between trains intended exclusively for the carriage of freight and those intended for the carriage of passengers are so obvious and familiar as to forbid the view suggested. The cases in which a recovery has been denied upon such facts as are here presented are so numerous that it is not practicable to cite them fully. Among them are *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *McVeety v. Railroad Co.*, 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 Am. & Eng. R. Cas., N. S., 471; *Railroad Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Files v. Railroad Co. (Mass.)* 21 N. E. 311, 14 Am. St. Rep. 411; *Smith v. Railroad Co.*, 124 Ind. 394, 24 N. E. 753; *Railroad Co. v. White (Tex. Civ. App.)* 34

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S. W. 1042; Railroad Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367; Railway Co. v. Black, 87 Tex. 160, 27 S. W. 118. The adjectives used to characterize the negligence of the brakeman in leaving the switch open should not be permitted to excuse the obvious failure of the plaintiff below to place her intestate in the position of one to whom the company owed care. In directing a verdict for the defendant, the trial judge correctly applied to the evidence the pertinent principles of the law as they are illustrated in the decided cases.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

BURKET, DAVIS, and PRICE, JJ., concur.

### LOUISVILLE & N. R. CO. v. MCCLISH.

(Circuit Court of Appeals, Sixth Circuit, April 8, 1902.)

[115 Fed. Rep. 268.]

#### Witnesses—Proof of General Good Reputation—When Admissible.

The fact that the testimony of a witness is contradicted by that of other witnesses, even in such manner that the conflict is irreconcilable, and cannot be explained consistently with the truthfulness of both sides, does not authorize the introduction of evidence to show his general good reputation for truth and veracity, which is only permissible where a direct attack has been made on the general character of a witness for truth by some recognized method of impeachment, as distinguished from an attack upon his testimony in the particular case.

#### Railroads—Killing of Person Walking on Track—Contributory Negligence.\*

The question of the contributory negligence of a person killed by a train while walking on a railroad track is not affected by a universal or general custom of people to use such tracks for footways, nor by the question whether the deceased knew that trains were due at the time; but where no question of license or public crossing is involved, and the deceased was a mere trespasser, walking upon an embankment eight feet high, the railroad company, in an action for his death, is entitled to an instruction that he was guilty of contributory negligence as a matter of law.

#### Appeal—Review—Limitation by Exception.

A question arising on the charge of the trial court, presented for review by an appellate court, is limited by the exception taken in the court below, and cannot be broadened by the assignment of errors or by the brief of counsel.

#### Trial—Instructions—Matters Affecting Credibility of Witness.

Where those in charge of the engine of a railroad train which it was alleged struck and killed plaintiff's intestate were witnesses and testified as to the occurrence, which was in a state in which a statute made it their duty to keep a lookout, and to give warning signals, and, if possible, stop the train on discovering a person on the track, and made the omission of such precautions a criminal offense in case such omission resulted in the death of a person, for the purpose of showing the interest of the witnesses, to be considered by the jury in weighing their testimony, it is not error to call attention to such criminal liability, where the testimony in the particular case warrants it.

\*See note appended to Cottrell v. Sou. Ry. Co. (Miss.), 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

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**Evidence—Inferential Proof—Habits of Deceased.**

In an action against a railroad company to recover for the death of a person alleged to have been struck and killed by a train, where there was no eyewitness to the accident, it is not competent for defendant to show a habit of deceased to jump on moving trains near the place where his body was found, for the purpose of raising an inference that his death resulted from such an attempt, but the testimony should be confined to his acts on the particular occasion in issue capable of being directly or circumstantially proved.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Charles N. Burch, for plaintiff in error.

Wm. Kinney and H. J. Livingston, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge. This action was brought to recover damages sustained by the wrongful death of George McClish, it being alleged that he was negligently run over by one of the trains of the defendant company. The testimony tended to show that on the afternoon of February 4, 1899, the deceased left Brownsville in the direction of his home, and later in the afternoon his body was found about one mile north of Brownsville, at the foot of an embankment, near the railroad track. The injuries on his person were of such a character as to cause death. It is the claim of the plaintiff that he was knocked from the track and killed by one of the locomotives of a passing train, while the company contended that death ensued from the wrongful attempt of the deceased to board one of the trains of the company. It is strenuously argued that the case should not have been submitted to the jury, but should have been arrested by an instruction to find for the company at the conclusion of the testimony. It would serve no useful purpose to summarize our views of the evidence, which we have carefully considered. It is only necessary to say that we have reached the conclusion that under the Tennessee statute a case was made upon the testimony sufficient to warrant its submission to the jury. We proceed to consider several of the assignments of error.

1. The witness Henry Wright, called by the plaintiff, gave testimony tending to show that he was at work on a telephone pole some distance south of the place of the injury; that he saw McClish, with whom he was well acquainted, pass up along the track northwardly shortly before the passenger train went in the same direction. Further, that shortly after the passenger train passed he saw parties bringing the body of McClish from the scene of the injury. The company offered the testimony of three witnesses, tending, with more or less certainty, to show that Wright was not at this pole that day, but was at a certain opera house until the body was brought into town. Over the objection of the defendant company the plaintiff was permitted to introduce the testimony

of witnesses to establish the general good character of the witness Wright for truth and veracity. The question of the admissibility of this kind of testimony has led to no little contrariety of decision in the courts of this country. The practice is not regulated by any statute of Tennessee, so far as we are advised, and is a question of general law, not controlled by state decisions. *Garrett v. Railroad Co.*, 41 C. C. A. 237, 16 Am. & Eng. R. Cas., N. S., 363, 101 Fed. 102, 49 L. R. A. 645. The question was presented to this court under facts differing from those now before us in *Spurr v. U. S.*, 31 C. C. A. 202, 87 Fed. 713. In that case it was sought to sustain the admission of this class of testimony upon the ground that the cross-examination had impeached the defendant's character for truth and veracity. Of this claim the court, speaking by Judge Swan, said:

"A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission. 1 Greenl. Ev. § 469. In his character as a witness defendant is not entitled to any privilege not extended to other witnesses. *Reagan v. U. S.*, 157 U. S. 301-305, 15 Sup. Ct. 610, 39 L. Ed. 709; *U. S. v. Hollis* (D. C.) 43 Fed. 248. In general, where no attempt has been made to impeach him by evidence of bad character, or by contradictory statements, or by the cross-examination, he cannot corroborate his testimony, or give it weight by evidence of his general reputation for truthfulness; nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of testimony of character is thus broadly stated by Greenleaf (1 Greenl. Ev. § 54): 'And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him.' The evidence was obviously intended to give weight to the defendant's personal testimony; not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion. *Stevenson v. Gunning's Estate*, 64 Vt. 609, 25 Atl. 697; *Fundorburg v. State*, 100 Ala. 36, 37, 14 South. 877; *Tedens v. Schumers*, 112 Ill. 263, 267; *People v. Cowgill*, 93 Cal. 597, 29 Pac. 228."

In the present case we perceive in the character of Wright's cross-examination nothing which tends to impeach his general character for truth. It is true it is searching and exhaustive, but it relates entirely to details of his alleged conduct and observation of McClish to which he had testified in chief, and we think the doctrine of the *Spurr* Case entirely applicable to the case in hand so far as that feature is concerned.

Did the contradiction of Wright by the witnesses who claim that he was not where he says he was, and consequently could

not have seen what he attempted to describe, put in issue the general character of the witness for truth, and thereby justify the introduction of witnesses to sustain it? Greenleaf, who goes farther upon this subject than many of the authorities are willing to follow in admitting this class of testimony, supports the doctrine that the contradiction of a witness by other testimony does not lay the foundation for the introduction of other testimony supporting his general reputation for truth. Greenl. Ev. § 469, and notes. What more is there in this case than the contradiction of Wright by other testimony? It is true that the contradiction is of that character that admits of no reconciliation of the testimony upon any theory of honest mistake or failure of memory. This is often true of witnesses whose general character for truth is unassailable. If, in every case where the witnesses are in direct and irreconcilable conflict, general character proof can be introduced, the disputed issues of fact will be lost sight of in a mass of testimony sustaining or impeaching the various witnesses in the case. The present case affords a striking illustration of the effect of the introduction of this class of testimony, for we find no less than six other witnesses at the trial whom it was deemed necessary to sustain by proof of general reputation. If this practice is to be followed, as is said in *Russell v. Coffin*, 8 Pick. 142, "great delay and confusion would rise; and, as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses, and not of the action." An attentive consideration of the cases and of the reasons upon which they are founded leads us to the conclusion that the introduction of this class of testimony should be confined to cases where an attack has been made upon the character of the witness by some method which tends to impeach his general character for truth. It is true that contradicting testimony may have an effect indirectly to impeach in the mind of the trier the character of the witness contradicted, but that is not the purpose of the testimony. It does not matter how much a witness may be contradicted, his general character is presumed good until it is assailed by some recognized method of impeachment. This may be undertaken by showing that the general reputation of the witness for truth is bad, by showing by direct proof or upon cross-examination that he has been convicted of an infamous crime. In these instances the attack is made upon his character, and is not so much upon his testimony in the particular case as upon his unreliability as a witness. When his character is thus assailed, the attack may be repelled by proof of general good reputation for truth. Until it is impeached it is not in issue, and we think the ends of justice will be subserved by confining the testimony to the issues of fact essential to the determination of the controversy before the court. While, as we have said, the cases are by no means



uniform upon this subject, the conclusion reached is sustained by many well considered cases; among others; *Wertz v. May*, 21 Pa. 274; *Brann v. Campbell*, 86 Ind. 516; *State v. Ward*, 49 Conn. 429; *Webb v. State*, 29 Ohio St. 351; *State v. Archer*, 73 Iowa, 320, 35 N. W. 241; *Russell v. Coffin*, 8 Pick. 142; *Brown v. Moores*, 6 Gray, 451; *Gertz v. Railroad*, 137 Mass. 77, 50 Am. Rep. 285; *Stevenson v. Gunning's Estate*, 64 Vt. 609, 25 Atl. 697; *People v. Gay*, 7 N. Y. 378; *Tedens v. Schumers*, 112 Ill. 263.

Whether the introduction of proof tending to show that the witness has made statements out of court inconsistent with his testimony is such an attack upon his character as justifies the introduction of sustaining testimony of general reputation is not a question involved in the record now before us. The cases are much in conflict upon the question, as a perusal of them will show. We cannot say that the admission of this sustaining testimony was harmless error. It tended to give undue weight and influence to the testimony of Wright over witnesses who rested upon the presumption of the law as to good character. *Brann v. Campbell*, 86 Ind. 516.

2. Under the decisions of the supreme court of Tennessee construing the statute under which this action was prosecuted, while the contributory negligence of the person killed will not bar a recovery, it may be taken into consideration in mitigation of damages. Upon this branch of the case the court instructed the jury:

"Take this case. I think you will agree with me in saying that it is always negligence, under any circumstances, for any man to walk along the track within the lines of contact by moving trains, unless it be under exceptional circumstances, where a man has scarcely any other choice of a pathway. Ordinary prudence would suggest that every man should keep off the railroad tracks unless he is compelled to use them for a walkway. But you know, as a matter of practical experience, that in a vast country like this it is impossible for the railroad company to keep the people from using their railroad tracks as a walkway. You know that people will take the railroad track because it is always a better road, higher and drier, and better kept than common roads and pathways that run parallel to them. This almost universal habit of using the railroad tracks as a walkway is to be considered by the jury in determining how far the intestate is to be chargeable with negligence in mitigating the damages; and this without regard to circumstances whether or not the railroad company has permitted it. If the railroad company has taken steps to exclude the public from using its tracks as a walkway, and, notwithstanding, the intestate violates the safeguards of the railroad by disregarding the means to prevent it, there the jury would naturally charge the intestate more readily with negligence. But if the company has taken no distinct means of warning off such intruders, that circumstance is to be con-

sidered by the jury in estimating the sum to be allowed in mitigation of damages. Again, if the intestate is not only walking upon the track, but he uses it for a walkway at a time and at a place when he knows or ought to know that trains are due to pass that way, that he is liable to come in contact with them, such a condition or circumstance would require the jury to increase the sum allowed in mitigation of damages. Thus, as before, the jury takes into consideration the facts and circumstances of this particular occasion and this particular man, and fairly and impartially estimates how much the damages should be mitigated by a reduction on account of the particular negligence shown by him on that occasion. Also, if the jury can see from facts and circumstances that after he had taken the track to use as a walkway he used it negligently by going heedlessly along without attention to the danger he is in from trains that are likely to pass or repass along the track at that time, such a circumstance would incline the jury to increase the amount to be allowed in mitigation of damages. And so it is, gentlemen of the jury, all the facts and circumstances of this case are submitted to you for your consideration to determine how much it would be fair to reduce the damages by reason of any negligence you find on the part of the plaintiff's intestate on this particular occasion."

Exception was duly taken to that part of the charge permitting the universal custom of people to walk upon railroad tracks to be considered as lessening the contributory negligence of the deceased.

The seventeenth request of the defendant was as follows:

"If you find from the evidence that plaintiff's intestate was killed by being struck by one of defendant's trains, then you must mitigate and reduce the damages which you allow plaintiff by taking into consideration the negligence of plaintiff's intestate in being upon defendant's track. I charge you that it was gross negligence on the part of plaintiff's intestate to go upon a railroad embankment eight feet high, where trains were frequently passing, and this negligence must be taken into consideration in assessing damages. The damages should be mitigated, and reduced to such amount as you deem proper. You can reduce the damages to a merely nominal amount."

Instead of giving request as asked, the court charged the jury as follows:

"If you find from the evidence that plaintiff's intestate was killed by being struck by one of defendant's trains, then you must mitigate and reduce the damages which you allow plaintiff by taking into consideration any negligence of plaintiff's intestate in being on defendant's tracks. I charge you that if you believe from the evidence that the plaintiff's intestate walked upon a railroad embankment eight feet high, where trains were frequently passing, and at a time when he knew

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that trains were due, if you find that he did not know the schedule trains, this negligence would and must be taken into consideration in assessing damages. The damages should be mitigated and reduced to such amount as you deem proper; and you may even reduce the damages to a merely nominal amount, if you think his negligence demands this as a matter of fairness and justice to the defendant. You must allow whatever mitigation you think just for any negligence on his part."

The objectionable feature of the charge given lies in the instruction that the jury might consider the almost universal habit of using the railroad tracks as a walkway in determining the question of the contributory negligence of the deceased. There is no testimony in the record showing a universal custom to thus use the right of way of a railroad for a footpath, and we do not perceive that a practice of this sort would make it any the less negligent. In such cases it has been frequently held that such use, where no question of license or public crossing is involved, is at the risk of those who see fit to thus expose themselves without cause. Even in the case of a licensee there is, under such circumstances, the highest duty to exercise the utmost degree of vigilance in looking out for approaching engines or cars. *Railroad Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181. In the absence of a license, the deceased, under the circumstances of this case, was a trespasser, to whom the company owed no duty except to avoid, after discovering his danger, any wanton or unnecessary injury to him. *Railroad Co. v. Cook*, *supra*. We think the defendant was entitled to a charge that the deceased was guilty of contributory negligence in thus exposing himself to danger by walking upon the track, and this without the qualification contained in the modification of the request in his behalf, "that, if the jury believed that the plaintiff's intestate walked upon a railroad embankment eight feet high, where trains were frequently passing, and at a time when he knew that trains were due, if you find that he did not know the scheduled trains, this negligence would and must be taken into consideration in assessing damages." This charge, by itself considered, might well justify the jury in believing that it was only negligence to make this use of the track when the deceased might expect trains to be due. We cannot agree to this proposition. The track is the property of the railroad company, which it has the legal right to use at any and all times. "It can never be presumed that cars are not approaching upon a track, or that there is no danger therefrom." *Elliott v. Railroad Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. It is true that in other parts of the charge the learned judge instructs the jury that to make use of the track of a railway for walking purposes except in cases of necessity may be contributory negligence, but in the respects pointed out the jury may well have understood the court otherwise, and, in our opinion, the charge was misleading.

3. As to the weight to be given to the testimony of the engineer and fireman, who were important witnesses in behalf of the defendant, the court charged:

"Counsel for the plaintiff have properly called your attention to the fact that we have a statute making it a felony for a fireman or an engineer on a railroad train not to observe the regulations of the statute which has just been called to your attention. In other words, if either of these engineers or firemen saw McClish as an obstruction on the road, and did not blow the whistle, and do all that was necessary to stop the train, or if they failed to see him, they are guilty of a felony, and would be punishable under the statute for that crime. It is plain, therefore, that these witnesses were testifying in their own interest in respect to that criminal liability. It is also to be observed that they are in the employment of a railroad company, and have such bias in that regard as belongs to ordinary human nature. But I have told you, even in criminal cases, that if the jury can see that the witness, notwithstanding the gravity of his interest, is telling the truth, that they not only may, but should, believe him, and base their verdict accordingly."

It is argued by counsel for plaintiff in error that this charge was erroneous. It is claimed that a proper interpretation of the Tennessee statute only requires the person in charge of the locomotive to be on the lookout ahead for obstructions; that in this case the engine was in charge of the engineer, and it was his duty to give the signals and take the precautions prescribed by the statute. Furthermore, that neither the engineer nor the fireman could be held criminally responsible under the laws of Tennessee unless the omission to take the statutory precautions resulted in the death of McClish. These questions raise important issues under the Tennessee Code, which do not seem to have been passed upon by the supreme court of that state. The exception taken, however, does not raise the question argued. It is as follows:

"(4) To that portion of the court's charge which calls the jury's attention to the statute making it a felony for an engineer or fireman to disregard the statutory precautions. Defendant excepts to said statute being referred to at all in the court's charge, and further excepts because, if referred to at all, the court should have stated that the omission to observe these precautions must have been willful, in order to make the lookout guilty of felony."

It is true that the assignment of errors is broader than the exception, and equally true that the argument is broader than the exception and the assignment. It has been frequently held that it is not the office of an assignment of error to extend the exception originally taken. It is the purpose of the rules of this court 10, 11, and 12 (31 C. C. A. cxlv, cxlvi, clii, 90 Fed. cxlv, cxlvi, clii), to require an exception to be specific, that attention may be called to the grounds thereof, and the

error, if any, corrected. *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 838. It is not permitted to look beyond the terms of the assignment of error to the brief for a specific statement of the question to be raised. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891. Looking, then, to the specific exception taken, we find it objected: First, that the court referred to the statute at all; second, the court should have stated the omission to observe the statutory precautions must have been willful in order to make the defendant guilty of felony. As to the first objection we see no reason why the court may not properly refer to a statute making the omission of a duty the subject of criminal as well as civil liability, where the witness is one who may be held criminally liable under the circumstances involved in the inquiry in the civil suit. That fact may influence his testimony, and, like other facts showing feeling or interest, may properly be considered by the jury under proper instructions. To justify reference to the criminal liability imposed by this statute, there must be testimony tending to show an omission to perform a duty required by the statute of the witness which may subject him to punishment. It is to be borne in mind, in this connection, that under the Tennessee statute there may be a liability in damages for failure to give the signals, while no conviction for crime can be had unless the omission causes death. The second part of the exception relates to the requirement that the omission must have been willful to involve criminal responsibility. The section of the Tennessee Code fixing criminal liability, so far as it relates to the circumstances shown in the present case, is as follows:

"If any engine driver or other person connected with the running of the locomotive or train upon any railroad shall omit to observe the precautions prescribed for the prevention of accidents, whereby an accident shall occur, and any person shall be killed, he shall be guilty of a felony."

This statute evidently does not make the crime dependent upon any particular element of purpose or intent upon the part of those who come within its terms. It is the omission on the part of such persons to observe the statutory requirements, which results in accident causing death, that renders them criminally responsible. We do not know what the court would have held had the exception directed attention to the applicability of this statute alone to the engineer under the circumstances shown; nor did the exception challenge the court's attention to the necessity of pointing out the fact that death must result from the omission to act before the witness could be indicted and convicted of a criminal offense.

4. Another proposition is much discussed in the briefs, and was the subject of oral argument. It involves the right of the defendant company to introduce evidence tending to show that the deceased was in the habit of jumping on trains near the place where the body was found. In the form in which

the offer of proof in this branch of the case was made it is quite likely that the question sought to be made was so involved with incompetent matter proposed to be proven at the same time that the alleged error in ruling upon it has not been properly brought into the record. As it has been thoroughly discussed, and may be an important question in a new trial of the case, we have concluded to give our views upon it. The learned counsel for plaintiff in error admit the general rule to be that testimony offered for the purpose of establishing contributory negligence of the deceased, like other testimony, must be limited to proving facts existing at the time of the happening of the injury complained of. It is contended, however, that when there is no eyewitness to the occurrence, and the manner of its happening is to be left to circumstantial evidence alone, it is competent to show the habit of the deceased in the respect of doing the thing which it is claimed he did at the time of receiving his injury. The argument is, proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because the deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of the deceased at other times. We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation in the light of the facts competent to be directly or circumstantially proved. While differing in its facts, we think the case of *Thompson v. Bowie*, 4 Wall. 463, 18 L. Ed. 423. is decisive in principle of the question now under consideration. In that case action was brought to recover upon three promissory notes. Bowie, the maker, sought to avoid payment on the ground that the notes were founded on a gaming consideration, and therefore void. There was no direct evidence offered at the trial to impeach the consideration of the notes, and circumstantial evidence only was relied upon. The trial court permitted a brother of the defendant to testify that whenever his brother was under the influence of liquor he had a propensity to gamble, and, as the maker was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, payable to the keeper of a gambling house, the inference was that they were given for

money won at play. Mr. Justice Davis, delivering the opinion, said:

"All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proof to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev. § 54. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

In discussing the principle herein involved in *Harriman v. Palace Car Co.*, 29 C. C. A. 194, 10 Am. & Eng. R. Cas., N. S., 277, 85 Fed. 353, Judge Thayer uses this language:

"When, therefore, a complaint does not charge incompetency, but simply alleges that an employee acted negligently on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue."

To the same general effect are *Jones, Ev. § 162*, and cases cited; *Eppendorf v. Brooklyn St. R. R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Franklin v. Franklin*, 90 Tenn. 441, 16 S. W. 557. In the latter case it was held incompetent to cross-examine a witness accused of forging a will then in dispute by showing that he had forged other signatures. Judge Lurton, then of the supreme court of Tennessee, delivered the opinion; saying, among other things:

"The fact of a forgery of a particular paper cannot be shown by proof of other crimes of the same kind. If it had been shown that he had written this will, and the defense was that it had been written innocently, or by direction of the testator, then, to show guilty purpose or motive, it might have been admissible to show other offenses of the same kind. That was not the question here."

*Chase v. Railroad Co.*, 77 Me. 62, 19 Am. & Eng. R. Cas. 356, 52 Am. Rep. 744, was a case where no one saw an accident at a crossing causing instant death. The court ruled that evidence of the general character and habits of the

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traveler for carelessness was not competent as bearing upon the question of due care upon his part. Upon the whole, while the question is not free from difficulty, we think the better rule excludes such testimony, and that there was no error in the action of the trial judge in the respect mentioned. For the reasons heretofore set forth, the judgment will be reversed.

GRANT v. OMAHA, K. C. & E. R. Co. *et al.**(Court of Appeals of St. Louis, Mo., April 29, 1902.)*

[68 S. W. Rep. 91.]

**Fire Spreading from Right of Way.\***

It was negligence for a railroad company to light a fire on its right of way running through plaintiff's land, at a time when it was very dry and there was a high wind blowing.

**Same—Action against Receivers.**

An action may, with the permission of the court, be maintained against the receivers of a railroad company for injuries caused by fire escaping from its right of way onto plaintiff's land, though the cause of action accrued before they were appointed.

Appeal from circuit court, Knox county; Edwin R. McKee, Judge.

Action by Abram S. Grant against the Omaha, Kansas City & Eastern Railroad Company and others for injuries caused by fire escaping from the right of way onto plaintiff's land. Judgment for plaintiff, and defendants appeal. Affirmed.

J. G. Trimble, for appellants.

BLAND, P. J. The petition alleges that the Omaha, Kansas City & Eastern Railroad Company is in the hands of Charles Chapman and James Hopkins, as receivers, by order of the United States circuit court of the Western district of Missouri, made January 7, 1900; that plaintiff has obtained an order from the judge of said circuit court permitting him to bring this suit. For cause of action the petition alleges, in substance, that on the 10th day of October, 1899, prior to the appointment of the receivers, and while the defendant company was operating the road, by the negligence of its agents, employees and section hands fire was permitted to escape from the right of way of said road onto plaintiff's adjoining land, by reason whereof the grass and grass roots of his meadow land were destroyed, to his damage in the sum of \$30, and 10 tons of hay in stacks, of the value of \$70, were also burned up and destroyed. Defendants Campbell and Hopkins answered for themselves, admitting that they were receivers of the prop-

\*See *Brennan Lumber Co. v. Great Northern Ry. Co.* (Minn.), 15 Am. & Eng. R. Cas., N. S., 478, and note at end of case; *St. Louis & S. F. Ry. Co. v. Ludlum* (Kan.), 23 Am. & Eng. R. Cas., N. S., 851; *Wabash R. Co. v. Miller* (Ind.), 23 Am. & Eng. R. Cas., N. S., 843; *Shields v. Norfolk C. R. Co.* (N. Car.), 22 Am. & Eng. R. Cas., N. S., 635.



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erty of the road, and denied every other allegation of the petition, and alleged that they were not necessary or appropriate parties to the suit. A trial was had to the court without a jury. The court found for the plaintiff, and assessed his damages at \$100, and rendered judgment against the receivers, to be paid out of the property or earnings of the defendant company. It was admitted on the trial that the plaintiff had received from the judge of the United States circuit court for the Western district of Missouri an order permitting him to bring this suit. The evidence on plaintiff's behalf satisfactorily shows that the section hands, on the day named in the petition, by order of the foreman, put out fire on the right of way of the road where it ran through plaintiff's land; that it was very dry, and there was a high wind blowing, by reason of which the fire escaped from the right of way onto plaintiff's land, and destroyed a portion of his meadow, and burned up about 10 tons of hay. The defendant offered no testimony, but demurred to plaintiff's evidence at its close. The refusal of the court to nonsuit plaintiff is assigned as error. We think the evidence satisfactorily shows that it was negligent to put out the fire on the day alleged on account of the dry condition of the earth, grass, and leaves, and on account of the wind that was then blowing. The contention of appellant that the court had no jurisdiction of the cause for the reason that the action accrued before the appointment of the receivers is untenable. In *Harding v. Nettleton*, 86 Mo. 658, it was held that an action might be maintained against a receiver of a railroad, by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. In *Combs v. Smith*, 78 Mo. 32, it was held that an action might be maintained against the receiver of a corporation for a tort committed by the corporation before his appointment.

Discovering no reversible error, the judgment is affirmed.

BARCLAY and GOODE, JJ., concur.

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COOK v. MISSOURI PAC. RY. CO.

(*Court of Appeals at Kansas City, Mo., May 5, 1902.*)

[68 S. W. Rep. 230.]

**Loss of Eye—Cause of Injury—Sufficiency of Evidence.**

In an action by a railway mail clerk against the railroad company for injuries due to the negligent throwing of a mail sack into plaintiff's face, resulting in the loss of an eye, it appeared that on the day after the accident plaintiff had called on an oculist, who found nothing serious the matter; that 12 days later he came back with a fully-developed inflammation of the optic nerve of the retina. This oculist testified that the condition of the eye might have resulted from the syphilitic condition of plaintiff's system. Two or three witnesses testified that plaintiff had stated he had the syphilis. Before the accident plaintiff had been

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at Hot Springs, and consulted a physician. Plaintiff testified that before he went to Hot Springs he had had an abrasion or sore on his genital organs, and had been examined for syphilis. The testimony of defendant's experts tended to show that the condition of plaintiff's eye under such circumstances would be more apt to result from syphilis than from a blow, etc. Another oculist testified in rebuttal that he had examined plaintiff at the time, and found no trace of syphilis; that plaintiff had told him that he had been suspected of having the disease. Plaintiff testified that the doctor told him that he did not think he was afflicted with syphilis: *held* that, though defendant's demurrer to the evidence was properly overruled, a verdict for \$2,500 was so against the preponderance of the testimony as to imply some prejudice, and must be reversed.

## Contributory Negligence—Burden of Proof—Instruction.

A charge that "contributory negligence is a defense pleaded by the defendant, and must be proven by the defendant by the greater weight of all the credible evidence in the case," tended to mislead the jury.

Appeal from circuit court, Jackson county; James H. Slover, Judge.

Action by Charles S. Cook against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Action for recovery of damages for personal injuries. The petition alleged that on June 5, 1898, and for a long time prior thereto, he was and had been in the employment of the United States as railway postal clerk on defendant's train running from Kansas City to Joplin, Mo., by way of Pleasant Hill, and that while in the performance of his duty as such postal clerk in receiving the mail one of the servants of defendant handled said mail in such a negligent manner that one of the sacks was thrown into plaintiff's face with such violence as to cause an injury which resulted in the loss of an eye, etc. The answer was a general denial, coupled with a plea of contributory negligence. There was a trial, which resulted in judgment for plaintiff, and defendant appealed.

Elijah Robinson, for appellant.

Hollis & Fidler, for respondent.

SMITH, P. J. (after stating the facts). 1. The defendant insists that the trial court erred in denying the demurrer offered by it at the conclusion of the evidence. This contention, we do not think, should be sustained. The plaintiff's own testimony was sufficient—barely so—to establish a *prima facie* case entitling him to a submission. But, even if this is so, shall the judgment stand? It is somewhat doubtful, under the evidence, whether or not the plaintiff was struck in the eye at all with a mail sack or the end of one; but, if such was the fact, we think it still more doubtful whether or not the injury complained of was the result of that stroke, or whether or not the stroke was the proximate cause of the loss of plaintiff's eye. Assuming that the defendant's baggageman did throw the sack from the truck into the mail car in such a way that it, or the cord used in connection with it, struck

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the plaintiff in the face or eye, it does not satisfactorily appear from the evidence that from the impact there was any bruise, contusion, or abrasion about the eye, or discoloration of the eyelid, nor any congestion or inflammation of that organ, nor any excretion of the lachrymal or tear gland. Neither the plaintiff's helper on the same mail car nor any of the trainmen seem to have noticed anything of this kind on the day of the alleged injury nor at any day subsequent thereto. It appears that on the next day after that of the accident the plaintiff visited Dr. De Lap, an oculist of Kansas City, and a witness called by plaintiff, who testified that he examined the plaintiff's eye, and "found nothing wrong with it, apparently." He further testified that "there was very slight congestion of the retina or the optic nerve," but so slight that he attached no importance to it. "I dilated the pupil, and told him to come back the next day, and then I made a more thorough examination, and that was when I found the condition I have just related. I did not find inflammation. The second day I thought he had a slight congestion, but it was so slight that I did not attach any importance to it." This witness further testified "that twelve days later on, the plaintiff came back with fully-developed inflammation of the optic nerve or the retina. The optic nerve, where it entered the eye, was then very much swollen and congested, the blood vessels greatly enlarged and tortuous, and a hazy condition of the whole retina." He thought that the condition of the plaintiff's eye might very well have resulted from syphilitic condition of his system. Two or three witnesses testified that the plaintiff had stated to them that he had syphilis, another that he had chancroid, and to still another that he had gonorrhea. It further appeared that prior to the accident plaintiff had visited Hot Springs, Ark., where he consulted a physician, who prescribed certain medicines and baths; but the name of the physician, nor that of the druggist who filled the prescription, he testified he could not recollect. Plaintiff further testified that before he went to Hot Springs he had an abrasion or sore on his genital organs, and had had himself examined for syphilis. Amongst other witnesses called by defendant to testify were three experts, namely, Drs. Thompson, King, and Tyree, who, by reason of their great learning and skill, had become eminent in their profession, the last of whom had been appointed by the court to examine the plaintiff's eye. The first of these experts testified as follows: "Q. If a man were struck in the eyelid with a mail cord,—a knot similar to this one,—and the blow was not sufficiently hard to leave any external evidence of the fact, what would be your opinion as to whether that would result in the loss of the sight of the eye? A. Well, it depends on how hard the blow was, whether it hit the eyeball, whether it might not injure the eye and not leave a mark on the face. But do you mean to say a trifling blow or a severe blow? Q. I have described it as well as I

can. I said a blow not sufficiently hard to leave any external evidence of the fact that there had been a blow on the outside of the lid. A. Yes, sir; such a blow can make a man blind. Q. Would you think it would be at all probable that a blow of that kind would result in that way? A. No, sir; not probable. Q. I will ask you to state what would be your opinion if a man called on you to examine his eye, say, on the evening of the 6th day of a certain month, and you found no evidence of anything whatever the matter with it, but the man claimed that he could not see, and you dilated the eye, and told him to call again the next morning, and he called, and you examined it again, with such instruments as you have for the purpose, and found slight congestion of the optic nerve, and twelve days afterwards he called again, and you examined it, and found a fully-developed case of inflammation of the optic nerve of the retina, and from that time on it should grow worse until, say, the middle or last of the second month afterwards, and then you found ophthalmia, and the eye totally blind, or practically so, what would be your opinion as to whether or not that probably resulted from being struck on the eyelid with a mail cord the day before the first examination? A. I wouldn't believe it. I don't think it could be. Q. I will get you to state whether such conditions as I have described result from other things than blows on the eye? A. Yes, sir. They very rarely result from a blow, and very commonly result from other causes. Q. What other causes? A. Well, disease of the kidneys, internal poison of different kinds, syphilis, and sometimes cold,—a simple cold, sometimes. Sitting in a draught—having a cold draught blow on the eye—in some cases will cause it. \* \* \* I never heard of a man going to Hot Springs for gonorrhea. Q. Doctor, assuming that a man had a blow on the eye such as I have described,—I have not been able to describe it any more minutely than that it was a blow,—but not sufficient to leave a discoloration of the lid, and suppose also he had had syphilis, and you would be called upon to examine the eye, and found the conditions I have described, what would you say as to what had caused that condition of the eye? A. I would be very much inclined to think it was the syphilis. Syphilis will do it in seventy per cent. of cases. I don't mean to say that seventy per cent. of the syphilitic cases have that inflammation, but that the inflammation will be caused by syphilis in a great majority of cases." The second testified that: "I do not believe that a blow on the outside of the eyelid with the knot of a mail cord, like this, not sufficiently hard to produce any discoloration, or leave any external evidence of the fact that there had been a blow, could produce blindness in that eye by the next day. I cannot conceive of such a thing. Q. Now, suppose a man had come to you on the 6th day of June, 1898, and you examined his eye, and could not see anything the matter with it, though he com-

plained of not being able to see out of that eye. You dilated it, and the next day you examined it again, and found slight congestion of the optic nerve; and twelve days afterwards you examined it again, and found a fully-developed case of inflammation of the optic nerve, and you continued treating him from time to time until the middle to the last of August, when you found atrophy, and reached the conclusive that the sight was gone, and there was no use to treat him any further. Would you say that condition could not have been brought about by a blow on the outside of the eyelid with a mail cord? A. I would say that the very fact of the presence of inflammation in the optic nerve would exclude the idea of a blow. Q. Why? A. Simply because blindness caused by a blow would produce atrophy of the optic nerve without inflammation. Inflammation presupposes the idea of infection. You cannot have inflammation without some cause of infection. It may be syphilitic, or it may be ordinary pus, of the germs of which we give numerous names, but which can be demonstrated by culture in vials. But an inflammation following a blow, the inflammation coming I would regard simply as a coincident. If a man loses his eye through inflammation of the optic nerve of the retina, I would know that was caused from inflammation of some kind, because from injury, traumatism, or blow if a man loses his sight, he always does it by a complete perishing away, which we call atrophy, and without inflammation. Q. Now, tell the jury what causes the condition I have described,—what it would probably result from. A. Well, it might result from syphilis. It may result from other kinds of infection. Syphilis is an infectious disease. There is a specific infection. It may be from other causes in which the infective material had gotten into the eye, and produced the inflammation of the optic nerve, if it was inflamed. There is quite a number of things I might mention. It may come from disease of the kidneys, and it may be effected from Bright's disease, where the circulation is poisoned. It is simply impossible for the conditions I have described to have been caused by a blow." The third that: "From the examination I made, I found atrophy of the nerve. He is blind in that eye. I can hardly give an opinion as to the cause of it. The condition is there; that is all. That condition comes from constitutional disease, such as syphilis, and from alcohol and tobacco. And there are other things which might produce it,—pressure along the nerve from hemorrhage, tumors, and things of that sort, either inside or outside. A blow sufficient to fracture the orbit might produce hemorrhage and pressure on the nerve so as to destroy it in this way, resulting in such an appearance as that in after time. That is about all that I can remember. Possibly rheumatism might do it. Any other debilitating cause might produce it if long continued. I have known of blows that left no external evidence stun the retina so as to produce

temporary blindness, but the sight is gradually regained. Q. Suppose the plaintiff in this case, or any one else, had called on you the afternoon of the 6th of June, 1898, and you had examined the eye, and was not able to discover anything the matter with it. You dilated the eye, and told him to call again the next day, and the next day he called again, and you made an examination, and found slight congestion of the optic nerve and retina. Now, twelve days after that time he called in again, and you made an examination, and found a fully-developed case of inflammation of the optic nerve, and you saw him from time to time, and this inflammation grew worse until, say, the middle to the last of August, and then you found atrophy, and concluded that he had permanently lost the sight of the eye. Would you think, or not, that that condition would probably have resulted from the blow with a mail cord, such as I have shown you here, and a blow which was not sufficient to leave any discoloration or external evidence of the fact that there had been a blow? A. I never saw inflammation of the optic nerve produced by a blow in that way. I don't know that ever— Well, there is one authority that makes mention of it. But I never saw it, and I am inclined to believe it cannot occur. My experience is it could not. It would be much more apt to make inflammation of some of the other parts. I never saw a case produced by such a blow. Q. Now, doctor, if a man would come to you under the circumstances I have detailed in the former question, and you found his eye in the condition at the several examinations that I have mentioned, and you ascertained that that man at one time had an abrasion on his private parts, and had had himself examined with a view to ascertaining whether he had syphilis, and had been to Hot Springs, and at some time after that, and at least two years prior to the time he is now complaining of, he had had weakness of the eyes, which were inflamed to such an extent that he had to leave his employment, which is that of mail clerk, get leave of absence, and had to wear colored glasses, and at the time he assured you that the result of his examination by the physician was that he had not syphilis,—to what would you attribute the loss of the eyesight? A. If I should get the history as you have stated it? Q. Yes. A. I should say it was from syphilis." In rebuttal, Dr. Sherrer, an oculist who had been practicing for three years, testified that at the time he had examined plaintiff, and found no traces of syphilis, and that plaintiff then told him that he had been suspected of having syphilis. The plaintiff testified that, while he had caused himself to be examined for syphilis, he was told by the examining physician that he did not think he was ever afflicted with that disease. The plaintiff's testimony was equivocating and contradicted in many material particulars, and is calculated to impress the impartial mind very unfavorably as respects its truthfulness and reliability. After examining the whole evidence, to much

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of which we have been able to more than allude, it is quite difficult to resist the conclusion that the verdict, which was for \$2,500, is so greatly against its preponderance as to imply some prejudice; and, such being our conclusion, it results that a judgment rendered on such a verdict ought not to stand. *Baker v. Stonebraker*, 36 Mo. 345; *Price v. Evans*, 49 Mo. 396; *Vautrain v. Railway Co.*, 78 Mo. 44; *Rosecrans v. Railway Co.*, 83 Mo. 678; *Spohn v. Railway Co.*, 87 Mo. 74; *Cannon v. Moore*, 17 Mo. App. 92.

The plaintiff's instruction No. 2 told the jury, amongst other things, "that contributory negligence is a defense pleaded by the defendant, and must be proven by the defendant by the greater weight of all the credible evidence in the case; and unless you believe the defendant has shown by such," etc., then defendant has failed to support its defense. The action of the court in the giving of this instruction is certainly of very questionable propriety. Its language is very well calculated to mislead the jury. Any jury of average intelligence might, under such an instruction, be led to believe it to be its duty to exclude from consideration on the issue of contributory negligence the testimony of the plaintiff himself, and it might conclude that if the defendant should rely, to support the affirmative of this issue, on that of the plaintiff himself,—defendant introducing none itself,—that the preponderance of all the evidence on this issue was in favor of the negative.

A number of other errors have been assigned for a reversal of the judgment, but they have been found to be without merit. In any view of the case that we have been able to take, we cannot resist the conclusion that the judgment ought to be overthrown. We feel that the case disclosed by the record is such as requires a new trial.

The judgment will accordingly be reversed, and the cause remanded. All concur.

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*Texas & N. O. R. Co. v. Bigham* (Tex.), 34.

Discrimination justifying the issuance of mandamus to compel common carrier to move and transport interstate traffic,

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- or to furnish cars or other facilities for transportation.
- United States *v.* Norfolk & W. Ry. Co. (W. Va.), 19.
- Duty of carrier to prorate supply of cars on hand.
- United States *v.* Norfolk & W. Ry. Co. (W. Va.), 19.
- Duty to protect employees of consignee unloading car.
- Ryan *v.* New York, N. H. & H. R. Co. (N. Y.), 699.
- Following consignee's directions as a defense where goods were injured by cold.
- Gillett *v.* Missouri, K. & T. Ry. Co. of Texas (Tex.), 45.
- Jurisdiction to order destruction of road and sale of materials by receiver where operation of road would be an actual loss.
- Jack *v.* Williams (S. Car.), 10.
- Liability for conversion of wheat destroyed by unusual storm during delivery in carriage and delivery.
- Gulf, C. & S. F. Ry. Co. *v.* Darby (Tex.), 1.
- Liability for injury to adjacent property from explosion of contents of car during delay in delivery.
- Ft. Worth & D. C. Ry. Co. *v.* Beauchamp (Tex.), 52.
- Liability of carrier as warehouseman where it has refused to deliver goods.
- Frederick *v.* Louisville & N. R. Co. (Ala.), 43.
- Limiting Liability.
  - Authority of agent to ship goods carries with it authority to accept bill of lading and enter into contract limiting carrier's liability.
  - Adams Exp. Co. *v.* Carnahan (Ind.), 677.
  - Burden of proving that delay was caused by carrier's negligence where carrier had contracted against liability for delay not caused by negligence.
  - Anderson *v.* Atchison, T. & S. F. Ry. Co. (Mo.), 42.
  - Burden on carrier where goods are injured by water to show that injury was not due to its negligence.
  - Mears *v.* New York, etc., R. Co. (Conn.), 668.

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- Contracts limiting liability not measured by different rules than where carriers are not parties.
- Adams Exp. Co. *v.* Carnahan (Ind.), 677.
- Evidence that persons shipping goods was offered two modes of shipment, one called "owner's risk," at a certain rate, and the other "shipper's risk," and chose the former, was admissible.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.
- Presumption that court properly submitted to jury the question of existence of agreement as to value of horse.
- Southern Ry. Co. *v.* Horner (Ga.), 47.
- Presumption that freight rate is based on valuation.
- Adams Exp. Co. *v.* Carnahan (Ind.), 677.
- Reduced rate as consideration.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.
- Negligence in failing to deliver car load of explosives, question for jury in action for injury to property from their explosion.
- Ft. Worth & D. C. Ry. Co. *v.* Beauchamp (Tex.), 52.
- Negligence not inferred from mere fact that goods are wet while in carrier's possession.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.
- Presumption as to condition of goods from recital in shipping receipt.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.
- Question asked local carrier as to state of weather on day he carted goods to plaintiff's house inadmissible in action for damages by rain.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.
- Railroad cannot be compelled to maintain and operate road at actual loss.
- Jack *v.* Williams (S. Car.), 10.
- Records of weather bureau as evidence in action for damage to freight by rain.
- Mears *v.* New York, etc., R. Co. (Conn.), 668.

# **CARRIERS OF GOODS—Continued.**

Rev. St. U. S., secs. 3100, 3102, and 1 Supp. Rev. St. U. S. 1891, pp. 294, 540, does not entitle carrier to subrogation to lien of government on account of duties paid by him.  
*State v. Bland* (Mo.), 38.

Shipper was not entitled to deduction from freight rates fixed by railroad commissioner where his cotton was not compressed in transit.  
*Galveston, H. & S. A. Ry. Co. v. Orthwein-Fitzhugh Cotton Co.* (Tex.), 679.

Shipping receipt as contract.  
*Mears v. New York, etc., R. Co.* (Conn.), 668.

South Carolina statute providing penalty for failure to pay damages on freight within sixty days not unconstitutional as in violation of interstate commerce clause of constitution.

*Porter v. Charleston & S. Ry. Co.* (S. Car.), 657.

Sufficiency of evidence of defect in car door, in action for injury to employee of consignee unloading car.

*Ryan v. New York, N. H. & H. R. Co.* (N. Y.), 699.

Sufficiency of evidence to raise presumption of negligence where delay in shipment of freight.

*Anderson v. Atchison, T. & S. F. Ry. Co.* (Mo.), 42.

Under count seeking recovery against railroad company as voluntary bailee of goods destroyed before delivery to consignee, burden of proof was on plaintiff to show negligence alleged.

*Frederick v. Louisville & N. R. Co.* (Ala.), 43.

Unjust discrimination in distributing cars among coal shippers.

*United States v. Norfolk & W. Ry. Co.* (W. Va.), 19.

Whether joinder of action ex delicto with statutory action constitutes joinder of action ex contractu with action ex delicto.

*Southern Ry. Co. v. Horner* (Ga.), 47.

# **CARRIERS OF LIVE STOCK.**

*See Carriers of Freight.*

*Carriers of Goods.*

*Common Carriers.*

*Shipping Receipts.*

Admission of evidence to show nature of insecurity of pens under general allegation as to insecurity.

*Houston & T. C. Ry. Co. v. Trammell* (Tex.), 685.

Company contracting to ship cattle over its own and connecting line and sued for injury occurring on connecting line could not complain of judgment over in its favor against connecting company.  
*Texas & P. Ry. Co. v. McCarty* (Tex.), 654.

## **Damages.**

Measure of damages recoverable against connecting carriers for improper treatment of cattle.

*Gulf, C. & S. F. Ry. Co. v. Houghton* (Tex.), 697.

Degree of care, instruction.  
*Texas & P. Ry. Co. v. Tribble* (Tex.), 32.

Evidence as to cost of horse inadmissible in action for its loss.

*Galliers v. Chicago, B. & Q. R. Co.* (Iowa), 28.

Liability where cattle were placed in insecure pen at midnight as affected by plaintiff's refusal to receive them and pay freight charges.

*Houston & T. C. Ry. Co. v. Trammell* (Tex.), 685.

## **Limiting Liability.**

Reduced rates as consideration.  
*Mears v. New York, etc., R. Co.* (Conn.), 668.

Limiting liability, presumption that question was properly submitted to the jury.  
*Southern Ry. Co. v. Horner* (Ga.), 47.

Railway company contracting to ship cattle from its own and connecting line to certain point was liable for injury occurring on connecting line.

*Texas & P. Ry. Co. v. McCarty* (Tex.), 654.

Raising new issue by amendment, in action for loss of



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- horse in transitu.
- Galliers *v.* Chicago, B. & Q. R. Co. (Iowa), 28.
- Striking out allegation as to cost of horse, in action for its loss.
- Galliers *v.* Chicago, B. & Q. R. Co. (Iowa), 28.
- Sufficiency of evidence in action for injury to live stock in transitu.
- Susong *v.* Florida Cent. & P. R. Co. (Ga.), 48.
- Sufficiency of evidence to show that plaintiff was not obliged to receive cattle reaching their destination at midnight and put in an insecure pen, although plaintiff did not have money with him for freight charges.
- Houston & T. C. Ry. Co. *v.* Trammell (Tex.), 685.

**CARRIERS OF PASSENGERS***See Common Carriers.**Damages.**Personal Injuries.**Tickets and Fares.**Trespassers.*

- Absence of statutory number of brakemen, question for jury.
- Comerford *v.* New York, etc., R. Co. (Mass.), 130.
- Absolute duty of company to protect prospective passenger from insults of station agent.
- St. Louis, etc., Ry. Co. *v.* Wilson (Ark.), 793.
- Admissibility of evidence of change in method of operating trains, harmless error.
- Prescott & N. W. Ry. Co. *v.* Smith (Ark.), 809.
- Admissibility of evidence that father gave son car fare, in action for injury sustained by latter while crossing track to board car.
- Chicago & E. I. R. Co. *v.* Houston (Ill.), 141.
- Allegations as to cause of accident to passenger rendered immaterial by admission of the establishment of prima facie case.
- McNeill *v.* Durham & C. R. Co. (N. Car.), 707.
- Alleged passenger on freight train presumptively a trespasser.
- Purple *v.* Union Pac. R. Co. (C. C. A.), 711.

**CARRIERS OF PASSENGERS***—Continued.*

- Application of Arkansas statute prescribing method of making up passenger train.
- Prescott & N. W. Ry. Co. *v.* Smith (Ark.), 809.
- Burden of proof where defendant company admitted that plaintiff was entitled to actual damages.
- Louisville & N. R. Co. *v.* Champion (Ky.), 732.
- Care required in keeping car steps and platform free from ice and snow.
- Herbert *v.* St. Paul City Ry. Co. (Minn.), 152.
- Carrier under no duty to passenger to keep in safe condition depot platform used exclusively for freight.
- Houston, E. & W. T. Ry. Co. *v.* Grubbs (Tex.), 754.
- Company cannot be compelled to operate road at actual loss.
- Jack *v.* Williams (S. Car.), 10.
- Contributory Negligence.
- Alighting at other places than station, insufficiency of evidence.
- St. Louis, etc., Ry. Co. *v.* Farr (Ark.), 762.
- Alighting from moving car.
- Brown *v.* New York, N. H. & H. R. Co. (Mass.), 143.
- Pence *v.* Wabash R. Co. (Iowa), 77.
- Alighting from moving car in obedience to direction of employee.
- Pence *v.* Wabash R. Co. (Iowa), 77.
- Alighting from moving car, question for jury.
- Comerford *v.* New York, etc., R. Co. (Mass.), 130.
- Alighting from moving train.
- Lindsay *v.* Southern Ry. Co. (Ga.), 748.
- Boarding moving train.
- Pence *v.* Wabash R. Co. (Iowa), 77.
- Boarding moving train in obedience to direction of employee.
- Pence *v.* Wabash R. Co. (Iowa), 77.
- Boy assisting passenger in jumping from moving train.
- Oxsher *v.* Houston, E. & W. T. Ry. Co. (Tex.), 727.
- Boy assisting passenger to board train getting off after

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- starting of train.  
*Oxsher v. Houston, E. & W. T. Ky. Co. (Tex.)*, 727.
- Boy 16 years of age not incapable of sufficient discretion to avoid extending part of person beyond car line.  
*Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, 701.
- Burden of proof of due care on plaintiff in action for injury to passenger caused by alighting from moving car.  
*Brown v. New York, N. H. & H. R. Co. (Mass.)*, 143.
- Failure to look and listen before crossing track to board car.  
*Chicago & E. I. R. Co. v. Huston (Ill.)*, 141.
- Leaving car for some purpose not incident to journey.  
*Chicago, etc., Ry. Co. v. Sattler (Neb.)*, 688.
- Negro. compelled to ride on platform of crowded car of excursion train.  
*Williams v. International & G. N. R. Co. (Tex.)*, 778.
- Passenger alighting from moving train at invitation of conductor was not guilty of contributory negligence.  
*Johnson v. Atlantic & N. C. R. Co. (N. Car.)*, 770.
- Passenger not deprived of right of visiting dining car by his knowledge of existence of an unvestibuled sleeper in train.  
*Northern Pac. Ry. Co. v. Adams (C. C. A.)*, 734.
- Passenger riding on platform of caboose to avoid danger.  
*Prescott & N. W. Ry. Co. v. Smith (Ark.)*, 809.
- Prima facie case of contributory negligence not established by evidence of misstep of passenger while alighting.  
*Texas & P. Ry. Co. v. Gardner (C. C. A.)*, 759.
- Riding with part of person extended beyond car line.  
*Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, 701.
- Riding with part of person extended beyond car line as affected by fact that cars were overcrowded and passenger was required to ride on platform.  
*Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, 701.

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- Sufficiency of evidence to show contributory negligence of youth 16 years of age riding with head extended beyond side of moving train.  
*Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, 701.
- Walking on track to board car.  
*Spavin v. Lake Shore & M. S. Ry. Co. (Mich.)*, 135.
- Damages.**
  - Elements of damages for injury to passenger, apprehension of insanity.  
*Walker v. Boston & M. R. R. (N. H.)*, 80.
  - Evidence of mental suffering of passengers properly excluded where no personal injury was shown.  
*Smith v. Wilmington & W. R. Co. (N. Car.)*, 772.
  - Excessive verdict.  
*Herbert v. St. Paul City Ry. Co. (Minn.)*, 152.
  - Excessive verdict for injury to passenger.  
*Pence v. Wabash R. Co. (Iowa)*, 77.
  - Excessive verdict for injury to passenger, question for jury.  
*Loker v. Southwestern Missouri Electric Ry. Co. (Mo.)*, 132.
  - Extra fare only could be recovered where passenger ejected by mistake of conductor to whom he refused to pay fare.  
*Brown v. Rapid Ry. Co. (Mich.)*, 819.
  - Mental and physical suffering as elements of damages for injury to passenger.  
*Walker v. Boston & M. R. R. (N. H.)*, 80.
  - Punitive damages cannot be recovered for employees' acts unless they are willful, wanton, or malicious, and in the line of his employment.  
*St. Louis, etc., Ry. Co. v. Wilson (Ark.)*, 793.
  - Punitive damages, error to submit question to jury in action for failure to stop train at flag station.  
*Yazoo & M. V. R. Co. v. Faust (Miss.)*, 818.
  - Punitive damages, instruction not warranted by evidence in action for insulting prospective passenger in waiting room.

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- St. Louis, etc., Ry. Co. v. Wilson (Ark.), 793.
- Punitive damages, passengers leaving train because of conductor's mistaken refusal to accept ticket.
- Louisville & N. R. Co. v. Champion (Ky.), 732.
- Right of husband to recovery for mental anguish of wife separated from children.
- International & G. N. R. Co. v. Anchonda (Tex.), 788.
- Sufficiency of evidence of nature of passenger's injuries.
- Nicholson v. Northern Pac. Ry. Co. (C. C. A.), 751.
- Degree of care.
- Williams v. International & G. N. R. Co. (Tex.), 778.
- Degree of care required in stopping street car.
- Freeman v. Metropolitan St. Ry. Co. (Mo.), 582.
- Degree of care required of street railroad company.
- Citizens' Ry. Co. v. Craig (Tex.), 516.
- Duty of carrier to keep distant corner of depot grounds in good condition.
- Davis v. Houston, E. & W. T. Ry. Co. (Tex.), 800.
- Duty of carrier to one entering train with understanding with conductor not to pay fare.
- Purple v. Union Pac. R. Co. (C. C. A.), 711.
- Duty of street railway company to discharge passenger at safe place.
- Sweet v. Louisville Ry. Co. (Ky.), 768.
- Duty to furnish safe place to ride.
- Benedict v. Minneapolis & St. L. R. Co. (Minn.), 701.
- Duty to heat waiting room.
- St. Louis, etc., Ry. Co. v. Wilson (Ark.), 793.
- Duty to inform passenger that stop is not for station.
- St. Louis, etc., Ry. Co. v. Farr (Ark.), 762.
- Duty to light depot grounds.
- Davis v. Houston, E. & W. T. Ry. Co. (Tex.), 800.
- Duty to protect prospective passenger from insults from

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- persons in waiting room.
- St. Louis, etc., Ry. Co. v. Wilson (Ark.), 793.
- Effect of knowledge of facts suggesting inquiry as to whether passengers may ride on freight train.
- Purple v. Union Pac. R. Co. (C. C. A.), 711.
- Ejection of Passengers.
- Person riding on freight train without permit, relying on representations of agent which he knows to be false.
- Houston, E. & W. T. Ry. Co. v. Stell (Tex.), 722.
- Presumption that requirement of conductor was legal where passenger was ejected for nonpayment of street railway fare.
- Smith v. Indianapolis St. Ry. Co. (Ind.), 116.
- Sufficiency of evidence to show place of ejection.
- Gaukler v. Detroit, G. H. & M. Ry. Co. (Mich.), 806.
- Evidence.
- Error in admitting evidence as to wrecks happening on trains in charge of engineer whose competency has been proven.
- McNeill v. Durham & C. R. Co. (N. Car.), 707.
- Of outcries of other passengers in action for injury to passenger caused by collision.
- Louisville & N. R. Co. v. Simpson (Ky.), 513.
- Outcries of other injured passengers as *res gestæ*.
- Louisville & N. R. Co. v. Carothers (Ky.), 750.
- Hack driver properly joined as defendant in action against railway company for injury to hack passenger.
- Chicago, R. I. & P. Ry. Co. v. Durand (Kan.), 519.
- Harmless error in admitting evidence as to extent of passenger's injuries.
- Loker v. Southwestern Missouri Electric Ry. Co. (Mo.), 132.
- Instruction as to liability of carrier erroneous because requiring coincident freedom from negligence on the defendant's part and contributory

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- negligence on the part of plaintiff's injured wife.  
*International & G. N. R. Co. v. Anchonda* (Tex.), 788.
- Instruction as to negligence in failing to heat waiting room not erroneous as making carrier an insurer.  
*St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 793.
- Instruction not warranted by evidence, in action for injury caused by derailment.  
*McNeill v. Durham & C. R. Co.* (N. Car.), 707.
- Insufficiency of evidence to show negligence in action for injury to prospective passenger caused by failure to light depot.  
*Davis v. Houston, etc., Ry. Co.* (Tex.), 800.
- Interest in actions *ex delicto* cannot be recovered.  
*Southern Ry. Co. v. Horner* (Ga.), 47.
- Intoxication, not negligence as matter of law to leave ejected intoxicated passenger at certain point.  
*Gaukler v. Detroit, G. H. & M. Ry. Co.* (Mich.), 806.
- Jurisdiction to order destruction of road and sale of materials where its operation would be at an actual loss.  
*Jack v. Williams* (S. Car.), 10.
- Liability for assault on passenger by conductor.  
*Johnson v. Detroit, Y. & A. A. Ry.* (Mich.), 827.
- Liability for injury to boy assisting passengers caused by getting off train after it is started as affected by fact that trainmen had not been notified that he was not a passenger.  
*Oxsher v. Houston, E. & W. T. Ry. Co.* (Tex.), 727.
- Liability for injury to passenger compelled to ride on platform of swaying car.  
*Williams v. International & G. N. R. Co.* (Tex.), 778.
- Liability for injury to passenger in station of terminal company where carrier had not contracted for use of separate portion of station.  
*Frazier v. New York, N. H. & H. R. Co.* (Mass.), 814.
- Liability for injury to person accepted as passenger by

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- conductor having apparent authority.  
*Spence v. Chicago, R. I. & P. Ry. Co.* (Iowa), 822.
- Liability for refusal to unlock station room.  
*St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 793.
- Liability for willful and wanton and malicious acts of employees to passenger.  
*St. Louis, etc., Ry. Co. v. Wilson* (Ark.), 793.
- Limiting Liability.  
Contract exempting company from liability for any injury to person did not extend to passenger's death.  
*Northern Pac. Ry. Co. v. Adams* (C. C. A.), 734.
- Limits of depot premises under Mississippi Code prohibiting the backing of trains near passenger depots beyond a certain speed.  
*King v. Illinois Cent. R. Co.* (C. C. A.), 875.
- Negligence in starting train.  
*Texas & P. Ry. Co. v. Gardner* (C. C. A.), 759.
- Negligence of company in running vestibuled train with some unprotected platforms, at unusual speed, question for the jury.  
*Northern Pac. Ry. Co. v. Adams* (C. C. A.), 734.
- Nonsuit properly ordered in action for carrying passenger beyond destination, where she was a woman accompanied by her children, and it was raining.  
*Smith v. Wilmington & W. R. Co.* (N. Car.), 772.
- One entering train with understanding with conductor not to pay fare a trespasser.  
*Purple v. Union Pac. R. Co.* (C. C. A.), 711.
- One riding on train prohibited from carrying passengers a trespasser.  
*Purple v. Union Pac. R. Co.* (C. C. A.), 711.
- Pain and suffering as elements of damages in action for injury to passenger.  
*Pence v. Wabash R. Co.* (Iowa), 77.
- Passengers actually on train whether it is moving or not is

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being "transported over road," within meaning of Nebraska statute.

Chicago, etc., Ry. Co. *v.* Sattler (Neb.), 688.

Passenger leaving car for a purpose not incident to journey is not being "transported over road," within meaning of Nebraska statute.

Chicago, etc., Ry. Co. *v.* Sattler (Neb.), 688.

Presumption of negligence from injury to passenger.

Texas & P. Ry. Co. *v.* Gardner (C. C. A.), 759.

Question for jury as to negligence in overcrowding excursion train.

Williams *v.* International & G. N. R. Co. (Tex.), 778.

Question for jury whether street railway passenger was discharged at dangerous place.

Sweet *v.* Louisville Ry. Co. (Ky.), 768.

Question for jury whether there was negligence in overcrowding excursion train, where negro was injured by reason of having to ride on platform of swaying car.

Williams *v.* International & G. N. R. Co. (Tex.), 778.

Question of fitness of place of ejection of passenger eliminated where he was injured at a point 25 or 30 feet distant.

Gaukler *v.* Detroit, G. H. & M. Ry. Co. (Mich.), 806.

Right of passenger to leave train on account of business or curiosity.

Chicago, R. I. & P. Ry. Co. *v.* Sattler (Neb.), 688.

Sufficiency of evidence of negligence where passenger slipped on ice and snow on car steps and platform.

Herbert *v.* St. Paul City Ry. Co. (Minn.), 152.

Sufficiency of evidence to show invitation from agent to cross depot grounds to purchase ticket.

Davis *v.* Houston, E. & W. T. Ry. Co. (Tex.), 800.

Sufficiency of evidence to show that passenger left a car for some purpose not incident to his journey so as to be unable to claim protection of Nebraska

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statute providing for liability in certain cases where passenger is being "transported over road."

Chicago, etc., Ry. Co. *v.* Sattler (Neb.), 688.

Sufficiency of evidence to show ticket agent's knowledge of passenger's relationship in action for mental anguish of mother from separation from her children caused by negligence in starting train too soon.

International & G. N. R. Co. *v.* Anchonda (Tex.), 788.

**Tickets and Fares.**

Excursion ticket construed to embody contract entitling holder to transportation between certain points.

International & G. N. R. Co. *v.* Ing (Tex.), 746.

Passenger was not obliged to prove that defendant executed and issued ticket where no plea of non est factum.

International & G. N. R. Co. *v.* Ing (Tex.), 746.

Ticket not having printed notice provided for by Texas statute not transferable.

International & G. N. R. Co. *v.* Ing (Tex.), 746.

Ticket prima facie evidence of right to carriage between certain points.

International & G. N. R. Co. *v.* Ing (Tex.), 746.

Tickets transferable.

International & G. N. R. Co. *v.* Ing (Tex.), 746.

Utmost human skill, diligence and foresight not required in stopping street railway car.

Freeman *v.* Metropolitan St. Ry. Co. (Mo.), 584.

**OARS.**

*See Carriers of Freight.  
Master and Servant.*

**OAR STEPS.**

*See Carriers of Passengers.*

**CATTLE CHUTE.**

*See Master and Servant.*

**CATTLE GUARDS.**

*See Stock, Injuries to.*

**CHILDREN.****Contributory Negligence.**

Age and intelligence of boy 11 years old to be considered in determining issue of contributory negligence.

Missouri, K. & T. Co. of Texas *v.* Scarborough (Tex.), 608.

Boy 16 years of age not incapable of sufficient discretion to avoid extending part of person beyond car line.

Benedict *v.* Minneapolis & St. L. R. Co. (Minn.), 701.

Burden of proving where boy 11 years of age was injured by projection from car while standing near track.

Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.

Of boy assisting passenger, in jumping from moving train. Oxshier *v.* Houston, E. & W. T. Ry. Co. (Tex.), 727.

Sufficiency of evidence to show contributory negligence of youth 16 years of age riding with head extended beyond side of moving train.

Benedict *v.* Minneapolis & St. L. R. Co. (Minn.), 701.

Evidence as to extent of boy's injury, in action by father.

Illinois Cent. R. Co. *v.* Henon (Ky.), 145.

Evidence that father gave son car fare, in action for injury sustained by latter while crossing track to board car.

Chicago & E. I. R. Co. *v.* Houston (Ill.), 141.

Failure to allege manumission by father, in action for injury to son.

Illinois Cent. R. Co. *v.* Henon (Ky.), 145.

Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts statute requiring railroad companies to fence roads to prevent entrance of cattle.

Byrnes *v.* Boston & M. R. R. (Mass.), 600.

Liability to father for personal injuries of son employed without former's consent.

Illinois Cent. R. Co. *v.* Henon

**CHILDREN—Continued.**

(Ky.), 145.

Limitation applicable to action for injury to infant brought by him after attaining majority.

Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.

Presumption of loss, in action by father for death of son.

Chicago & E. I. R. Co. *v.* Houston (Ill.), 141.

Res gestæ in action by father for injury to minor son.

Illinois Cent. R. Co. *v.* Henon (Ky.), 145.

Willful or reckless misconduct not shown where boy was injured on tracks after passing through freight yard where it did not appear that company maintained any way across yard which public was invited to use.

Byrnes *v.* Boston & M. R. R. (Mass.), 600.

**CITY COUNCIL.**

*See Street Railways.*

**CLASS LEGISLATION.**

*See Constitutional Law. Eminent Domain.*

**COAL BINS.**

*See Injuries to Property.*

**COLLATERAL ATTACK.**

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**COLLISIONS.**

*See Carriers of Passengers. Master and Servant.*

**COMBUSTIBLES.**

*See Fires Set by Locomotives.*

**COMMON CARRIERS.**

*See Constitutional Law.*

Railroad company cannot be compelled to maintain and operate road at actual loss.

Jack *v.* Williams (S. Car.), 10.

Railroad company, in operation of its road as common carriers, not a public officer.

Lyons *v.* Rutland R. Co. (Vt.), 27.

**COMPENSATION.**

*See Officers.*

**COMPRESS.**

*See Carriers of Goods.*

**CONCURRENT NEGLIGENCE CONSIGNEES.**

*See Accidents on Track.  
Crossings.*

*See Carriers of Freight.*

**CONDUCTORS.**

*See Carriers of Passengers.*

**CONSIGNORS.**

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**CONNECTING CARRIERS.**

*See Shipping Receipts.*

Burden on carrier where goods are injured by water to show that injury was not due to its negligence.

*Mears v. New York, N. H. & H. R. Co. (Conn.), 668.*

Company contracting to ship cattle over its own and connecting line and sued for injury occurring on connecting line could not complain of judgment over in its favor against connecting company.

*Texas & P. Ry. Co. v. McCarty (Tex.), 654.*

Liability for injury on connecting line where stipulation that liability shall cease at initial carrier's terminus.

*Pittsburg, C., C. & St. L. Ry. Co. v. Viers (Ky.), 62.*

**Limiting Liability.**

Connecting carrier not named in receipt entitled to benefit of provision.

*Mears v. New York, etc., R. Co. (Conn.), 668.*

Liability for improper treatment of cattle as affected by fact that each connecting carrier limited its liability to its own line.

*Gulf, C. & S. F. Ry. Co. v. Houghton (Tex.), 697.*

Negligence nor inferred from mere fact that goods are wet while in carrier's possession.

*Mears v. New York, etc., R. Co. (Conn.), 668.*

Railway company contracting to ship cattle over its own and connecting line to certain point was liable for injury occurring on connecting line.

*Texas & P. Ry. Co. v. McCarty (Tex.), 654.*

Right of connecting carrier to action over against other carriers.

*Ft. Worth & R. G. Ry. Co. v. Reese (Tex.), 673.*

Venue of action where ratification by connecting carrier of original contract of initial carrier.

*Pittsburg, C., C. & St. L. Ry. Co. v. Viers (Ky.), 62.*

**CONSOLIDATION.**

*See Contracts.*

Inserting name of another company as defendant where action had been brought before consolidation.

*Stewart v. Walterboro & W. Ry. Co. (S. Car.), 849.*

Liability for torts previously committed.

*Stewart v. Walterboro & W. Ry. Co. (S. Car.), 849.*

**CONSTITUTIONAL LAW.**

*See Bonds.*

Acts 1899 of Ind., p. 260, providing for the granting of franchises to street railways not in violation of constitutional provision requiring corporations to be formed under general law.

*Smith v. Indianapolis St. Ry. Co. (Ind.), 116.*

Amendment of South Carolina statute withdrawing right of bondholders to reorganize in case of foreclosure of railroad mortgage, except on condition of submission to certain rates for transportation, not an impairment of property rights.

*Com'rs of Railroads v. Grand Rapids & I. Ry. Co. (Mich.), 665.*

Assessing damages irrespective of benefits in eminent domain proceedings.

*Beveridge v. Lewis (Cal.), 83.*

Constitutionality of Acts 1899 of Ind., p. 260, authorizing cities to grant franchise to street railways.

*Smith v. Indianapolis St. Ry. Co. (Ind.), 116.*

Constitutionality of statute providing penalty for failure to pay damages on freight.

*Porter v. Charleston & S. Ry. Co. (S. Car.), 657.*

Contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages for injuries to stock and from fire not against public policy.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.), 538.*

**CONSTITUTIONAL LAW — CONTRACTS—Continued.***Continued.*

Massachusetts statute removing bar of limitation to filing petition to have damages assessed is not invalid as class legislation, because, while applicable to other railroads, terminal companies are exempt from its operation.

*Dunbar v. Boston & P. R. Corp. (Mass.)*, 382.

South Carolina statute providing penalty for failure to pay damages on freight within sixty days not unconstitutional as in violation of interstate commerce clause of constitution.

*Porter v. Charleston & S. Ry. Co. (S. Car.)* 657.

Validity of contract to maintain side track for convenience of sawmill owner.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, 538.

**CONSTRUCTION.**

*See Contractors.*

*Liens.*

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**CONSTRUCTION TRAINS.**

*See Carriers of Passengers.*

**CONTAGIOUS DISEASES.**

*See Pest Houses.*

**CONTRACTORS.**

Liability of material man to railroad for unlawful seizure of material furnished contractor, but in railroad's possession.

*Cameron v. Orleans & J. Ry. Co., Limited (La.)* 829.

Liability of railroad for material furnished contractor for construction of road.

*Cameron v. Orleans & J. Ry. Co., Limited (La.)* 829.

Right of railroad to enjoin contractor from removing material collected for construction of road.

*Cameron v. Orleans & J. Ry. Co., Limited (La.)*, 829.

**CONTRACTS.**

*See Carriers of Goods.*

*Liens.*

Assignability of contract to maintain side tracks for convenience of sawmill owner in

consideration of release of damages to stock and from fire.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, 538.

Contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages for injuries to stock and from fire not against public policy.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, 538.

Jurisdiction to determine sufficiency of consideration of contract to maintain side track for convenience of sawmill owner.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)* 538.

Liability of consolidated company under contract to maintain side tracks for convenience of sawmill owner entered into in consideration of release of damages for injuries to stock and from fire.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, 538.

Validity of contract to maintain side track for convenience of sawmill owner.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.)*, 538.

**CONTRACTS OF EMPLOYMENT.**

*See Master and Servant.*

**CONTRIBUTORY NEGLIGENCE.**

*See Accidents on Track.*

*Carriers of Passengers.*

*Crossings.*

*Fires Set by Locomotives.*

*Imputable Negligence.*

*Master and Servant.*

*Negligence.*

*Personal Injuries.*

**Burden of Proof.**

*Instruction.*

*Cook v. Missouri Pac. Ry. Co. (Mo.)*, 954.

Rule in federal courts.

*Hemingway v. Illinois Cent. R. Co. (C. C. A.)*, 899.

Degree of care required for self-protection.

*Reed v. City & Suburban Ry. Co. (Ga.)*, 278.

Erroneous conduct in trying to avoid danger.



**CONTRIBUTORY NEGLIGENCE—CROSSINGS—Continued.**

*Reed v. Missouri, K. & T. Ry. Co. (Mo.)*, 262.

Failure to have child vaccinated, in action for communication of contagious disease.

*Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex.)*, 936.

Gross negligence implies utter want of caution or care, amounting to recklessness, and complete disregard of the care a man owes himself.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

Same test must be applied to conduct of both parties in determining whether cause of action is proximate or remote.

*Rider v. Syracuse Rapid Transit Ry. Co. (N. Y.)*, 635.

not applicable where act of plaintiff in driving in front of electric car and that of conductor or motorman was so substantially concurrent that it was impossible to separate conduct of injured party from injury itself.

*Rider v. Syracuse Rapid Transit Ry. Co. (N. Y.)*, 635.

Judgment properly rendered for defendant where special finding showed contributory negligence precluding recovery, although they were inconsistent with general verdict.

*Morford v. Chicago, I. & L. Ry. Co. (Ind.)*, 595.

Question for jury where person killed at crossing.

*Hemingway v. Illinois Cent. R. Co. (C. C. A.)*, 899.

Degree of care required in maintaining bridge.

*Denison & P. S. Ry. Co. v. Foster (Tex.)*, 576.

Duty to employee crossing track at public crossing when off duty.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

Duty to keep bridge in repair, instruction.

*Denison & P. S. Ry. Co. v. Foster (Tex.)*, 576.

Duty to provide crossing where land inside city limits, under Kansas statute requiring railroad companies to fence and provide farm crossings where road runs through cultivated lands.

*Smith v. Missouri, K. & T. Ry. Co. (Mo.)*, 599.

Error in excluding evidence that bridge appeared to be properly constructed.

*Denison & P. S. Ry. Co. v. Foster (Tex.)*, 576.

Evidence of declaration of trainmen not part of *res gestæ*, but mere hearsay, in action for injury caused by defect in bridge.

*Denison & P. S. Ry. Co. v. Foster (Tex.)*, 576.

**Farm Crossings.**

Duty to provide crossings where land inside city limits, under Kansas statute requiring railroad companies to

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*See Carriers of Freight.*

**CORPORATE EXISTENCE.**

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**CORPORATIONS.**

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Admission that officer of corporation had authority to execute note sufficient to estop corporation.

*Baines v. Coos Bay, etc., R. & Nav. Co. (Ore.)*, 412.

**CORPSES.**

*See Carriers of Freight.*

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**COUPLING CARS.**

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**CROSSINGS.**

*See Accidents on Track.*

Burden of proving that defect in bridge was due to act of stranger.

*Denison & P. S. Ry. Co. v. Foster (Tex.)*, 576.

**Contributory Negligence.**

Doctrine that remote negligent act of injured party will not bar recovery was

**CROSSINGS—Continued.**

fence and provide farm crossings where road runs through cultivated lands.  
*Smith v. Missouri, K. & T. Ry. Co. (Mo.)*, 599.

**Gates.**

Error in instructing that single isolated circumstance of failure to operate gates was negligence.

*Chicago, R. I. & P. Ry. Co. v. Durand (Kan.)*, 519.

Instruction with respect to speed and failure to signal properly denied as giving undue prominence to certain facts.

*Sherwin v. Rutland R. Co. (Vt.)*, 602.

Instruction with respect to trainmen's negligence after discovering plaintiff's peril not warranted by evidence.

*Sherwin v. Rutland R. Co. (Vt.)*, 602.

It is proper, in action for injuries at a railroad crossing, to submit to jury question as to width of crossing or traveled place.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

Liability for negligence of lessee.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

**Signals.**

Evidence of failure to signal for another crossing.

*Chicago, R. I. & P. Ry. Co. v. Durand (Kan.)*, 519.

Failure to give statutory signals, no excuse for contributory negligence when accident was caused by plaintiff's failure to look and listen.

*Chicago, I. & L. Ry. Co. v. Reed (Ind.)*, 627.

Under S. Car. Rev. St. sec. 1692, providing that if a person is injured at a railroad crossing, and the railroad company fails to give statutory signals it shall be liable, unless person injured was guilty of willful negligence, contributing to the injury, failure to ring the bell or blow the whistle is negligence per se.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

**CROSSINGS—Continued.****Stop, Look and Listen.**

Failure to give statutory signals no excuse for contributory negligence where accident was caused by plaintiff's failure to look and listen.

*Chicago, I. & L. Ry. Co. v. Reed (Ind.)*, 627.

Failure to look at points where train could have been seen in time negligence per se.

*Chicago, I. & L. Ry. Co. v. Reed (Ind.)*, 627.

Instruction not warranted by evidence.

*Sherwin v. Rutland R. Co. (Vt.)*, 602.

**Question for jury.**

*Sherwin v. Rutland R. Co. (Vt.)*, 602.

Sufficiency of evidence in action for killing trespasser on track.  
*Haltiwanger v. Columbia, N. & L. R. Co. (S. Car.)*, 883.

Where driver negligently drove on track of rapidly approaching electric car, accident may properly be attributed to his negligence, though vehicle was carried some distance along track before it was overturned and injuries inflicted.  
*Rider v. Syracuse Rapid Transit Ry. Co. (N. Y.)*, 635.

Whether railroad fireman, at the time of an accident, at a public crossing, was in active employ of the company, or a member of the public, question for jury.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.)*, 317.

**DAMAGES.**

*See Carriers of Freight.*

*Carriers of Goods.*

*Carriers of Passengers.*

*Children.*

*Contracts.*

*Eminent Domain.*

*Fires.*

*Injuries to Property.*

*Personal Injuries.*

*Right of Way.*

*Water and Water Courses.*

Duty to minimize damage.

*Armistead v. Shreveport & R. R. Val. Ry. Co. (La.)*, 868.

**Elements.**

Apprehension of insanity.

*Walker v. Boston & M. R. R. (N. H.)*, 80.

**DAMAGES—Continued.**

- Mental and physical suffering of injured passenger.  
*Walker v. Boston & M. R. R.* (N. H.), 80.
- Mental suffering because of delay in shipment of corpse.  
*Louisville & N. R. Co. v. Hill* (Ky.), 56.
- Pain and suffering.  
*Pence v. Wabash R. Co.* (Iowa), 77.
- Enhancing damages of carrier where navigable stream was obstructed by railroad bridge.  
*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.), 868.
- Excessive Verdict.**  
Action for delay in shipment of corpse.  
*Louisville & N. R. Co. v. Hull* (Ky.), 56.
- Injuries to passengers.  
*Pence v. Wabash R. Co.* (Iowa), 77.
- Personal injuries of passenger.  
*Loker v. Southwestern Missouri Electric Ry. Co.* (Mo.), 132.
- The fact that the trial court cut down verdict did not tend to show that it was the result of passion and prejudice.  
*Doran v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 929.
- Instruction as to value of time lost not warranted by evidence.  
*Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.
- Liability for obstruction of navigable stream by railroad bridge as affected by act of carrier in abandoning freight.  
*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.), 868.
- Liability of material man for seizure of material furnished contractor, but in railroad's possession.  
*Cameron v. Orleans & J. Ry. Co., Limited* (La.), 829.
- Loss of profits by carrier through obstruction of navigable stream.  
*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.), 868.
- Measure of damage to carrier from obstruction of navigable stream by railroad bridge.  
*Armistead v. Shreveport & R. R. Val. Ry. Co.* (La.), 868.

**DEATH BY WRONGFUL ACT**  
*See Master and Servant.*

- Assignment of wife's cause of action for death of husband under Texas statute.  
*Southern Pac. Co. v. Winton* (Tex.), 358.
- Contributory Negligence.**  
Question for jury where person killed at crossing.  
*Hemingway v. Illinois Cent. R. Co.* (C. C. A.), 899.
- Damages.**  
Error in instruction not cured by another instruction.  
*Ft. Worth & R. G. Ry. Co. v. Sivells* (Tex.), 927.
- Measure of damages for killing of husband and father.  
*Ft. Worth, etc., Ry. Co. v. Sivells* (Tex.), 927.
- Recovery for physical pain and mental anguish suffered by injured party up to time of his death, under Texas statute providing for survival of causes of action for personal injuries other than those resulting in death.  
*Gulf, etc., Ry. Co. v. Moore, et al.* (Tex.), 620.
- Habits of deceased, in action for killing person on track.  
*Louisville & N. R. Co. v. McClish* (C. C. A.), 942.
- New trial properly refused where verdict for defendant was warranted.  
*James v. Florida Cent. & P. R. Co.* (Ga.), 634.
- Right of action given by Rev. St. of Idaho, sec. 4100, and 2 Ballinger's Ann. Codes & St. of Wash., sec. 4828, to heirs or personal representatives is not dependent on right of deceased to have maintained action had he survived.  
*Northern Pac. Ry. Co. v. Adams* (C. C. A.), 734.
- Right of attorney performing services for widow in prosecution of action for negligence resulting in husband's death to intervene to recover compensation.  
*Southern Pac. Co. v. Winton* (Tex.), 358.
- Survival of cause of action did not depend upon the bringing of suit thereon by injured party in his lifetime.  
*Gulf, etc., Ry. Co. v. Moore* (Tex.), 620.

**DE FACTO CORPORATIONS. ELECTRIC RAILWAYS.**

*See Eminent Domain.  
Telegraphs and Telephones.*

*See Crossings.  
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**DEFECTS.**

*See Master and Servant.*

**DEFENCES.**

*See Arrest.  
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**DELAY.**

*See Carriers of Freight.*

**DEPOTS.**

*See Carriers of Passengers.  
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**DISEASES.**

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**DIRECTION OF VERDIOT.**

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**DISCHARGED EMPLOYEES.**

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**DISCRIMINATION.**

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**DRUNKENNESS.**

*See Carriers of Passengers.*  
Not negligence as matter of law  
to leave ejected intoxicated  
passenger at certain point.  
*Gaukler v. Detroit, G. H. & M.  
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**DUTIES.**

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**ELEMENTS OF DAMAGES.**

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**EMINENT DOMAIN.**

*See Right of Way.*

Collateral attack cannot be made  
on right of city to condemn  
land.

*South Chicago City Ry. Co. v.  
City of Chicago (Ill.), 484.*

**Damages.**

Benefit to land not taken.

*Beveridge v. Lewis (Cal.), 83.*

Constitutional clause provid-  
ing that damages may be  
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efits repugnant to 14th  
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*Beveridge v. Lewis (Cal.),  
83.*

Constitutionality of Massa-  
chusetts statute removing  
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*Dunbar v. Boston & P. R.  
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Massachusetts statute remov-  
ing bar of limitation to  
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ages assessed is not invalid  
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nies are exempt from its  
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*Dunbar v. Boston & P. R.  
Corp. (Mass.), 382.*

Nominal damages for con-  
structing telegraph line over  
railroad right of way.

*Postal Tel. Cable Co. of  
Montana v. Oregon Short  
Line R. Co. (Mont.), 432.*

Right of jurors to exercise  
individual judgment in as-  
sessing damages.

*Beveridge v. Lewis (Cal.), 83.*

Determination of railroad's  
right to condemn land of  
another company could not  
be collaterally attacked.

*Chesapeake & W. R. Co. v.  
Washington, C. & St. L.  
Ry. Co. (Va.), 444.*

Notice to defendant of collat-  
eral attack upon condemna-

**EMINENT DOMAIN—Cont'd.**

- tion proceedings before county court.  
 Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co. (Va.), 444.  
 Petition for viewers to assess damages for entry on railroad lands cannot be used for recovery for unlawful entry, but only to recover compensation for right with which company becomes vested.  
 Mountz v. Philadelphia, H. & P. R. Co. (Pa.), 416.  
 Proceedings for viewers to assess damages for entry of railroad on lands must be by holder of title as owner or lessee; it cannot be by administrator.  
 Connor v. Tennessee Cent. Ry. Co. (C. C. A.), 417.  
 Question as to right of telegraph company as a de facto corporation to exercise power of eminent domain can only be raised by state.  
 Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.  
 Question as to whether land was public property cannot be litigated in supplementary proceedings to pay judgment.  
 South Chicago City Ry. Co. v. City of Chicago (Ill.), 484.  
 Right of telegraph company as a de facto corporation to exercise power of eminent domain.  
 Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.  
 Right of telegraph company to construct its line over railroad right of way under Montana statute.  
 Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.  
 Right to construct lines over railroad's right of way under federal statute.  
 Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.  
 Statute governing supplementary proceedings to pay judgment.  
 South Chicago City Ry. Co. v. City of Chicago (Ill.), 484.

**EMINENT DOMAIN—Cont'd.**

- Sufficiency of notice of wish to settle in condemnation proceedings.  
 Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co. (Va.), 444.  
 Summary proceedings by internal improvement company to acquire title before rights over fund paid into court are determined.  
 Chesapeake & W. R. Co. v. Washington, C. & St. L. Ry. Co. (Va.), 444.

**EMPLOYEES.**

*See Master and Servant.*

**EMPLOYERS.**

*See Master and Servant.*

**EMPLOYERS' LIABILITY ACT.**

*See Fellow Servants.*

Hand car within meaning of Texas statute providing that railroads shall be liable for damages sustained by any servant or employee, while engaged in the work of operating "cars, locomotives, or trains," by reason of negligence of any employees whether fellow servants or not.  
 Texas & P. Ry. Co. v. Smith (C. C. A.), 224.

States may fix by legislative enactment the liabilities of employers for the acts and negligence of their employees.  
 Southern Pac. Co. v. Schoer (C. C. A.), 254.

**EMPLOYMENT.**

*See Master and Servant.*

**EQUITY JURISDICTION.**

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**ESTOPPEL.**

*See Corporations.*  
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**EVIDENCE.**

*See Carriers of Freight.*  
*Carriers of Passengers.*  
*Crossings.*  
*Fires Set by Locomotives.*  
*Master and Servant.*  
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**EVIDENCE—Continued.**

Burden of proving that physician acquired information as to patient's injuries in professional character, under New York Code Civ. Proc., sec. 834. *Griffiths v. Metropolitan St. Ry. Co.* (N. Y.), 407.

Competency of physician to testify as to patients' condition, under Arkansas statute providing that physician shall be incompetent to testify concerning information acquired from patients.

*Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.

Competency of section man to testify as to speed of train.

*Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.

Evidence of declaration of trainmen not part of *res gestæ*, but mere hearsay, in action for injury caused by defect in bridge. *Denison & P. S. Ry. Co. v. Foster* (Tex.), 576.

Plaintiff's testimony as to cause of his weak eyes may be considered although contradicted by that of physician.

*Birmingham Southern R. Co. v. Cuzzart* (Ala.), 312.

Privileged communications of patient to physician.

*Doran v. Cedar Rapids & M. C. Ry. Co.* (Iowa), 929.

Where physician acquired information as to how accident happened from injured party while attending him as surgeon, he is not rendered incompetent to testify thereto by New York Code Civ. Proc., sec. 834, unless such information was necessary to enable him to act in professional capacity.

*Green v. Metropolitan St. Ry. Co.* (N. Y.), 402.

Writings containing competent and incompetent evidence.

*Southern Pac. Co. v. Schoer* (C. C. A.), 254.

**EXCAVATIONS.**

*See Master and Servant.*

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*See Damages.*

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**EX CONTRACTU.**

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**EXEMPLARY DAMAGES.**

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**EXPRESS MESSENGERS.**

*See Master and Servant.*

**FARM CROSSINGS.**

*See Crossings.*

**FEDERAL COURT RULES.**

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**FEDERAL JURISDICTION.**

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**FELLOW-SERVANT ACT.**

*See Fellow Servants.*

**FELLOW SERVANTS.**

Company liable for injury to section hand caused by negligence of fellow servants, also section men, engaged with him in removing hand car from track.

*Lindgren v. Minneapolis & St. L. R. Co.* (Minn.), 171.

Employee of iron company, while loading cars, fellow servant of trainmen, under Pennsylvania statute.

*Weaver v. Philadelphia & R. Ry. Co.* (Pa.), 198.

Fire knocker not a fellow servant of hostler in charge of engine by which former was injured.

*St. Louis, I. M. & S. Ry. Co. v. Thurmond* (Ark.), 149.

Foreman of section gang a vice principal under Arkansas statute providing that those entrusted with "authority of superintendence, control or command" are vice principals.

*Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.

Hand car within meaning of Texas statute providing that railroads shall be liable for all damages sustained by any servant or employee while engaged in the work of oper-

**FELLOW SERVANTS—Cont'd.**

ating "cars, locomotives, or trains, by reason of negligence of any employee, whether fellow servant or not.

Texas & P. Ry. Co. *v.* Smith (C. C. A.), 224.

Liability for negligent act of coemployee while transferring rails from one car to another by use of locomotive moving along track, under Iowa statute, providing that railroads shall be liable for all damages sustained by employees in consequence of negligence of other employees, when such wrongs are connected with operation of any railroad.

Stebbins *v.* Crooked Creek R. & Coal Co. (Iowa), 271.

Liability under Utah statute for negligence of superior servants.

Southern Pac. Co. *v.* Schoer (C. C. A.), 254.

Liability under Utah statute for negligence of superior servants occurring while they are not exercising superintendence.

Southern Pac. Co. *v.* Schoer (C. C. A.), 254.

Negligence of fellow servant must be pleaded.

Peters *v.* McKay & Co. (Cal.), 173.

Section foreman engaged with section crew in operating hand car a vice principal.

Haworth *v.* Kansas City Southern Ry. Co. (Mo.), 235.

States may fix by legislative enactment liabilities of employers for the acts and negligence of their employees.

Southern Pac. Co. *v.* Schoer (C. C. A.), 254.

Train master and road master superintending work of removing wreck was responsible for negligence in fastening derrick chain, and not the fellow servants of injured employee.

Reed *v.* Missouri, K. & T. Ry. Co. (Mo.), 262.

**FENCES.**

*See Children.*

*Stock, Injuries to.*

Admissibility of evidence that track was fenced to within thirty or forty feet of switch

**FENCES—Continued.**

where company claimed that fence so near switch would interfere with the switching of trains.

Texas & P. Ry. Co. *v.* Seay (Tex.), 866.

Cattle guards, sufficiency of.

Sappington *v.* Chicago & A. Ry. Co. (Mo.), 862.

Distance it was necessary to leave tracks unfenced in town, question for jury.

Downey *v.* Mississippi River & B. T. Ry. Co. (Mo.), 616.

Duty to fence tracks within town.

Downey *v.* Mississippi River & B. T. Ry. Co. (Mo.), 616.

Implied notice of defects.

Sappington *v.* Chicago & A. Ry. Co. (Mo.), 862.

Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts statute requiring railroad companies to fence roads to prevent entrance of cattle.

Byrnes *v.* Boston & M. R. R. (Mass.), 600.

Validity of oral contract to fence track as affected by statute of frauds.

Evans *v.* Southern Ry. Co. (Ala.), 859.

**FINANCIAL CIRCUMSTANCES.**

*See Railroads.*

**FIRES.**

Assignability of contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages to stock and from fire.

Missouri, K. & T. Ry. Co. *v.* Texas *v.* Carter (Tex.), 538.

Contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages for injuries to stock and from fire not against public policy.

Missouri, K. & T. Ry. Co. *v.* Texas *v.* Carter (Tex.), 528.

Contributory Negligence.

Storing hay in barn adjoining right of way.

Texas & P. Ry. Co. *v.* Rutherford (Tex.), 334.

**FIRES—Continued.****Damages.**

Harmless error in instruction, in action for destruction of grass.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Market value of apples produced by trees destroyed by fire as element of damages.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Measure of damages where grass land or meadow was destroyed by fire.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Necessity of proving value of trees destroyed under allegation of petition.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Sufficiency of allegation to permit introduction of evidence of value of farm before and after orchard was destroyed.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Degree of care required in furnishing and maintaining spark arresters.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.), 538.*

Evidence of condition of other engines in action for damages by fire set by locomotives.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.), 538.*

Evidence of other fires.

*Texas & P. Ry. Co. v. Rutherford (Tex.), 334.*

Liability for spreading of fires lighted on right of way.

*Grant v. Omaha, etc., R. Co. (Mo.), 953.*

Liability of receivers on account of fire set prior to receivership.

*Grant v. Omaha, etc., Ry. Co. (Mo.), 953.*

Presumption of negligence.

*Krejci v. Chicago & N. W. Ry. Co. (Iowa), 924.*

Requested instruction as to care required in furnishing spark arresters properly refused as argumentative.

*Missouri, K. & T. Ry. Co. of Texas v. Carter (Tex.), 538.*

Sufficiency of evidence of negligence in managing engine.

*Texas & P. Ry. Co. v. Rutherford (Tex.), 334.*

Sufficiency of evidence that com-

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bustibles were allowed to accumulate and remain on right of way.

*Texas & P. Ry. Co. v. Rutherford (Tex.), 334.*

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**FREIGHT DEPOTS.**

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**FRIGHTENING TEAMS.****Contributory Negligence.**

Duty of driver of shy team to avoid street upon which there is an electric railway.

*Doran v. Cedar Rapids & M. C. Ry. Co. (Iowa), 929.*

Duty of motorman to exercise care to discover plaintiff's peril.

*Doran v. Cedar Rapids & M. C. Ry. Co. (Iowa), 929.*

Liability, erroneous instruction.

*Oates v. Metropolitan St. Ry. Co. (Mo.), 916.*

Negligence of motorman in violently ringing bell could not be justified as being to assist driver of runaway horse in preventing it from going on the track.

*Oates v. Metropolitan St. Ry. Co. (Mo.), 916.*

Question whether motorman used ordinary care in management of his car when horse in front of it became frightened was for the jury.

*Oates v. Metropolitan St. Ry. Co. (Mo.), 916.*



**GATES.**

*See Crossings.*

**GENERAL VERDIOT.**

*See Crossings.*

**GROSS.**

*See Negligence.*

**GROSS NEGLIGENCE.**

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**HACKMEN.**

*See Carriers of Passengers.*

Hack driver properly joined as defendant in action against railway company for injury to hack passenger.

Chicago, R. I. & P. Ry. Co. v. Durand (Kan.), 519.

**HAND CARS.**

*See Fellow Servants.  
Master and Servant.*

**HEARSAY EVIDENCE.**

*See Evidence.*

**HUSBAND AND WIFE.**

*See Personal Injuries.*

**ICE.**

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**IMPAIRMENT OF CONTRACT OBLIGATIONS.**

*See Bonds.*

**IMPUTABLE NEGLIGENCE.**

Negligence of servant in failing, while driving his master in vehicle, to avoid danger from fallen trolley wire, imputable to latter.

Read v. City & Suburban Ry. Co. (Ga.), 278.

**INDEBTEDNESS.**

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**INFANTS.**

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**INJURIES TO EMPLOYEES.**

*See Master and Servant.*

**INJURIES TO PROPERTY.**

*See Water and Water Courses.*

Determining whether verdict was excessive in action for in-

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jury to property from operation of coal bins.

Louisville & N. R. Co. v. Walton (Ky.), 570.

Judgment in action against railroad for injuries from negligent construction and operation of stock pens not a bar to subsequent action for permanent depreciation in value resulting from their prudent construction and operation.

Bramlette v. Louisville & N. R. Co. (Ky.), 441.

Liability for injury to adjacent property from explosion of contents of car during delay in delivery.

Ft. Worth & D. C. Ry. Co. v. Beauchamp (Tex.), 52.

Liability of railroad for injury to adjacent property from prudent operation of stock pens required by law.

Bramlette v. Louisville & N. R. Co. (Ky.), 441.

Negligence in failing to deliver car load of explosives, question for jury in action for injury to property from their explosion.

Ft. Worth & D. C. Ry. Co. v. Beauchamp (Tex.), 52.

Property owner not estopped from recovering damages for injuries to his property from operation of coal bins.

Louisville & N. R. Co. v. Walton (Ky.), 570.

Recovery of damages from injuries to property from operation of coal bins necessary to operation of railroad.

Louisville & N. R. Co. v. Walton (Ky.), 570.

**INSPECTION.**

*See Master and Servant.  
Street Railways.*

**INSTRUCTIONS.**

*See Crossings.  
Fires Set by Locomotives.*

In an action against a railroad company, it is not a charge on facts to say "I feel confident that you will not be influenced by the fact that the railroad is a rich corporation."

Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 317.

**INSULTS.**

*See Carriers of Passengers.*

**INTELLIGENCE.**

*See Children.*

**INTEREST.**

*See Damages.*

**INTERSTATE COMMERCE.**

Fact that grain was received at initial point from carrier by which it was transported from point in another state, and was there stored for further shipment did not make shipment an interstate one, where it was not taken under through bill of lading.

*United States ex rel. Kellogg v. Lehigh Val. R. Co. (N. Y.), 682.*

Mandamus where discrimination in furnishing cars for transportation of interstate traffic.

*United States v. Norfolk & W. Ry. Co. (W. Va.), 19.*

Second action, in mandamus proceedings against railroad for unjust discrimination in furnishing cars for shipment of coal, where parties and subject-matter involved in the two proceedings are the same.

*United States v. Norfolk & W. Ry. Co. (W. Va.), 710.*

Shipment between same points in state not an interstate shipment because line of road between terminal points passes through other states.

*United States ex rel. Kellogg v. Lehigh Val. R. Co. (N. Y.), 682.*

South Carolina statute providing penalty for failure to pay damages on freight within sixty days not unconstitutional as in violation of interstate commerce clause of constitution.

*Porter v. Charleston & S. Ry. Co. (S. Car.), 657.*

Unjust discrimination in distributing cars among coal shippers.

*United States v. Norfolk & W. Ry. Co. (W. Va.), 19.*

**INTOXICATION.**

*See Carriers of Passengers.*

**JOINDER OF ACTIONS.**

*See Carriers of Freight.*

**JUDICIAL NOTICE.**

That weak eyes may be inherited.

*Birmingham Southern R. Co. v. Cuzzart (Ala.), 312.*

**JUDICIAL SALES.**

Right of purchaser of railroad property at judicial sale.

*Connor v. Tennessee Cent. Ry. Co. (C. C. A.), 417.*

When property of public corporation, such as railroad company, cannot be sold under process separately and apart from its franchise.

*Connor v. Tennessee Cent. Ry. Co. (C. C. A.), 417.*

**JURISDICTION.**

*See Railroad Commission.*

Power of court to order destruction of road and sale of materials where operation would be at an actual loss.

*Jack v. Williams (S. Car.), 10.*

**LEASES AND RUNNING POWERS.**

Action by citizen for joint tort against lessor of railroad, a state corporation, and receivers of lessee, citizens of another state, improperly removed to federal court, on petition of receivers, alleging that other defendant had no interest or liability jointly with receivers.

*Central Ohio R. Co. v. Mahoney (C. C. A.), 499.*

Liability for negligence of lessee causing accident at public crossing.

*Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 317.*

**LESSEES.**

*See Leases and Running Powers.*

**LESSORS.**

*See Leases and Running Powers.*

**LEX LOCI.**

*See Torts.*

**LICENSEES.**

Contributory Negligence.

Care required of licensee walking on railroad track.

*King v. Illinois Cent. R. Co. (C. C. A.), 875.*

**LICENSEES—Continued.**

Question of contributory negligence of person killed while walking on track not affected by custom of public to use track as foot path.

Louisville & N. R. Co. v. McClish (C. C. A.), 942.

Sufficiency of evidence of such wanton and gross negligence as will render unavailable a plea of contributory negligence, in action for killing a person on track in railroad yard.

King v. Illinois Cent. R. Co. (C. C. A.), 875.

Duty to persons walking on track used as foot path.

Haltiwanger v. Columbia, N. & L. R. Co. (S. Car.), 883.

Liability for injury to person on freight train with consent of conductor.

Baltimore & O. S. W. Ry. Co. v. Cox (Ohio), 939.

Willful or reckless misconduct not shown where boy was injured on tracks after passing through freight yard, and it did not appear that company maintained any way across yard which public was invited to use.

Byrnes v. Boston & M. R. R. (Mass.), 600.

**LICENSES.**

*See Taxation.*

**LIENS.**

*See Bonds.*

Ark. Act March 31, 1899, providing for material men's liens not applicable to contract executed prior to its passage.

Choctaw & M. R. Co. v. Sullivan (Ark.), 505.

**LIFE TABLES.**

*See Damages.*

*Personal Injuries.*

**LIMITATIONS.**

*See Children.*

*Eminent Domain.*

*Personal Injuries.*

**LIMITING LIABILITY.**

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**LOCAL ASSESSMENTS.**

Sufficiency of description of property assessed to railroad company.

South Chicago City Ry. Co. v. City of Chicago (Ill.), 484.

**LOCAL CARRIERS.**

*See Hackmen.*

**LOOKOUTS.**

*See Accidents on Track.*

*Frightening Teams.*

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**LOSS OF PROFITS.**

*See Damages.*

**MACHINERY.**

*See Master and Servant.*

**MALICE.**

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**MANDAMUS.**

Discrimination in furnishing cars to transport interstate traffic.

United States v. Norfolk & W. Ry. Co. (W. Va.), 19.

**MASTER AND SERVANT.**

*See Appeal.*

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*Employers' Liability Act.*

*Fellow Servants.*

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**Assumption of Risk.**

Assumption of risk not shown as matter of law in action for death of conductor killed in derailment of freight train which was being backed down grade.

International & G. N. Ry.

Co. v. Vinson (Tex.), 372.

Brakeman uncoupling moving cars after being properly instructed.

Gorman v. Minneapolis &

St. L. Ry. Co. (Iowa), 293.

Brake on logging train becoming loose, sufficiency of evidence.

Bowers v. Star Logging &

Lumber Co. (Ore.), 300.

Coupling cars without waiting to see that engineer has been signaled.

Zahn v. Milwaukee & S. Ry.

Co. (Wis.), 268.

Employee's knowledge of defects in machinery properly

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left to jury.  
 Gulf, C. & S. F. Ry. Co. v. Haden (Tex.), 285.  
 Engineer's absence of knowledge of particular defect as affected by his general knowledge of defects along the line.  
 Gulf, etc., Ry. Co. v. Moore (Tex.), 620.  
 Engineer's knowledge of defects in track.  
 Gulf, etc., Ry. Co. v. Moore (Tex.), 620.  
 Engineer's right to rely on assumption that track was in reasonably safe condition.  
 Gulf, etc., Ry. Co. v. Moore (Tex.), 620.  
 Experienced employee conclusively held to appreciate dangers which may arise from defects of which he is chargeable with notice.  
 Pennsylvania Co. v. McCurdy (Ohio), 381.  
 General rule.  
 Southern Indiana Ry. Co. v. Moore (Ind.), 251.  
 Injury to employee loading cattle caused by giving way of top plank of cattle chute.  
 Ft. Worth & D. C. Ry. Co. v. Gary (Tex.), 290.  
 Mismatched couplings of foreign cars.  
 Southern Pac. Co. v. Winton (Tex.), 358.  
 Overcrowded hand car.  
 Haworth v. Kansas City Southern Ry. Co. (Mo.), 235.  
 Plaintiff's own testimony that he was aware of existence of defect.  
 Smalls v. Southern Ry. Co. (Ga.), 166.  
 Riding on defective hand car.  
 Weldon v. Omaha, K. C. & E. Ry. Co. (Mo.), 244.  
 Sufficiency of evidence of employees' knowledge of defect in machinery.  
 Gulf, C. & S. F. Ry. Co. v. Haden (Tex.), 285.  
 That directions and warnings were given by engineer, and not conductor, did not affect the question of assumption of risk by brakeman uncoupling moving cars.  
 Gorman v. Minneapolis &

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St. L. Ry. Co. (Iowa), 293.  
 The fact that business of clearing away wreck is inherently dangerous could not affect the right of recovery of employee injured by reason of negligence in fastening derrick chains.  
 Reed v. Missouri, K. & T. Ry. Co. (Mo.), 262.  
 Yard overcrowded with cars.  
 Bence v. New York, N. H. & H. R. R. (Mass.), 295.  
 Competency of section man to testify as to speed of train.  
 Haworth v. Kansas City Southern Ry. Co. (Mo.), 235.  
 Contributory Negligence.  
 Contributory negligence, as matter of law, not shown by evidence in action for death of conductor killed in derailment.  
 International & G. N. Ry. Co. v. Vinson (Tex.), 372.  
 Coupling foreign cars with mismatched couplings was not.  
 Southern Pac. Co. v. Winton (Tex.), 358.  
 Employee's violation of rule of employer not negligence per se.  
 Missouri, K. & T. Ry. Co. of Texas v. Pawkett (Tex.), 185.  
 Employee walking on track without seeing train after jumping from moving switch engine.  
 Jean v. Boston & M. R. R. (Mass.), 234.  
 Engineer not bound, for his self-protection, to keep lookout for defects in track.  
 Gulf, etc., Ry. Co. v. Moore (Tex.), 620.  
 Erroneous conduct in trying to avoid danger.  
 Reed v. Missouri, K. & T. Ry. Co. (Mo.), 262.  
 Evidence justified finding that conductor injured in collision at switch was not negligent in remaining in caboose for purpose of adjusting switch.  
 Missouri, K. & T. Ry. Co. of Texas v. Pawkett (Tex.), 185.  
 Instruction not objectionable as requiring that contribu-

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- tory negligence be proximate cause of injury.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Johnson (Tex.), 178.
- Instruction properly modified by adding (in substance) "unless accident was caused by defect in appliance."  
 Bowers *v.* Star Logging & Lumber Co. (Ore.), 300.
- Knowledge of rules, sufficiency of evidence.  
 Springs *v.* Southern Ry. Co. (N. Car.), 274.
- Making coupling not a placing of cars in train within meaning of rule forbidding employees to place cars with defective couplings in train.  
 Southern Pac. Co. *v.* Winton (Tex.), 358.
- Of injured conductor in failing to see that brakeman went ahead to signal to see whether train could enter switch.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), 185.
- Requested instruction properly refused where evidence did not show that conductor killed in derailment could have checked speed of train sufficiently.  
 International & G. N. Ry. Co. *v.* Vinson (Tex.), 372.
- Right of defendant to special charge in action for injury to employee.  
 Gulf, C. & S. F. Ry. Co. *v.* Mangham (Tex.), 193.
- Where a conductor is injured in a collision occurring from delay in his train in taking side track, an expert cannot testify as to precautions he should have taken under the rules for his protection, over objection that the rules were the best evidence.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), 185.
- Demand by assignee of claim for wages not a compliance with Indiana statute providing for monthly payment of wages in absence of written contract.  
 Chicago & S. E. Ry. Co. *v.* Glover (Ind.), 376.
- Direction of verdict for defendant not warranted in action for death of brakeman caused by mismatched couplings.  
 Southern Pac. Co. *v.* Winton (Tex.), 358.
- Duties and Liabilities of Master to Servant.**
- Absence of evidence of negligence of fireman, in action for injury to brakeman coupling cars.  
 Zahn *v.* Milwaukee & S. Ry. Co. (Wis.), 268.
- Act of God excusing performance of duty to servant.  
 Southern Pac. Co. *v.* Schoer (C. C. A.), 254.
- Admissibility of evidence that plaintiff complained of use of road engine and was promised a safer engine, in action by brakeman for injuries alleged to have been caused by being compelled to ride on pilot of road engine, instead of switch engine.  
 Springs *v.* Southern Ry. Co. (N. Car.), 274.
- Burden of proving nonexistence of written contract under Indiana statute providing for monthly payment of wages in absence of written contract.  
 Chicago & S. E. Ry. Co. *v.* Glover (Ind.), 376.
- Care due employee crossing track at public crossing when off duty.  
 Davis *v.* Atlanta & C. A. L. Ry. Co. (S. Car.), 317.
- Care due from railroad company to one acting as express messenger and also, with its knowledge and approval, as its baggageman.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Reasor (Tex.), 281.
- Complaint alleging that employee "who was in charge and control and superintendence of defendant's engine" negligently moved it, injuring plaintiff, alleged charge of engine, and was not demurrable as indefinite, or as attempting to join two causes of action, under Ala. Code, sec. 1749. subdiv. 2,

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giving an employee an action for damages for injury from negligence of employee having superintendence intrusted to him, and subdivision giving such action for negligence of employee having control of an engine. *Birmingham Southern R. Co. v. Cuzzart* (Ala.), 312.

Defect in machinery, sufficiency of allegation where machine is in possession of defendant. *Gulf, C. & S. F. Ry. Co. v. Haden* (Tex.), 285.

Degree of care in furnishing safe machinery. *Gustafson v. Seattle Traction Co.* (Wash.), 176.

Degree of care required in inspecting cars and appliances. *Southern Pac. Co. v. Winton* (Tex.), 358.

Duty to furnish safe place to work, degree of care. *Southern Indiana Ry. Co. v. Moore* (Ind.), 251.

Duty to light excavation, where issue was question of negligence where employee was injured when going to work. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Tex.), 178.

Evidence of condition of car after accident, in action for injury to employee riding on defective hand car. *Weldon v. Omaha, K. C. & E. Ry. Co.* (Mo.), 244.

Evidence of prior possibilities of similar accidents from same cause, in action for injuries sustained by employee while attempting to set brake on logging train. *Bowers v. Star Logging & Lumber Co.* (Ore.), 300.

Failure of foreman to give signal to stop at proper place, sufficiency of evidence in action for injury to section man riding on hand car. *Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.

Indiana statute providing for monthly payment of wages in absence of written con-

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tract must be strictly construed. *Chicago & S. E. Ry. Co. v. Glover* (Ind.), 376.

Injury to section man running hand car at dangerous rate of speed, sufficiency of evidence. *Haworth v. Kansas City Southern Ry. Co.* (Mo.), 235.

Inspection of machinery, sufficiency of evidence of due care. *Gulf, C. & S. F. Ry. Co. v. Haden* (Tex.), 285.

Instruction as to negligence erroneous for assuming that plaintiff was in a perilous position, in action for injury to servant caused by propelling locomotive against car in which he was riding. *St. Louis S. W. Ry. Co. of Texas v. Sibley* (Tex.), 292.

Liability for failure to inspect cars as affected by existence of rule requiring inspection. *Southern Pac. Co. v. Winton* (Tex.), 358.

Liability for injury to employee waiting to be assigned work. *Reed v. Missouri, K. & T. Ry. Co.* (Mo.), 262.

Liability for injury to servant resulting from negligence in fastening derrick chain, in removing wreck. *Reed v. Missouri, K. & T. Ry. Co.* (Mo.), 262.

Liability for negligence of employee running car for his private use causing injury to employee in a collision between hand car and other vehicle. *International & G. N. R. Co. v. Branch* (Tex.), 230.

Negligence in failing to guard excavation, instruction. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Tex.), 178.

Negligence in leaving car too near switch, insufficiency of evidence in action for injury to employee sustained while climbing side of moving car in switch yard. *Bence v. New York, N. H. & H. R. R.* (Mass.), 295.

**MASTER AND SERVANT— MASTER AND SERVANT—**  
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- Negligence question for jury, in action for injury to brakeman resulting from fall from top of car caused by breaking of running board. *Mexican Cent. Ry. Co., Limited, v. Townsend (C. C. A.), 306.*
- No duty to warn experienced employee of danger of being struck by car in crowded yard. *Bence v. New York, N. H. & H. R. R. (Mass.), 295.*
- Opinion of employees as to sufficiency of light at excavation, in action for injury to employee. *Missouri, K. & T. Ry. Co. of Texas v. Johnson (Tex.), 178.*
- Peremptory instruction that foreman was free from negligence in failing to give customary signal to stop hand car properly refused, in action for injury to section hand. *Haworth v. Kansas City Southern Ry. Co. (Mo.), 235.*
- Proximate cause of injury to section hand removing wreck, where injury was inflicted by flying fragment of car, where derrick chain had been improperly fastened. *Reed v. Missouri, K. & T. Ry. Co. (Mo.), 262.*
- Question for jury whether derailment was caused by defective rail or obstruction merely. *Peters v. McKay & Co. (Cal.); 173.*
- Question for jury whether failure of foreman in charge of section crew to give customary signal to stop hand car was negligence. *Haworth v. Kansas City Southern Ry. Co. (Mo.), 235.*
- Question for jury whether hand car was overcrowded in action for injury to section man. *Haworth v. Kansas City Southern Ry. Co. (Mo.), 235.*
- Sufficiency of evidence of defect in rail where employee was injured by reason of derailment. *Peters v. McKay & Co. (Cal.), 173.*
- Sufficiency of evidence of negligence. *Central of Georgia Ry. Co. v. Austin (Ga.), 148.*
- Sufficiency of evidence of negligence in construction of bridge. *Miller v. Great Northern Ry. Co. (Minn.), 371.*
- Sufficiency of evidence that injury to employee was caused by failure to have sufficient hands to lower the gins of pile driver. *Gustafson v. Seattle Traction Co. (Wash.), 176.*
- Sufficiency of evidence to show negligence in furnishing machinery. *Gulf, C. & S. F. Ry. Co. v. Haden (Tex.), 285.*
- Sufficiency of evidence to sustain finding that defendant was negligent in having failed to properly instruct and warn employee injured by reason of brake on logging train becoming loose. *Bowers v. Star Logging & Lumber Co. (Ore.), 300.*
- That the cutting off of engine while train was in motion was unusual on defendant's road did not show negligence in injuring brakeman uncoupling moving cars. *Gorman v. Minneapolis & St. L. Ry. Co. (Iowa), 293.*
- Though courts can presume that foreign law with respect to payment of wages of discharged employee are the same as those of its own state, they cannot presume that foreign laws impose a certain penalty. *Louisiana & N. W. Ry. Co. v. Phelps (Ark.), 379.*
- Under allegation that company had negligently allowed handhold to become defective and insecurely fastened to car, evidence was admissible to show that wood in which end of handhold was embedded was not sound. *Galveston, H. & S. A. Ry. Co. v. Jones (Tex.), 247.*

**MASTER AND SERVANT — MASTER AND SERVANT —**  
*Continued.*

Where complaint against master alleged that "coupling pin was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted on plaintiff, his right eye being permanently impaired, disfigured, and injured, and from which plaintiff has suffered great mental and physical pain and anguish," the clause "and from which plaintiff has suffered," etc., referred back to averment as to pin striking him; and plaintiff's testimony that from his blow he suffered pain was competent.

Birmingham Southern R. Co. v. Cuzzart (Ala.), 312.

Whether mismatched couplings proximate cause of death of brakeman.

Southern Pac. Co. v. Winton (Tex.), 358.

Whether railroad fireman, at the time of an accident at a public crossing, was in active employ of company, or member of the public, was a question for the jury.

Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 317.

**Evidence.**

Admissibility of testimony of witness that he had examined car, where it was not shown how he learned the identity of car, in action for injury to employee from defective handhold.

Galveston, H. & S. A. Ry. Co. v. Jones (Tex.), 247.

Harmless error in permitting brakeman to give his opinion as to speed of train at time of derailment, in action for death of conductor.

International & G. N. Ry. Co. v. Vinson (Tex.), 372.

Harmless error in permitting testimony of engineer that it was common for him to receive orders to look out for broken rails, in action for injury to employee.

Mexican Cent. Ry. Co. v. Wilder (C. C. A.), 493.

Notice to employee when not notice to railroad.

Read v. City & Suburban Ry. Co. (Ga.), 278.

Relation between railroad company and one acting as express messenger and also, with its consent and approval, as its baggage man.

Missouri, K. & T. Ry. Co. of Texas v. Reasor (Tex.), 281.

Relation between railroad company and one acting as express messenger and also, with its consent and approval, as its baggageman, sufficiency of evidence.

Missouri, K. & T. Ry. Co. of Texas v. Reasor (Tex.), 281.

**Release.**

Contract with next of kin purporting to release railroad company from liability for death of employee knocked from side ladder of car no defence in action for such death, under Vermont statute requiring such ladders to be placed on inside or at rear of cars.

Tarbell v. Rutland R. Co. (Vt.), 368.

Contract with next of kin releasing company from liability for death of employee invalid as against public policy.

Tarbell v. Rutland R. Co. (Vt.), 368.

Contract with next of kin releasing company from liability for death of employee no defence in action for such death, under Vermont statutes providing for imprisonment of negligent railroad agents.

Tarbell v. Rutland R. Co. (Vt.), 368.

Employee's sanity at time of execution question for jury. Shook v. Illinois Cent. R. Co. (C. C. A.), 202.

Sufficiency of evidence of fraud in obtaining release from liability for personal injuries to employee who subsequently became insane.

Shook v. Illinois Cent. R. Co. (C. C. A.), 202.



**MASTER AND SERVANT— NEGLIGENCE—Continued.***Continued.*

Statutory provision as to payment of wages to discharge employees not applicable to foreign contract of employment.

Louisiana & N. W. Ry. Co. v. Phelps (Ark.), 379.

**MATERIAL MEN.***See Contractors.***MEDICAL SERVICES.***See Personal Injuries.***MEDICAL TESTIMONY.***See Evidence.**Personal Injuries.***MEDICINE.***See Personal Injuries.***MENTAL ANGUISH.***See Personal Injuries.***MENTAL SUFFERING.***See Carriers of Freight. Damages.***MINORS.***See Children.***MISJOINDER.***See Stock, Injuries to.***MORTALITY TABLES.***See Personal Injuries.***MORTGAGES.***See Reorganization.*

Property added to plant of street railroad covered by prior mortgage only.

Westinghouse Electric Mfg. Co. v. Citizens' St. Ry. Co. (Ky.), 510.

**MUNICIPAL CORPORATIONS.***See Eminent Domain. Street Railways.***NAVIGABLE STREAMS.***See Water and Water Courses.***NEGLIGENCE.**

*See Accidents on Track. Connecting Carriers. Consolidation. Crossings. Fellow Servants. Fires. Frightening Teams.*

*See Imputable Negligence.**Injuries to Property.**Master and Servant.**Personal Injuries.**Pest Houses.**Stock, Injuries to.**Water and Water Courses.*

Act of God excusing performance of duty.

Southern Pac. Co. v. Schoer (C. C. A.), 254.

Elements of actionable negligence.

Baltimore & O. S. W. Ry. Co. v. Cox (Ohio), 939.

Erroneous conduct in trying to avoid danger.

Reed v. Missouri, K. & T. Ry. Co. (Mo.), 262.

Gross negligence implies utter want of caution or care, amounting to recklessness, and a complete disregard to the care a man owes himself.

Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 317.

Joinder of causes of action in action for injury to employee.

Chase v. Spartanburg Ry. Gas & Electric Co. (S. Car.), 896.

No such degree as gross.

Purple v. Union Pac. R. Co. (C. C. A.), 711.

Same test must be applied to conduct of both parties in determining whether cause of action is proximate or remote.

Rider v. Syracuse Rapid Transit Ry. Co. (N. Y.), 635.

**NEGOTIABLE INSTRUMENTS.***See Bills of Lading.***NOTICE TO MASTER.***See Master and Servant.***NUISANCES.***See Injuries to Property.***OBSTRUCTIONS.***See Water and Water Courses.***OFFICERS.**

Laws 1899 of N. Y., ch. 354, relating to liability of director for failure to file annual report applicable to foreign as well as domestic corporations.

Staten Island Midland R. Co. v. Hinchliffe (N. Y.), 166.

**OFFICERS—Continued.**

- Liability of directors for failure to file annual report, defence under Laws 1899 of N. Y., ch. 354, sec. 34.
- Staten Island Midland R. Co. *v.* Hinchliffe (N. Y.), 166.
- Right of officer whose duties are merely nominal to compensation for other services.
- Baines *v.* Coos Bay, etc., R. & Nav. Co. (Ore.), 412.

**OPINION EVIDENCE.**

*See Master and Servant.*

**PARTIES.**

*See Carriers of Passengers.*  
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**PASSENGERS.**

*See Carriers of Passengers.*

**PAVING STREETS.**

*See Street Railways.*

**PENALTIES.**

*See Carriers of Goods.*  
*Master and Servant.*

**PERSONAL EXAMINATION.**

*See Personal Injuries.*

**PERSONAL INJURIES.**

*See Accidents on Track.*  
*Children.*  
*Contributory Negligence.*  
*Crossings.*  
*Damages.*  
*Death by Wrongful Act.*  
*Licensees.*  
*Negligence.*

Abuse of discretion not to compel plaintiff to submit to personal examination.

Louisville & N. R. Co. *v.* Simpson (Ky.), 513.

Act of God excusing performance of duty.

Southern Pac. Co. *v.* Schoer (C. C. A.), 254.

Admissibility of evidence of change in disposition of injured party to show that he suffered physical pain and mental anguish.

Gulf, etc., Ry. Co. *v.* Moore (Tex.), 620.

Burden of proving that physician acquired information as to patient's injuries in pro-

**PERSONAL INJURIES—Continued.**

fessional character, under N. Y. Code Civ. Proc., sec. 834.

Griffiths *v.* Metropolitan St. Ry. Co. (N. Y.), 407.

**Contributory Negligence.**

Age and intelligence of boy 11 years old to be considered in determining issue of contributory negligence.

Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.

Burden of proof.

Cook *v.* Missouri Pac. Ry. Co. (Mo.), 954.

Burden of proving where boy 11 years of age was injured by projection from car while standing near track.

Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.

Erroneous conduct in trying to avoid danger.

Reed *v.* Missouri, K. & T. Ry. Co. (Mo.), 262.

Question for jury.

Hemingway *v.* Illinois Cent. R. Co. (C. C. A.), 899.

When question of law.

Hemingway *v.* Illinois Cent. R. Co. (C. C. A.), 899.

**Damages.**

Elements of damages recoverable by husband for injury to wife, instruction not warranted by evidence.

Freeman *v.* Metropolitan St. Ry. Co. (Mo.), 584.

Evidence of mental suffering properly excluded where no personal injury was shown.

Smith *v.* Wilmington & W. R. Co. (N. Car.), 772.

Excessive verdict in action by mother for death of married son.

Southern Pac. Co. *v.* Winton (Tex.), 358.

Exemplary damages for reckless disregard of human life.

Louisville & N. R. Co. *v.* Simpson (Ky.), 513.

Expenses of medical attendance must be alleged.

Missouri, K. & T. Ry. Co. of Texas *v.* Reasor (Tex.), 281.

In action for personal injuries, it was not error to refuse to instruct that plaintiff had

**PERSONAL INJURIES — Continued.**

- been able since his injury to earn approximately as much as before, even if the evidence was without conflict to that effect.  
 Birmingham Southern R. Co. *v.* Cuzzart (Ala.), 312.  
 Instruction as to husband's right to recover for loss of his own time in nursing and caring for injured wife erroneous because not limiting such recovery to reasonable value of time.  
 Freeman *v.* Metropolitan St. Ry. Co. (Mo.), 584.  
 Instruction properly refused as giving undue prominence to a single fact.  
 Birmingham Southern R. Co. *v.* Cuzzart (Ala.), 312.  
 Life tables as evidence.  
 Gulf, C. & S. F. Ry. Co. *v.* Mangham (Tex.), 193.  
 Medical services, sufficiency of evidence to show that expenses were reasonable and necessary.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Reasor (Tex.), 281.  
 No recovery in excess of damages alleged.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), 185.  
 Physical and mental suffering.  
 International & G. N. R. Co. *v.* Anchonda (Tex.), 788.  
 Remittitur.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Pawkett (Tex.), 185.  
 Sufficiency of evidence of cause of injury in action for loss of an eye.  
 Cook *v.* Missouri Pac. Ry. Co. (Mo.), 954.  
 Sufficiency of evidence of nature of passenger's injuries.  
 Nicholson *v.* Northern Pac. Ry. Co. (C. C. A.), 751.  
 Judicial notice cannot be taken of the fact that weak eyes may be inherited.  
 Birmingham Southern R. Co. *v.* Cuzzart (Ala.), 312.  
 Life tables admissible in determining amount of damages.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.  
 Limitation applicable to action

**PERSONAL INJURIES — Continued.**

- for injury to infant brought by him after attaining majority.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Scarborough (Tex.), 608.  
 Plaintiff's testimony as to cause of his weak eyes may be considered although contradicted by that of physician.  
 Birmingham Southern R. Co. *v.* Cuzzart (Ala.), 312.  
 Testimony of physician as to expressions of pain constituting *res gestæ*, in action for injury to employee.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Johnson (Tex.), 178.  
 Testimony of physician as to extent of injuries of employee.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Johnson (Tex.), 178.  
 Where physician acquired information as to how accident happened from injured party while attending him as surgeon, he is not rendered incompetent to testify thereto by N. Y. Code Civ. Proc., sec. 834, unless information was necessary to enable him to act in professional capacity.  
 Green *v.* Metropolitan St. Ry. Co. (N. Y.), 402.

**PEST HOUSES.**

- Liability for communication of contagious disease where patient in railroad's custody escaped.  
 Missouri, K. & T. Ry. Co. of Texas *v.* Wood (Tex.), 936.

**PETITION FOR VIEWERS.**

*See Eminent Domain.*

**PHYSICAL SUFFERING.**

*See Personal Injuries.*

**PHYSICIANS.**

*See Evidence.*

**PLATFORMS.**

*See Carriers of Passengers.*

**PLEADING.**

*See Carriers of Freight.*  
*Carriers of Live Stock.*  
*Children.*  
*Fellow Servants.*  
*Fires.*  
*Master and Servant.*  
*Personal Injuries.*  
*Water and Water Courses.*

**PLEDGE.**

*See Bills of Lading.*

**PREJUDICE.**

*See Instructions.  
Railroads.*

**PRESUMPTIONS.**

*See Carriers of Goods.  
Carriers of Passengers.  
Master and Servant.  
Shipping Receipts.*

**PRIVATE CROSSINGS.**

*See Crossings.*

**PRIVATE TRACKS.**

*See Contracts.*

**PRIVILEGED COMMUNICATIONS.**

*See Evidence.  
Personal Injuries.*

**PROCESS.**

Power of state to authorize service upon nonresidents by publication.  
Connor v. Tennessee Cent. Ry. Co. (C. C. A.), 417.  
When state may provide for service of summons on nonresidents by publication.  
Connor v. Tennessee Cent. R. Co. (C. C. A.), 417.

**PROFITS.**

*See Damages.*

**PROPERTY OWNERS.**

*See Injuries to Property.*

**PROSPECTIVE DAMAGES.**

*See Damages.*

**PROSPECTIVE PASSENGERS.**

*See Carriers of Passengers.*

**PROXIMATE CAUSE.**

*See Accidents on Track.  
Contributory Negligence.  
Crossings.  
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Negligence.*

**PUBLIC LANDS.**

In act of March 3, 1875, sec. 1, the meaning of the word "adjacent" as applied to lands should be determined by the evidence in each particular case.  
United States v. St. Anthony R. Co. (C. C. A.), 398.

**PUBLIC LANDS—Continued.**

Taking timber from adjacent land, construction of act March 3, 1875, sec. 1.  
United States v. St. Anthony R. Co. (C. C. A.), 398.

**PUBLIC OFFICERS.**

*See Common Carriers.*

**PUBLIC POLIOY.**

*See Constitutional Law.  
Master and Servant.*

**PUNITIVE DAMAGES.**

*See Carriers of Passengers.  
Personal Injuries.*

**PURCHASERS.**

*See Judicial Sales.*

**RAILROAD AID BONDS.**

*See Bonds.*

**RAILROAD COMMISSIONS.**

Provision of Louisiana constitution, conferring upon supreme court jurisdiction of suits against railroad commission, not applicable to suits brought by commission to recover fines imposed by itself.  
Railroad Commission of La. v. Kansas City Southern Ry. Co. (La.), 31.

**RAILROADS.**

*See Bonds.  
Carriers of Freight.  
Carriers of Passengers.  
Consolidation.  
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Judicial Sales.  
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Local Assessments.  
Mandamus.  
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Railroads in Streets.  
Reorganization.  
Right of Way.*

Admission that officer of corporation had authority to execute note sufficient to estop corporation.  
Baines v. Coos Bay, etc., R. & Nav. Co. (Ore.), 412.  
Corporate existence shown by introduction of charter.  
Chesapeake & W. R. Co. v. Washington, C. & St. L. R. Co. (Va.), 444.

**RAILROADS—Continued.**

In an action against a railroad company, it is not a charge on facts to say, "I feel competent that you will not be influenced by the fact that the railroad is a rich corporation."

Davis v. Atlanta & C. A. L. Ry. Co. (S. Car.), 317.

Liability of railroad for material furnished contractor for construction of road.

Cameron v. Orleans & J. Ry. Co., Limited (La.), 829.

Operation of road at actual loss cannot be required.

Jack v. Williams (S. Car.), 10.

Power of court to order destruction of road and sale of materials where its operation would be at an actual loss.

Jack v. Williams (S. Car.), 10.

Power of legislature to compel creditor corporation to accept payment of bonds before maturity.

Little River Tp. v. Board of Com'rs (Kan.), 437.

Provision of Louisiana constitution, conferring upon supreme court jurisdiction of suits against railroad commission, not applicable to suits brought by the commission to recover fines imposed by itself.

Railroad Commission of La. v. Kansas City Southern Ry. Co. (La.), 31.

**RAILROADS IN STREETS.**

*See Street Railways.*

Deed construed to convey only part of grantor's interest in streets.

Bullard v. New York, etc., R. Co. (Mass.), 385.

Right to damages after discontinuance of highway and its use for railway purposes, on account of alteration of grade, on ground that land was still subjected to more onerous use.

Bullard v. New York, etc., R. Co. (Mass.), 385.

**RAILWAYS.**

*See Street Railways.*

**RATES.**

*See Carriers of Goods.*

**RECEIVERS.**

*See Fires.*

Power of court to order destruc-

**RECEIVERS—Continued.**

tion of road and sale of material by receiver where road could be operated only at actual loss.

Jack v. Williams (S. Car.), 10.

**RECKLESSNESS.**

*See Licensees.*

*Personal Injuries.*

**RELEASE.**

*See Contracts.*

*Master and Servant.*

**REMEDIES.**

*See Eminent Domain.*

**REMITTITUR.**

*See Personal Injuries.*

**REMOTE CAUSE.**

*See Contributory Negligence.*

*Crossings.*

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**REMOTE NEGLIGENCE.**

*See Accidents on Track.*

*Crossings.*

**REMOVAL OF CAUSE.**

*See Leases and Running Powers.*

**REMOVAL TO FEDERAL COURT.**

*See Leases and Running Powers.*

**REORGANIZATION.**

Application of statute fixing rates where reorganization by purchaser at foreclosure sale.

Commissioners of Railroads v. Grand Rapids & I. Ry. Co. (Mich.), 665.

**RES GESTÆ.**

*See Carriers of Passengers.*

*Children.*

*Evidence.*

*Personal Injuries.*

**RES JUDICATA.**

*See Injuries to Property.*

**REVENUE DUTIES.**

*See Carriers of Freight.*

**RIGHT OF WAY.**

*See Eminent Domain.*

*Fences.*

*Fires Set by Locomotives.*

*Telegraphs and Telephones.*

**RIGHT OF WAY—Continued.**

Cost of constructing old roadbed by trespassing corporation not element of damages in action to recover value of old railroad's right of way.

Cochran v. Missouri, K. & T. Ry. Co. (Mo.), 502.

Elements of damages in action to recover value of old railroad's right of way.

Cochran v. Missouri, K. & T. Ry. Co. (Mo.), 502.

Question as to boundary line properly submitted to jury in action to recover value of old railroad's right of way.

Cochran v. Missouri, K. & T. Ry. Co. (Mo.), 502.

**ROADBEDS.**

*See Right of Way.*

**RULES.**

*See Master and Servant.*

**SAFE PLACE TO WORK.**

*See Master and Servant.*

**SALARIES.**

*See Officers.*

**SALES.**

*See Judicial Sales.*

**SCOPE OF EMPLOYMENT.**

*See Arrest.*

**SECTION FOREMEN.**

*See Fellow Servants.*

**SECTION HANDS.**

*See Master and Servant.*

**SELF-PROTECTION.**

*See Contributory Negligence.*  
*Street Railways.*

**SERVANTS.**

*See Master and Servant.*  
*Officers.*

**SERVICE OF PROCESS.**

Presumption that citation was sent to defendant railway company's attorney by proper officer of other defendant company.

Texas & P. Ry. Co. v. McCarty (Tex.), 654.

**SERVICE OF SUMMONS.**

*See Service of Process.*

**SHIPPERS.**

*See Carriers of Freight.*

**SHIPPING RECEIPTS.**

As contracts.

Mears v. New York, etc., R. Co. (Conn.), 668.

Presumption as to condition of goods from recital in shipping receipt.

Mears v. New York, etc., R. Co. (Conn.), 668.

**SIDE TRACKS.**

*See Contracts.*

**SIGNALS.**

*See Crossings.*

**SMALLPOX.**

*See Pest Houses.*

**SNOW.**

*See Carriers of Passengers.*

**SPARK ARRESTERS.**

*See Fires Set by Locomotives.*

**SPECIAL DAMAGES.**

*See Carriers of Freight.*

**SPECIAL FINDINGS.**

*See Crossings.*

**SPECIAL PROFITS.**

*See Carriers of Goods.*

**SPEED.**

*See Carriers of Passengers.*  
*Evidence.*

**STATIONS AND DEPOTS.**

*See Carriers of Passengers.*  
*Licensees.*

Effect of act of police officer in changing the charge; in action for false imprisonment of person for using car as refuge from weather.

Texas & P. Ry. Co. v. Cope (Tex.), 906.

Texas & P. Ry. Co. v. Parker (Tex.), 906.

Effect of plaintiff's unlawful act, in action for false imprisonment of person using car as refuge from weather.

Texas & P. Ry. Co. v. Cope (Tex.), 906.

Texas & P. Ry. Co. v. Parker (Tex.), 906.

**STATIONS AND DEPOTS—STOCK, INJURIES TO—*Cont'd.****Continued.*

False imprisonment of person using car as refuge from weather.

Texas & P. Ry. Co. *v.* Cope (Tex.), 906.

Texas & P. Ry. Co. *v.* Parker (Tex.), 906.

False imprisonment of person using car as refuge from weather, scope of employment.

Texas & P. Ry. Co. *v.* Cope (Tex.), 906.

Texas & P. Ry. Co. *v.* Parker (Tex.), 906.

**STATUTE OF LIMITATIONS.**

*See Eminent Domain.*

*Personal Injuries.*

**STATUTES.**

*See Master and Servant.*

**STEPS.**

*See Carriers of Passengers.*

**STOCK, INJURIES TO.**

Assignability of contract to maintain side tracks for convenience of sawmill owner in consideration of release of damages to stock and from fire.

Missouri, K. & T. Ry. Co. of Texas *v.* Carter (Tex.), 538.

**Contributory Negligence.**

Permitting animals to run at large no defence where injury was caused by failure to fence.

Texas & P. Ry. Co. *v.* Seay (Tex.), 866.

Defective cattle guard proximate cause of killing stock where they had passed over other cattle guards.

Sappington *v.* Chicago & A. Ry. Co. (Mo.), 862.

**Evidence.**

Admissibility of evidence that track was fenced to within thirty or forty feet of switch where company claimed that fence so near switch would interfere with the switching of trains.

Texas & P. Ry. Co. *v.* Seay (Tex.), 866.

Failure to prove place of accident under Arkansas statute, requiring such actions to be

brought in county where killing occurred.

Little Rock & Ft. S. Ry. Co. *v.* Jamison (Ark.), 935.

Liability fixed by place of entry in fence.

Sappington *v.* Chicago & A. Ry. Co. (Mo.), 862.

Liability for injuries to boy received in crossing tracks, after passing through freight yard, as affected by failure to fence between tracks and freight yard, or between yard and street, under Massachusetts statute requiring railroad companies to fence roads to prevent entrance of cattle.

Byrnes *v.* Boston & M. R. R. (Mass.), 600.

Liability of consolidated company under contract to maintain side tracks for convenience of sawmill owner entered into in consideration of release from damages for injuries to stock and from fires.

Missouri, K. & T. Ry. Co. of Texas *v.* Carter (Tex.), 538.

Negligence in running over stock and breach of contract to fence, misjoinder of causes of action.

Evans *v.* Southern Ry. Co. (Ala.), 859.

Presumption of liability for killing of stock on track where company had contracted with landowner to fence right of way.

Evans *v.* Southern Ry. Co. (Ala.), 859.

Sufficiency of complaint in action for killing stock where company had contracted with landowner to fence right of way.

Evans *v.* Southern Ry. Co. (Ala.), 859.

Sufficiency of proof that injury occurred in certain county, under Arkansas statute providing that such actions shall be brought in county where injury occurred.

St. Louis, I. M. & S. Ry. Co. *v.* James (Ark.), 619.

Validity of oral contract to fence track as affected by statute of frauds.

Evans *v.* Southern Ry. Co. (Ala.), 859.

**STOCK PENS.**

*See Injuries to Property.*

**STOP, LOOK AND LISTEN.**

*See Crossings.*

**STREETS AND HIGHWAYS.**

*See Railroads in Streets.*  
*Street Railways.*

Right to damages after discontinuance of highway and its use for railway purposes, because of alteration of grade, on ground that land was still subjected to more onerous use.  
*Bullard v. New York, etc., R. Co. (Mass.), 385.*

**STREET RAILWAYS.**

*See Accidents on Track.*  
*Carriers of Passengers.*  
*Crossings.*  
*Frightening Teams.*

Acts 1899 of Ind., p. 260, providing for the granting of franchise to street railways not in violation of constitutional provision requiring corporations to be formed under general laws.

*Smith v. Indianapolis St. Ry. Co. (Ind.), 116.*

Authority to use streets, construction of Indiana statute.  
*Logansport Ry. Co. v. City of Logansport (Ind.), 559.*

**Contributory Negligence.**

Contributory negligence of person on street, injured through negligence in management of street car, does not preclude a recovery unless it enters directly into and forms a part of the efficient cause of the accident.

*Oates v. Metropolitan St. Ry. Co. (Mo.), 916.*

Degree of care required for self-protection from falling trolley wires.

*Read v. City & Suburban Ry. Co. (Ga.), 278.*

Negligence of servant in failing, while driving his master in vehicle, to avoid danger from falling trolley wire, imputable to latter.

*Read v. City & Suburban Ry. Co. (Ga.), 278.*

Degree of care due passenger in stopping street car.

*Freeman v. Metropolitan St. Ry. Co. (Mo.), 582.*

**STREET RAILWAYS—Cont'd.**

Degree of care required in inspecting trolley wires to prevent injuries to travelers in street.

*Read v. City & Suburban Ry. Co. (Ga.), 278.*

Degree of care required of street railway companies as carriers of passengers.

*Citizens' Ry. Co. v. Craig (Tex.), 516.*

Duty to pave, between tracks, construction of ordinance accepted by company.

*Borough of West Chester v. West Chester St. Ry. Co. (Pa.), 912.*

Equity jurisdiction where violation by city of contract rights of street railway company.  
*Logansport Ry. Co. v. City of Logansport (Ind.), 559.*

Indiana statute authorizing cities to grant street railway franchises not unconstitutional as granting special privilege.

*Smith v. Indianapolis St. Ry. Co. (Ind.), 116.*

Motorman not chargeable with negligence in failing to apprehend that boy will jump from wagon and go upon the track.  
*Baier v. Camden & S. Ry. Co. (N. J.), 911.*

Necessity of consent by city council to use of street by street railway, under Indiana statute.  
*Logansport Ry. Co. v. City of Logansport (Ind.), 559.*

Not bound to furnish safe places for discharging passenger.  
*Sweet v. Louisville Ry. Co. (Ky.), 768.*

Notice to employee with respect to matter over which he has no authority, and as to which he has no duty to perform, not notice to company.

*Read v. City & Suburban Ry. Co. (Ga.), 278.*

Property added to plant of street railroad covered by prior mortgage only.

*Westinghouse Electric Mfg. Co. v. Citizens' St. Ry. Co. (Ky.), 510.*

Right to exclusive or perpetual use of street could not be granted to street railway by city council.

*Logansport Ry. Co. v. City of Logansport (Ind.), 559.*



**STREET RAILWAYS—Cont'd.**

- Rule that railway car cannot be rightfully run into person, though he is on track through his own negligence, not applicable where driver attempted to cross track of electric railway diagonally when approaching car was so near as to render attempt dangerous. *Rider v. Syracuse Rapid Transit Ry. Co. (N. Y.), 635.*
- Street railway company liable only for repairing street between its tracks not estopped to deny liability for paving street. *City of Williamsport v. Williamsport Pass. Ry. Co. (Pa.), 568.*
- Utmost human skill, diligence and foresight not due passengers in stopping street railway car. *Freeman v. Metropolitan St. Ry. Co. (Mo.), 584.*

**SUBROGATION.**

*See Carriers of Freight.*

**SUMMONS.**

*See Process.*  
*Service of Process.*

**SUPERINTENDENCE.**

*See Fellow Servants.*

**SUPERIOR SERVANTS.**

*See Fellow Servants.*

**SUPPLEMENTARY PROCEEDINGS.**

*See Eminent Domain.*

**SURGEONS.**

*See Evidence.*

**SURVIVAL OF ACTION.**

*See Death by Wrongful Act.*

**TAXATION.**

*See Local Assessments.*

- When title to sewing machines shipped into the state passed, under statute taxing machines sold within state. *Sims v. Norfolk & W. R. Co. (N. Car.), 388.*

**TELEGRAPHS AND TELEPHONES.**

- Nominal damages for constructing line over railroad right of way.

**TELEGRAPHS AND TELEPHONES—Continued.**

- Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.*
- Question as to power of telegraph company as a de facto corporation to exercise power of eminent domain can only be raised by the state. *Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.*
- Rights of telegraph company as a de facto corporation to exercise power of eminent domain. *Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.*
- Right of telegraph company to construct its line over railroad right of way under Montana statute. *Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.*
- Right to construct lines over railroad's right of way under federal statute. *Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (Mont.), 432.*

**TELEPHONE COMPANIES.**

*See Telegraphs and Telephones.*

**TERMINAL COMPANIES.**

*See Carriers of Passengers.*

**TICKETS AND FARES.**

*See Carriers of Passengers.*

**TIMBER.**

*See Public Lands.*

**TORTS.**

- See Consolidation.*
- Error to instruct as to what constitutes negligence in action for tort committed in another state. *Savannah, F. & W. Ry. Co. v. Evans (Ga.), 489.*

**TRACKS.**

*See Fences.*  
*Master and Servant.*  
*Stock, Injuries to.*

**TRANSFERS.**

*See Tickets and Fares.*

**TRESPASSERS.**

*See Carriers of Passengers.  
Licensees.*

Alleged passenger on freight train presumptively a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), 711.

**Contributory Negligence.**

Question of contributory negligence of person killed while walking on track not affected by custom of public to use track as foot path.

Louisville & N. R. Co. *v.* McGlash (C. C. A.), 942.

Duty to persons walking on track used as foot path.

Haltiwanger *v.* Columbia, N. & L. R. Co. (S. Car.), 883.

Effect of knowledge of facts suggesting inquiry as to whether passengers may ride on freight train.

Purple *v.* Union Pac. R. Co. (C. C. A.), 711.

Ejection of passenger riding on freight train without permit relying on representations of agent which he knows to be false.

Houston, E. & W. T. Ry. Co. *v.* Stell (Tex.), 722.

Liability for injury to person on freight train with consent of conductor.

Baltimore & O. S. W. Ry. Co. *v.* Cox (Ohio), 939.

One entering train with understanding with conductor not to pay fare a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), 711.

One riding on train not intended for passengers as a trespasser.

Purple *v.* Union Pac. R. Co. (C. C. A.), 711.

Sufficiency of evidence in action for killing trespasser on track. Haltiwanger *v.* Columbia, N. & L. R. Co. (S. Car.), 883.

**TROLLEY WIRES.**

*See Street Railways.*

**UNPROTECTED PLATFORM.**

*See Carriers of Passengers.*

**VACCINATION.**

*See Contributory Negligence.*

**VENUE.**

*See Connecting Carriers.*

**VESTED RIGHTS.**

*See Bonds.*

**VESTIBULED TRAINS.**

*See Carriers of Passengers.*

**VICE PRINCIPALS.**

*See Master and Servant.*

**VIEWERS.**

*See Eminent Domain.*

**WAGES.**

*See Master and Servant.*

**WAITING ROOMS.**

*See Carriers of Passengers.*

**WAITING TO BE ASSIGNED WORK.**

*See Master and Servant.*

**WANTONNESS.**

*See Carriers of Passengers.  
Personal Injuries.*

**WAREHOUSEMEN.**

*See Carriers of Freight.*

**WATER AND WATER COURSES.**

*See Appeal.*

**Damages.**

Damages for obstructing water course through negligence in constructing railroad embankment.

Lamplsey *v.* Atlantic Coast Line R. Co. (S. Car.), 389.

Duty to minimize damages.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), 868.

Enhancing damages by carrier where navigable stream was obstructed by railroad bridge.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), 868.

Liability for obstruction of navigable stream by railroad bridge as affected by act of injured carrier in abandoning freight.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), 868.

Loss of profits by carrier through obstruction of navigable stream.

Armistead *v.* Shreveport & R. R. Val. Ry. Co. (La.), 868.

**WATER AND WATER WEALTH.****COURSES—Continued.**

Measure of damage to carrier from obstruction of navigable stream by railroad bridge.

*Armistead v. Shreveport & R. R. Val. Ry. Co. (La.)*, 868.

Liability for obstruction of navigable stream by railroad bridge.

*Armistead v. Shreveport & R. R. Val. Ry. Co. (La.)*, 868.

Negligence in obstructing water course in constructing embankment.

*Lampley v. Atlantic Coast Line R. Co. (S. Car.)*, 389.

Sufficiency of petition in action for obstructing water course through negligence in constructing embankment.

*Lampley v. Atlantic Coast Line R. Co. (S. Car.)*, 389.

*See Railroads.*

**WILLFULNESS.**

*See Carriers of Passengers.*

*Licensees.*

*Personal Injuries.*

**WIRES.**

*See Street Railways.*

**WITNESSES.**

*See Evidence.*

Proof of general good reputation when admissible.

*Louisville & N. R. Co. v. McClish (C. C. A.)*, 942.

**WRECKS.**

*See Master and Servant.*

**WRITING.**

*See Evidence.*

**YARDS.**

*See Licensees.*





